

Mediation in Fee Disputes Between Non-Corporate Lawyers and Clients

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Abstract:

Mediation can help in an attorney-client fee dispute because it opens the channels of communication. I have provided the example of a client who pays a non-refundable retainer to a lawyer in return for services. The lawyer ignores all the client's calls, does not render the services, and the client is forced to find another lawyer. The client demands the retainer back, the lawyer refuses, and a fee dispute is born. Mediation is particularly helpful in a situation like this because it can de-escalate the situation. Instead of going straight to a lawsuit, the lawyer and client can sit down and share their perspectives. When they communicate, they may see that they share interests, and these interests could be met the best through a mediated agreement. Parts I and II of this article discuss fee disputes in real-life contexts. Part III traces the common ways that a fee dispute arises, while Part IV elaborates on the options available to participants in fee disputes. Part V explores the benefits of mediation in fee disputes. Mediation can provide a way for both parties to "win" by meeting all (or most) of their interests.

I. Introduction:

Many car dealerships have a little-known policy where customers who buy a car can return it within 2-3 days and get a full refund. The policy protects consumers who might have second thoughts after an impulse purchase, or discover something is wrong with the car.¹ But, for a client who signs a nonrefundable retainer with a lawyer, there are no similar protections. A client could lose their retainer, just because they had a change of plans or decided that the attorney would not be well-suited for the case. From

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¹ See "How to Buy A Used Car." Available <http://www.faqs.org/docs/consumer/used-car.html>. Accessed 1 May 2007. (Privilege to return a car after purchasing is available if dealership extends it to customers).

the lawyer's perspective the client breached the agreement by firing them before they could perform work, so they are entitled to keep the retainer. However, this situation causes serious problems for both the client and the lawyer. The client has lost his retainer and the lawyer risks a lawsuit by the client for the money and a report to the disciplinary board, both of which cost a large amount of time and money and risk professional reputation.

This kind of an argument over fees is one example of the large number of fee disputes that can arise between a lawyer and a client. Fee disputes are relatively common and present a serious problem for the legal profession as a whole and for individual lawyers and clients.² Sometimes it is a case of second-thoughts with a retainer; other times, a client's bill is higher than the client anticipated. In situations, where there is a lack of communication between the lawyer and the client, mediation may often be a good solution.³ ⁴ Mediation allows both parties to view the dispute from new perspectives and explore possible solutions.⁵ When used early in the dispute process, mediation can end a fee dispute before it evolves into the lawyer suing the client for unpaid fees or the client suing the lawyer for the retainer or excessive fees. Mediation plays a key role in early

² See Lester Brickman, *Attorney-Client Fee Arbitration: A Dissenting View*, 1990 UTAH L. REV. 277, 278 (1990).

³ See Alan Scott Rau, *Resolving Disputes Over Attorneys' Fees: The Role of ADR*, 46 SMU L. REV. 2005, 2067-2068 (1993): "It is, of course, a truism that many fee disputes will arise out of a failure of "communication" between attorney and client over the nature and extent of lawyering called for by the client's problem."

⁴ In other cases, where there are allegations of legal malpractice and more complicated scenarios, mediation may not be the best approach. Most voluntary and mandatory fee arbitration programs run through state Bar Associations accept cases that involve simpler fee disputes. It is difficult to draw a line and distinguish between fee disputes and other legal malpractice, since excessive fees can violate ethical rules and could arguably result in legal malpractice. Nonetheless, this paper will only explore more simple situations, like when a client pays a nonrefundable retainer and decides 2 days later that they do not want to use the lawyer after all and demands the return of all or part of the retainer.

⁵ See Cecelia Morris, *Guidelines for Mediation of an Attorney Fee Dispute*, Practicing Law Institute New York Practice Skills Course Handbook Series, 14 PLI/NY 1053, 1055 (1998): Mediation is "a confidential, flexible, cost effective, dispute resolution process in which an impartial third party, the mediator, facilitates negotiations between the parties."

intervention of fee dispute cases. Many states have voluntary mediation programs administered by their state bar associations (others have arbitration programs or mediation/arbitration combination programs).⁶ Both lawyer and client have a mutual interest in getting the situation resolved in the least expensive and most efficient way possible.⁷ Mediation can meet this mutual interest in many situations.

II. A Real Life Situation and Options

Consider this posting by Bcrenshaw on an internet forum called "Labor Law Talk:"

"Hi Jon, It sounds like you are an attorney that is ethical. My husband and I have sent in a "non-refundable" retainer fee for services on adoption and we decided 48 hours after we sent her the check we wanted to go with In-Vitro and look at adoption if it did not work (1-2 years from now). The attorney will not give us our money back and she has not done anything for us. I was told by our county officials to pursue our money by submitting a fee arbitration in the county where she practices. I really don't want to do this, I really thought she would ethically give us our money back, but she will not. What are my options?"

Thanks,

Bcrenshaw"⁸

⁶ See State and Local Bar ADR Survey, ABA Section of Dispute Resolution (2001), available at <http://www.abanet.org/dispute> (last visited 15 February 2007).

⁷ See ROGER FISHER AND WILLIAM URY, GETTING TO YES, 71-73 (Patton Ed., 2nd ed., Penguin Books 1991) (1981). Fisher and Ury give the example of a customer who feels cheated in a business transaction. Not only has the customer failed, so has the storeowner, because the storeowner could lose a customer and his reputation is damaged. Shared interests are crucial to finding a mutually beneficial agreement. Both sides need to be content enough with the agreement to want to abide by it. See also Morris, *supra* note 5, at 1060, "You and your client have a mutual interest in resolving a fee dispute. To do so, it is important to trust the mediator as you would a wise friend, and continue to work as long as the mediator sees hope. Remember, once you walk away, agreement becomes impossible."

⁸ See Labor Law Talk. Available <http://www.laborlawtalk.com/showthread.php?t=100029>. Accessed 25 February 2007. Sadly, Bcrenshaw did not receive any responses to his posting.

Bcrenshaw's question about her options dovetail with what William Ury describes as the five important points along the way to a mutually satisfactory agreement in *Getting Past No*: ie: interests, options for satisfying these interests, standards for resolving differences fairly, alternatives to negotiation, and proposals for agreement.⁹ Although this process is used in mediation, it can also be used when deciding what to do in a conflict situation like Bcrenshaw's. In Bcrenshaw's situation, her position is that she wants the retainer back, and this is in conflict with the lawyer's position that the lawyer wants to keep the retainer. Ury explains that joint problem-solving looks at the interests behind the positions.¹⁰ Interests are the "intangible motivations that lead you to take that position- your needs, desires, concerns, fears, and aspirations."¹¹ For an agreement to satisfy both sides, each side needs to figure out their own interests as well as the other party's, and find ways to satisfy both.¹² Here, Bcrenshaw's interests include a desire to get the money back so that she can pursue in vitro fertilization as well as wanting to feel respected and validated by the lawyer. The lawyer's interests could be reimbursement for the initial consultation and opening a case file, a desire for respect from the client for the lawyer's expertise, and a desire to protect his reputation.

Next, after identifying each side's interests, Bcrenshaw needs to look at her interests as well as the lawyer's to see if she can figure out a solution that will satisfy both. The strength of mediation is that options can be invented that aren't immediately apparent in adversarial methods like litigation.¹³ After looking at options, Bcrenshaw

⁹ See WILLIAM URY, *GETTING PAST NO: NEGOTIATING YOUR WAY FROM CONFRONTATION TO COOPERATION*, 18-19 Bantam Books (1991):.

¹⁰ See *id.* at 19.

¹¹ *Id.*

¹² *Id.*

¹³ See *id.* 20. Ury notes that while you may not be able to obtain your position, you may be able to satisfy your interests.

would consider what standards to use to select an option with the other side when their interests are the same.¹⁴

Finally, Bcrenshaw would look at her alternatives to a negotiated agreement.¹⁵ Ury notes that knowing your alternatives determines your success in satisfying your interests.¹⁶ Negotiation looks to whether you can satisfy your interests better through a mediated agreement than you can by pursuing your Best Alternative to a Negotiated Agreement, or BATNA.¹⁷ The BATNA is the “walkaway alternative” or the best alternative to satisfying your interests without the other person agreeing.¹⁸ Identifying BATNA requires Bcrenshaw to look at what she can do by herself to pursue her interests, what she can do to the other side to make them respect her interests, and how she can bring in a third party to further her interests.¹⁹ If your BATNA is superior to an agreement you can negotiate with another person, you might not have to negotiate.²⁰ Bcrenshaw also needs to figure out the lawyer’s BATNA. In a situation where both sides have weak BATNAs, it may be easier to develop an agreement that is superior to the best alternatives.²¹

Here, both Bcrenshaw and the lawyer have weak BATNAs, making this a good case for mediation. Bcrenshaw stands little chance of having her interests met through her BATNA, because a successful court case or disciplinary board complaint does not get her the money back after court fees or meet her other interests. Similarly, the lawyer also stands little chance of having his interests met through his BATNA, because winning a

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *See* URY, *supra* note 9 at 20.

¹⁹ *Id.*

²⁰ *See id.* at 22.

²¹ *See id.* at 24.

court case or disciplinary board complaint does not meet the lawyer's interest in preserving his time, money and reputation. Therefore, mediation could be used in Bcrenshaw's case, either by itself or in conjunction with arbitration.

III. Fee Disputes and their Origins

Before we discuss Bcrenshaw's options in this situation, it may be beneficial to take a brief look at some of the reasons for fee disputes and how they damage the reputation of the legal profession. Fee disputes, or arguments between the client and the lawyer about the amount of the fee, are common.^{22 23} One reason they are so common is because it is hard to figure out a value for legal fees because legal services take place "out of the client's sight" and involve difficult legal forms and maneuvering that the client might not be aware of.²⁴ Lawyers often fail to tell clients how much work they've put into a case or how much legal knowledge is required.²⁵ Sometimes this lack of communication between the lawyer and the client regarding the amount or nature of the

²² See Jeffrey M. Smith, *The Pitfalls of Suing Clients for Fees*, 69 A.B.A.J. 776, 778 (1983) ("...at least twenty and perhaps in excess of thirty percent" of legal malpractice claims arise from fee disputes).

²³ See Rau, *supra* note 3, at 2005-06 (citations omitted):

Just how often "disputes over fees" arise between attorneys and clients is a subject as to which we have little or no reliable information. At the very outset, of course, we encounter a problem of characterization; a neat dichotomy between, for example, "fee disputes" and disputes involving attorney "misconduct" hardly accounts for the messiness of human realities...They may involve disagreements about the reasonableness of hourly charges, or the propriety of charges for particular disbursements or services (such as work devoted to the preparation of the bill itself!). They may involve claims of "bill padding," or of "overlawyering" -- or they may involve assertions that the fee was simply excessive in light of the result obtained. Other disputes, in contrast, are nominally about "other things": they may involve claims of attorney delay, neglect, conflict of interest, or incompetence, or may focus on misuse of client property, or improper attempts to collect or secure payment of fees. Payment of fees, then, is often intertwined with other subjects of contention."

²⁴ See Rau, *supra* note 3, at 2007. See also Rule 1.5(a) of the *Model Rules of Professional Conduct* for a list of factors to be considered in determining the reasonableness of a fee. Available at http://www.abanet.org/cpr/mrpc/rule_1_5.html. Accessed 23 April 2007.

²⁵ See Rau, *supra* note 3, at 2008 (quoting Abraham S. Blumberg, *The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession*, 1 L. & SOC'Y REV. 15, 24-26 (1967)) (discussing the fee process as a "confidence game" where the attorney's goal is to manage the relationship to show the client he has provided enough services to justify the fee).

work completed leads to a fee dispute because the client isn't aware of the services that the lawyer provided, and may assume that the lawyer did very little or nothing at all. Mediation can play an important role in this kind of situation by facilitating communication.²⁶

A client may have several reasons for not paying a bill. James Calloway outlines a few of these reasons as 1) not affording the bill; 2) unhappiness with the result in the matter; 3) unhappiness with the lawyer and 4) not believing that the bill is fair.²⁷ Here, Bcrenshaw's lawyer could have charged a retainer to make sure that the client would pay her fees and could afford the bill. Bcrenshaw's reason for not paying the bill is Calloway's number four- that the bill is not fair. "Fair" is a vague concept, which is defined by a series of factors in Rule 1.5(a) of the Model Rules of Professional Conduct, which vary according to communities and geography as well as a client's personal finances.²⁸ Here, Bcrenshaw's reasons for not paying the bill are that she doesn't feel it's fair to pay a nonrefundable retainer, but it seems like the attorney didn't even take the time to understand Bcrenshaw's reasons for not paying the bill or to explain his own for keeping the bill.

IV. Options for Participants in Fee Disputes

²⁶ See Morris, *supra* note 5, at 1055 (stating, "[r]esolving a conflict within the confines of a fiduciary relationship, particularly where there is an obligation to perform necessary work, takes thought and finesse. The process of mediation is an excellent tool to use in settling these kinds of controversies. Mediation offers the advantages of wide applicability and relatively low cost to the parties.").

²⁷ See James Calloway, *Fee Agreements and Bills that Clients Will Pay*, Oklahoma Bar Association (2000). Available www.okbar.org/members/map/CallowayFeeAgreements.pdf Accessed 25 February 2007.

²⁸ See *id.* at 2 (stating, "[i]f the client believes by his or her own subjective standards that the bill is fair and the lawyer's services have been good, then he or she will make a much greater effort to pay the bill than otherwise. You are certainly aware of the negative perception concerning lawyer's bills and lawyer's billing practices across the country. If you were to informally poll a few dozen people off the street and ask for their response to the phrase "Attorney's fees" you would probably hear such things as "expensive," "I couldn't afford them," "_____lawyers," or worse. Convincing a client that the lawyer's fees are fair and the bill for legal services is fair is perhaps one of the greatest challenges facing the legal profession, particularly those members of the legal profession who represent individuals rather than businesses.").

A. Litigation

Returning to the discussion of Bcrenshaw's options, litigation first comes to mind when a lawyer and client are involved in a fee dispute.²⁹ It is important for the parties to resist the impulse to litigate. Litigation is undesirable for clients and lawyers due to cost, delays, an increase in hostility, the lack of remedies available in courts, the winner-takes-all attitude in courts, and a complete lack of understanding of the interests of the parties.³⁰ The costs of litigation can cut down on recovery for the lawyer and client, and sometimes even eliminate it.³¹

Here, Bcrenshaw would have a very difficult time finding a lawyer to handle the suit or testify as an expert witness. Even if she could find a lawyer to handle the suit, she would have to pay the second lawyer another retainer fee. If Bcrenshaw's first retainer was \$5000, and she signed an agreement with second lawyer to represent her, the retainer with the second lawyer might also be around \$5,000. In this scenario Bcrenshaw could find herself paying \$5,000 to get back a \$5,000 retainer. Even if Bcrenshaw was lucky enough to find a lawyer to represent her, and could afford to pay another \$5000 for a second retainer, she would encounter significant costs and delay in litigation. If she lost in court, she would lose the first retainer, lose the second retainer, and lose other fees as well, and could end up losing over \$10,000 in her attempt to recover the original \$5000 retainer. Additionally, any confidential information the client communicated to the

²⁹ See Mark Richard Cumminsford, "Resolving Fee Disputes and Legal Malpractice Claims Using ADR," 85 MARQ. L. REV. 975, 980 (2002) (outlining the approaches that a client in a fee dispute situation like Bcrenshaw's may take.)

³⁰ See Rau, *supra* note 3, at 2017-2018 (quoting Jeffrey M. Smith, *The Pitfalls of Suing Clients for Fees*, 69 A.B.A. J. 776, 777 (1983) (Law firm sues to recover \$15,000 from client, but after the cost of an attorney to represent the attorney suing the client, time spent by attorneys from the firm, cost of expert witnesses, taxation on recovery, and a malpractice counterclaim on the firm's insurance deductible and future insurance premiums, there's not much profit. The public relations value of a suit by the attorney against a client is negative too.)

³¹ *Id.*

lawyer can be used by the lawyer in his defense.³² If the client doesn't pay the fee, the attorney can also maintain possession of the case file and hold it "hostage" until the fee is paid.³³

Plaintiffs like Bcrenshaw usually don't win in district court.³⁴ If Bcrenshaw opts to take the case to small claims court instead of district court, he will encounter other obstacles. He can represent himself without having to pay a second lawyer, but he will pay another cost. Bcrenshaw will have to explain his fee dispute claim to a judge who may not understand the breach of contract claims and may require the client to jump through legal hoops such as making an opening statement and cross-examining the defendant. In addition, when the client sues the lawyer, he is on the lawyer's "home turf," and since he has minimal knowledge of the substantive and procedural law, he will find himself at a disadvantage.³⁵ There are also limits on the amount of money that a plaintiff can collect in court, usually ranging from \$1500-\$2500.³⁶ This means that Bcrenshaw could only get back around \$2500 of the \$5000 retainer. Additionally, when a lawyer is defending himself against a fee dispute, he may use confidential information about his representation of the client to defend himself.

From the lawyer's perspective, if a lawyer sues a client for an unpaid fee, it is almost guaranteed that the client will in turn sue him for legal malpractice.³⁷ This makes

³² See ABA Model Rule of Professional Conduct 1.6. Available http://www.abanet.org/cpr/mrpc/rule_1_6.html. Accessed 4 April 2007.

³³ *Id.*

³⁴ See Rau, *supra* note 3, at 2015.

³⁵ See Cumminsford *supra* note 29 at 978.

³⁶ Rhode Island's limit on recovery in small claims court is \$2500. R.I. GEN. LAWS § 10-16-1 (2007), available at <http://www.rilin.state.ri.us/Statutes/TITLE10/10-16/10-16-1.HTM> (last visited April 10, 2007).

³⁷ See David Hricik, *Lawyer-Client Arbitration Agreements*, 12 No. 3 PROF. LAW 24, 25 (2001) (reporting that the likelihood that a lawyer's suit for unpaid fees will generate a malpractice counterclaim ranges up to 40%).

court a particularly undesirable option for fee disputes where the lawyer wants to receive a fee from the client. In addition, in some jurisdictions, if an attorney is found to have committed a serious ethical violation, he will forfeit recovering any fees.³⁸ The attorney will also have to pay significant amounts of time and money to confront the plaintiff in court.³⁹ The fee dispute could have negative effects on his professional reputation, even if it is positively decided in his favor, because potential clients may be loath to use a lawyer that is “unfair” to clients by overcharging with fees. In addition, lawsuits may result in a lawyer paying more for insurance.⁴⁰

If litigation is the BATNA for Bcrenshaw and his lawyer, the situation looks bleak for both parties. None of their interests- fairness, preserving their reputations, respect, getting the money in a timely manner- will be met in litigation, and in fact, litigation could make the situation more costly and more adversarial.

B. Pay the Bill Without Complaining

Bcrenshaw could simply pay the bill without complaining.⁴¹ Clients in a fee dispute situation like Bcrenshaw’s may not know how to approach the attorney. This occurs often.⁴² This could be the worst alternative to a negotiated agreement, or WATNA, for Bcrenshaw.⁴³ Bcrenshaw doesn’t want this worst alternative to a negotiated agreement to happen because it doesn’t meet any of her interests. Even if

³⁸ See Rau, *supra* note 3, at 2016-2018.

³⁹ See *supra* note 30 for cost to attorney of litigating.

⁴⁰ See Harvard Law Review Association, *Lawyers' Responses: Shifting the Costs of Liability*, 107 HARV. L. REV. 1651, 1652 (1994): "The most common way that lawyers respond to liability is to procure malpractice insurance... As malpractice claims and damage awards against attorneys have increased in frequency and severity, the insurance industry has made insurance more difficult for lawyers to obtain."

⁴¹ See Cumminsford, *supra* note 29, at 978.

⁴² See Rau, *supra* note 3, at 2008, for the proposition that a client who doesn't like the bill (thinks it is excessive) will probably just complain and then pay it anyway.

⁴³ See Nancy Foster, *Effective Alternatives Analysis in Mediation*, MEDIATE.COM, Jan. 2005, <http://www.mediate.com/articles/notini1.cfm> (last visited April 9, 2007).

avoidance is the best alternative to a negotiated agreement (BATNA), this still fails to meet some of the lawyer's interests, which may include costs for the lawyer in terms of his relationship with the client, his professional reputation, and the reputation of the legal profession.⁴⁴ If Bcrenshaw pays the bill without complaining, it doesn't meet the interests of both parties.

C. File a Complaint with the State Disciplinary Board

Bcrenshaw could also file a formal complaint with the state disciplinary board.⁴⁵ Many clients are not aware of this option and may only find out by calling their local bar association.⁴⁶ If Bcrenshaw hears about the state disciplinary board and files a formal complaint, she may be able to use some of his meager power in the situation to have someone "hold the lawyer accountable" and "punish him for keeping the money," and possibly compel him to return the money.⁴⁷ However, Bcrenshaw will probably not get any of his interests met with a complaint to the disciplinary board- and neither will the lawyer.

State bar associations police themselves and have disciplinary boards that investigate violations of state ethical rules when they receive complaints.⁴⁸ The disciplinary mechanism is geared towards deterring the most egregious ethical violations, which is quite different from the traditional theory of law enforcement that punishes every crime.⁴⁹ Situations like Bcrenshaw's, which involve an interpretation of a private contractual agreement between the lawyer and the client, do not present obvious

⁴⁴ See FISHER, *supra* note 7, at 97.

⁴⁵ See Cumminsford, *supra* note 29, at 978.

⁴⁶ Although a client can make a complaint to the state bar association disciplinary committee, most clients don't even know that it exists. See Rau, *supra* note 3, at 2009-2012.

⁴⁷ See URY, *supra* note 9, at 141.

⁴⁸ See Rau, *supra* note 3, at 2011.

⁴⁹ See *id.* Limited time and resources do not permit the state bar to punish every ethical violation.

egregious ethical violations when compared to serious ethical violations like fraud.⁵⁰ As a result, most of the fee dispute complaints to disciplinary boards don't even lead to formal proceedings, and are usually dismissed before the underlying contractual issues are even discussed.⁵¹ Even if an attorney does charge a blatantly excessive fee, the attorney will usually only be disciplined if the lawyer has done this numerous times.⁵²

It is not clear what a blatantly excessive, unreasonable fee would look like. There is a wide definition of what counts as "reasonable" fees under ABA Model Rule 1.5, especially in cases like "Bcrenshaw's" which involve retainers.⁵³ ⁵⁴ The client has the absolute right to end the attorney-client relationship at any time, for any reason, even if it's arbitrary, like Bcrenshaw's reason of not wanting to pursue adoption.⁵⁵ Theoretically, a discharged lawyer's recovery upon termination by the client is limited only to "quantum meruit, up to the time of discharge."⁵⁶ However, for clients in Bcrenshaw's situation who have paid a nonrefundable retainer (agreement between the lawyer and client providing for payment of part or the entire fee in advance of the lawyer's performance) and then terminated the lawyer's representation and demand the unearned fee returned, there is little protection under the ethical rules. Many states say that nonrefundable retainers are

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² ABA Standards for Imposing Lawyer Sanctions note that a single instance or two of charging excessive fees shouldn't warrant more than a reprimand and lawyers are disbarred only if it is a "pattern" of behavior, available at http://www.abanet.org/cpr/regulation/standards_sanctions.pdf, (last visited 3 May 2007); See Rau, *supra* note 3, at 2014.

⁵³ See *supra* note 24, referring to ABA Model Rule of Professional Responsibility 1.5.

⁵⁴ Note: Retainers and fees go by a number of terms and it can be difficult to figure out the difference between a flat fee, minimum fee, nonrefundable retainer, general retainer, and representation fee. This is another source of confusion and definitions vary from state to state. For an example of the terms, see "Topics of Interest to Lawyers: Legal Fees," a document put out by the Wisconsin Courts as an attempt to assist lawyers in navigating the variety of terminology involved in legal fees. Their valiant attempt at lending clarity to this area shows how convoluted some of the terminology has become for lawyers, much less clients (with no legal training) who are forced to navigate the morass of terms; available at <http://www.wicourts.gov/services/attorney/docs/trustlegalfees.pdf> (last visited May 3, 2007).

⁵⁵ See Brickman, *supra* note 2, at 302.

⁵⁶ *Id.*

not specifically banned, but the fees must be reasonable and "unreasonable" fees must be returned, but do not explain how to tell which portion of the fees are unreasonable.⁵⁷ New York is one of the few states that have banned all nonrefundable agreements, on the grounds that a nonrefundable retainer unfairly limits a client's right to change attorneys for any reason.⁵⁸ ⁵⁹ Even if Bcrenshaw lives in a state that bars the kind of nonrefundable retainer used in his case, he still faces an uphill battle, because the small financial amount may not be sufficiently egregious for the court to intervene. And even if the court intervenes, they may not order payment of the nonrefundable retainer because it is a small amount.

For lawyers, complaints to the disciplinary board are also a negative experience. The lawyer has to spend time defending the claim, similar to the time that he would spend in court if the client filed a lawsuit. While a client's complaint in front of the

⁵⁷ See *In re Miles* (1999), 516 S.E.2d 661 (also permitting "reasonable" non-refundable retainers). See also Ethics Opinion No. 250 of the Mississippi Bar (2002), available at http://www.msbar.org/ethic_opinions.php?id=513 (allowing "reasonable" non-refundable retainers but requiring attorney to return advance payment that is not earned, which includes an "unreasonable" portion of the fee).

⁵⁸ See *In re Cooperman*, 633 N.E.2d 1069 (N.Y. Ct. App. 1994) (Banning nonrefundable retainers and requiring attorneys to collect only for work done, or in *quantum meruit*); see also MBA Ethics Opinion 95-2 (holding it is unethical to charge nonrefundable retainer fee for a particular service or case, adopting rationale from *In re Cooperman*, 591 N.Y.S. 2d 855, 856 (1994). For further discussion, see Thomas Hull, A History and Analysis of Retainer Fees: Economics of Law Practice Seminar Fall 1999, available at <http://www.uiowa.edu/~cyberlaw/elp99/th011116.html> (last visited May 1, 2007). As a caution: *Cooperman's* proposition on barring nonrefundable retainers is the minority view; the majority of most of the states still permit nonrefundable retainers.

⁵⁹ For a discussion of some of the rationales behind nonrefundable retainers, see *Kentucky Bar Association Ethics Opinion KBA E-380* (1995) (describing some clients as "irresolute" who would "flit from lawyer to lawyer," and reasoning that "The non-refundable retainer secures an appropriate degree of commitment from the client and ensures that the lawyer will be compensated for time and responsibility invested and for the risk assumed in the early stages of a matter.") available at <http://www.uky.edu/Law/Library/kba/kba380.htm> (last visited May 1, 2007). While the Kentucky Bar notes that the client has the absolute power to discharge counsel, this is not an actual right: "The lawyer-client arrangement is a contractual arrangement, and while the lawyer has obligations, the lawyer also has rights. The client who discharges a lawyer has an obligation to the lawyer for the payment of "reasonable" compensation." *Id.*; see also Randy Fleisher, *Beginning a Plaintiff's Practice: Basic Equal Opportunity Employment Practice: 1999 Annual Meeting*, available at <http://www.bna.com/bnabooks/ababna/annual/99/annual49.pdf> (last visited May 1, 2007). Fleisher notes that he has his clients pay nonrefundable retainers to make sure that he gets paid and that they have a financial stake in the process.

disciplinary board might result in nothing more than a confidential private reprimand (a common practice in the RI Disciplinary Board to first-time complaints), the letter of reprimand goes on file with the Disciplinary Board. The lawyer knows that the Disciplinary Board has heard about his “dirty laundry” and if further complaints go before the board, he runs the risk of receiving stricter punishment.⁶⁰ Such complaints to the disciplinary board, although confidential, could result in a loss of reputation, especially if the client tells everyone about what the lawyer did.⁶¹ In addition, although the situation started out as a simple fee dispute, by the time the client writes a complaint to the disciplinary board, the client may go into more detail which could result in the lawyer being found liable for other more serious ethical violations such as breaking laws against fee-splitting with clients, not returning a client’s full file, or even engaging in fraud.⁶²

Therefore, a complaint to the disciplinary board does not meet many of Bcrenshaw’s interests, nor does it meet the interests of the lawyer involved. While Bcrenshaw may have the opportunity to have someone intervene and say that the lawyer’s behavior was not “ethical,” the chances of this happening for a fee dispute are small indeed because disciplinary boards are focused on more egregious behavior than private contract disputes. Bcrenshaw might spend a good deal of time and money to prepare a complaint to the Disciplinary Board, only to have her complaint summarily dismissed without an evaluation of its merits. If the merits are evaluated, the same problem arises- the situation might not be serious enough to the Board to merit censure or repayment. The best Bcrenshaw could hope for is a reprimand, but even that may not

⁶⁰ See Rau, *supra* note 3, at 2014.

⁶¹ *Id.*

⁶² See Cumminsford, *supra* note 29, at 984.

help Bcrenshaw because usually only repeated, egregious offenses receive punishment.⁶³ This is a poor BATNA for Bcrenshaw- he doesn't get money, respect, or acknowledgement that the attorney was unethical.

At first blush, this seems like it could be a good BATNA for a lawyer because the chances of being punished by the disciplinary board are small indeed. However, the lawyer still has to spend time and money preparing for the complaint, and most lawyers hire a second lawyer to represent them in the disciplinary proceedings. Even if the lawyer does not receive a reprimand or other punishment, the lawyer's reputation is still negatively affected because he is involved in a fee dispute, especially if the client lets other people in town know about it and the lawyer could lose business as a result. The lawyer's reputation among his peers is also tarnished, because they may hear about the complaint.⁶⁴ The lawyer may get to keep the retainer in Bcrenshaw's case, but after he pays for a lawyer to represent him in a disciplinary board proceeding and spends time on the case, and deals with the effects on his business and reputation, the lawyer could find that the costs of keeping the retainer weren't worth it.

D. Negotiate with the Lawyer

Bcrenshaw could engage in negotiation with the lawyer.⁶⁵ However, it sounds like Bcrenshaw has already tried this- unsuccessfully- and may need the use of a third party to facilitate mediation.

V. Consider Using Mediation

i. What is Mediation?

⁶³ See Rau, *supra* note 3, at 2012.

⁶⁴ See *id.* 2014.

⁶⁵ See Cumminsford, *supra* note 29, at 978.

Bcrenshaw's remaining option is to explore mediation.⁶⁶ Mediation is "a confidential, flexible, cost effective, dispute resolution process in which an impartial third party, the mediator, facilitates negotiations between the parties."⁶⁷ Mediation helps parties communicate and exploring options outside of what litigation could provide.⁶⁸ Mediation is usually informal, always voluntary, and is non-binding.⁶⁹ Mediation is helpful for fee dispute situations like Bcrenshaw's when there is an honest mistake or a lack of communication between the client and the lawyer.⁷⁰ It is often used if it's likely that parties will reach an agreement with the assistance of a disinterested third party or if parties will have an ongoing relationship after the resolution of the conflict.⁷¹ Mediation can be used either by itself or before using other forms of dispute resolution like arbitration.⁷²⁷³ Facilitative mediators are preferred by some individuals but there are a variety of styles to use.⁷⁴

Under any style, the mediator should work to facilitate communication across party lines and clarify each party's understanding of their interests and concerns, as well as those of their opponent.⁷⁵ Mediation works to generate unique options for a solution

⁶⁶ *Id.*

⁶⁷ See Morris, *supra* note 5, at 1055-1056.

⁶⁸ See James Melamed, *What is Mediation?*, available at <http://www.mediate.com/articles/what.cfm>. (last visited May 1, 2007).

⁶⁹ See Julie M. Tamminen, *Using Alternative Dispute Resolution to Handle Client Disputes*, 11 ME. B. J. 213 (1996). This is in contrast to arbitration, which uses a neutral party to adjudicate a dispute by issuing a binding judgment limited to the legal issues. Mediation takes this a step further to resolve conflicts by expanding beyond legal issues and can take place before discovery is finished. See Morris, *supra* note 5, at 1055-1056.

⁷⁰ See *id.*

⁷¹ See John W. Cooley, *The Use of Alternative Dispute Resolution in the Settlement of Attorney Fee Disputes*, 609 PLI/Lit 829, 832 (1999).

⁷² *Id.*

⁷³ See Cooley, *supra* note 71, at 832-34. Parties may use mediation as soon as a conflict arises and after traditional negotiation strategies fail, as well as at specific junctures in litigation.

⁷⁴ See Morris, *supra* note 5, at 1057-58.

⁷⁵ See Fisher, *supra* note 7, at 40.

to the dispute that all parties agree with.⁷⁶ Fisher and Ury note that a good mediator “separates the people from the problem.”⁷⁷

ii. Does mediation meet Bcrenshaw’s and the lawyer’s interests?

The lawyer and the client have shared interests in fee disputes, which makes them particularly well suited to mediation because mediation can explore options that satisfy mutual interests. One of the shared interests that Bcrenshaw and the lawyer have is getting the situation resolved in a fair and timely manner. Another is preserving their reputations, and saving face.⁷⁸

For Bcrenshaw, she can meet her interests of privacy, respect and fairness through mediation. Mediation protects the confidentiality and privacy of clients as well as lawyers and firms.⁷⁹ In Bcrenshaw’s case, if he doesn’t want other people to know that he and his wife are looking at in vitro fertilization or alternative options to adoption, privacy might rate highly on his list of priorities. One of the good points about mediation for Bcrenshaw is that mediation is less adversarial than litigation and is more creative than rigid.⁸⁰ Also, mediation is nonbinding, so if there isn’t a resolution, the client can look at other options.⁸¹ Finally, even if there isn’t a resolution agreed to in mediation, it gives Bcrenshaw the opportunity to be heard and helps the parties be less angry and more proactive.⁸² All of these positive attributes allow Bcrenshaw to more easily meet his interests, especially in light of the fact that his other options (litigation, disciplinary board

⁷⁶ See Morris, *supra* note 5, at 1057-58.

⁷⁷ See Fisher, *supra* note 7, at 17.

⁷⁸ See Ury, *supra* note 9, at 108.

⁷⁹ See Tamminen, *supra* note 4, at 213.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

complaints, etc.) do not involve privacy, respect, validation for his feelings, and may not vindicate his sense of fairness.

Mediation also meets many of the lawyer's interests in respect and privacy. It is nonbinding and resolves complaints in a way that preserves attorney-client relationships and protects the lawyer's professional reputation.⁸³ Mediation avoids a complaint to the disciplinary board, which can be time-consuming and a "hassle" because even if a lawyer is not found guilty he can get a reprimand and have his case on file with the disciplinary board.⁸⁴ Chances are good that the lawyer will be able to work out a better deal with the client than what would happen in court, after the fees and time constraints.⁸⁵ Also, if a lawyer mediates with a client early in the process, there is a greater chance that the client will listen to the lawyer and work with the lawyer to explore a solution.⁸⁶ Although it's not obvious at first glance, mediation does address many of the lawyer's interests in preserving reputation, saving money, and saving face.⁸⁷

⁸³ *Id.* See also Cooley, *supra* note 71, at 837-38.

⁸⁴ *See id.* 837-38.

⁸⁵ *Id.*

⁸⁶ See Gene Moscovitch, *Rest Easier*, LOS ANGELES DAILY UPDATE, MAY 19, 1999, <http://www.mediate.com/articles/moscovitchG2.cfm>. Moscovitch notes that a lawyer's fear of showing "weakness" when he agrees to mediation is unfounded. Early mediation is an opportunity to educate the new lawyer about the costs associated with the case, and the client is more likely to listen to this logic because the client has not invested that much time in the process yet. It also might make the plaintiff's lawyer think twice about representing the client, especially if you have some interesting facts to offer to the other lawyer about the case (since you're freed from attorney-client privilege by the client's filing of the lawsuit). Even if the case does end up in court, the lawyer can show that he tried to mediate with the plaintiff, which is a good faith showing that the judge will reward.

⁸⁷ *Id.* (By handling claims of professional negligence in an expeditious manner, the put-upon practitioner can at least attempt to limit the down side of what is to follow. Much as in the case of an IRS audit, there would seem to be little upside to be had from being a defendant in a legal malpractice case. The presumed personal upset and possible embarrassment of being sued, the need to continually report such an event to all future carriers as if one were a convicted sex offender, and the countless unpaid hours spent reliving the facts of a case one would just as soon forget, are rarely justified by a legal system which most attorneys themselves know only rarely provides the total vindication which most litigants seek).

Here, Bcrenshaw and the lawyer can work together to find a better solution to their fee dispute that meets both their interests of reputation and fairness.⁸⁸ Mediation isn't always successful and has some costs associated with it, but it would seem to be a better option for both parties compared to litigation or complaints to the disciplinary board. With mediation, Bcrenshaw and the lawyer could look at ideas like the lawyer returning part of the retainer and keeping a portion of the retainer to pay for opening a case file and doing preliminary research.⁸⁹ Mediation would allow Bcrenshaw and his lawyer to communicate and share their needs and interests. Even if no agreement was reached, the mediation session could allow the parties to communicate and learn new information, and gain ideas for a settlement in the future in a way that the adversarial nature of litigation or complaints to the disciplinary board would not.

C. Reasons to Carefully Consider Mediation

Although mediation has many positive aspects, it is not a panacea for all fee disputes and has both costs and risks associated with it.⁹⁰ One of the issues to consider is whether mediation really does produce better settlements for both parties than traditional methods like litigation.⁹¹ In cases like Bcrenshaw's, where the client has hired the

⁸⁸ See Cooley, *supra* note 71, at 832-34. "Thus, in a fee dispute between a lawyer and a client who have an ongoing attorney-client relationship over the years, a skillful mediator can help the parties identify their underlying interests, can effectively guide the client and counsel past positional bargaining, and perhaps even salvage the attorney-client relationship. Early mediation allows the parties, if they desire, to renegotiate a whole new settlement-- to transform the dispute from a destructive conflict situation into the joint negotiation of a new transaction which satisfies all the interests involved. Such a nonmonetary remedy, subscribed to by both parties, is rarely available through court adjudication."

⁸⁹ See Cooley, *supra* note 71, at 837-38. (With minimal procedural requirements, mediation provides an unlimited opportunity for the parties to exercise flexibility in communicating their underlying concerns and priorities regarding the dispute. It can educate the parties on potential alternative solutions, empower them to improve and strengthen their relationship in future interactions, and stimulate them to explore and to reach creative solutions affording mutual gain and a high rate of compliance).

⁹⁰ See Ury, *supra* note 9, at 23 (noting that negotiation has costs like time and money); see also Rau, *supra* note 3, at 220.

⁹¹ See Rau, *supra* note 3, at 220, Rau notes that it is difficult to empirically demonstrate the benefits of mediation with fee disputes (noting paucity of studies on success of mediation).

lawyer for a single isolated transaction, there may not be a future relationship to preserve anyway and mediation does not meet the client's interests.⁹² Similarly, if the lawyer has poor communication skills when talking directly to the client, having a third party in mediation probably will not help him communicate any better.⁹³ In addition, if the dispute is largely about money, as it is in Brenshaw's case, there's not much opportunity for a creative or integrative solution.⁹⁴ Rau's greatest fear, however, is the danger that unsuspecting clients will be pushed into inadequate settlements in mediation, when the mediator tells the client about the costs of pursuing litigation.⁹⁵

All of these criticisms of mediation bring up good points about the costs of mediation and when it may be inapplicable to certain situations. However, going back to William Ury's process of negotiation outlined in the beginning of the paper, the client and the lawyer both have interests, many of which are shared. These interests are usually unmet in traditional methods of dispute resolution like litigation. In this situation, it makes sense for a client like Brenshaw and a lawyer to at least consider mediation. Even if it's a one-time transaction like Brenshaw's, the lawyer still wants to preserve his professional reputation and receive business from other clients in the community. Having a skillful neutral third party in the mediation may very well help both parties communicate better. And as long as clients are well-informed about their options and their interests, they can probably make informed decisions in mediation. Of course, there are situations when mediation should not be used, such as when one party will not

⁹² See Rau, *supra* note 3, at 2069.

⁹³ *Id.*

⁹⁴ See *id.* at 2070.

⁹⁵ See *id.* at 2073.

negotiate in good faith.⁹⁶ Even in the absence of a wealth of empirical literature detailing the exact benefits of mediation, it makes sense to consider it as an option in a fee dispute.

D. Kinds of Mediation Available

Suppose that Bcrenshaw has decided that he wants to explore mediation. Where can he go for mediation? Bcrenshaw could use his state bar association's alternative dispute program. Many state bar associations have adopted alternative dispute resolution programs that involve voluntary and mandatory mediation, arbitration, or a combination of both approaches.^{97 98} The American Bar Association suggests in model Rule 1.9 that lawyers consider using arbitration or mediation programs if they are offered in the lawyer's jurisdiction by the bar association and the client requests their use. Part of the reason that the ABA suggests that fee disputes be resolved without litigation is their negative effects on lawyer-client relationships and their effect on the reputation of the legal practice.⁹⁹

⁹⁶ See Cooley, *supra* note 71, at 834 (Of course, mediation should not be considered or used in the inception of a dispute where the emergency situation requires a court order to prevent dissipation or sequestering of assets, or where other kinds of irreparable harm will likely occur to persons or property without court protection. Other typical situations in which early mediation is counter indicated? include those in which: all the real parties in interest have yet to be identified, one or more of the parties has everything to gain and nothing to lose by delay, a party has a rigid view of his or her legal rights and seeks revenge, or a party has consistently negotiated in bad faith)..

⁹⁷ See Brickman, *supra* note 2, at 292 (While some supporters of arbitration say that it is a superior alternative, others note that there are costs associated with arbitration that make it difficult for the client to receive a fair hearing. Arbitration deprives clients of fiduciary and ethical rights because arbitrators are not required to apply these rules, and do not have to disclose if they have done so).

⁹⁸ See Developments in the Law - Lawyers' Responsibilities and Lawyers' Responses, *Review*, 107 HARV. L. REV. 1547. (Presumably the attorney has something to gain by compelling arbitration of malpractice claims arising in connection with fee disputes. According to many commentators, however, arbitration of fee disputes between attorneys can be mutually beneficial Arbitration offers simplified procedures and lower costs that allow lay clients to pursue fee disputes in cases in which litigation with the help of a second attorney would not be cost-effective because of the small amounts usually at stake in fee disputes and the high costs of retaining a second lawyer; see also Brickman, *supra* note 2. Moreover, because fee disputes have the potential to create public image problems for the legal profession, many state bar associations have encouraged confidential arbitration as a means to resolve fee disputes. See also *Id.* at 278 n. 4 (describing programs for fee arbitration).

⁹⁹ See ABA Model Rule of Professional Conduct 1.5, Comment 9, http://www.abanet.org/cpr/mrpc/rule_1_5.html. ("If a procedure has been established for resolution of fee

Depending on what state Bcrenshaw lives in, his lawyer's consent could be necessary to go to mediation. In Rhode Island, for example, the State Bar Association offers a voluntary fee arbitration program, where lawyers may choose to decline to go through the process if they choose.¹⁰⁰ In contrast, California offers a mandatory mediation program for lawyers, where lawyers must mediate if the client opts to go to mediation.¹⁰¹ The proliferation of these programs is fascinating and their effectiveness is being discussed and debated. (While this is an interesting topic indeed, it is beyond the scope of this paper).¹⁰² ¹⁰³ Other options for mediation include using private mediator companies or clinics in law schools, or using mediation through the courts.

VI. Conclusion

Bcrenshaw is in a very difficult situation. Most likely, none of his options will fulfill all of his interests. Most likely, he will not get back the retainer. However, if Bcrenshaw and his lawyer carefully assess the options and their interests, they may come to the conclusion that mediation could produce an agreement that fulfills most of their interests. Mediation allows Bcrenshaw and his lawyer to see that each of them have weak BATNAs (best alternative to negotiated agreement) and strong WANTAs (worst case scenarios to negotiated agreements). Although there is a paucity of empirical data

disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it.”

¹⁰⁰ See Rhode Island Fee Arbitration Committee (Jan. 1, 1996), <http://www.ribar.com/public/feearbitration.asp#Rules>.

¹⁰¹ See State Bar of California Mandatory Mediation Project, http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10166&id=1325.

¹⁰² See Chart II- Part 2: Fee Arbitration Programs, 2006 ABA Survey of Fee Arbitration Programs, ABA Center for Professional Responsibility, http://www.abanet.org/cpr/clientpro/Fee_Arb_Chart_2_Part_2.pdf. This chart shows the bar association fee dispute resolution programs in every state.

¹⁰³ See American Bar Association, Standing Committee on Professional Discipline, Model Rules for Lawyer Disciplinary Enforcement, Rule 1: Comprehensive Lawyer Regulatory System, <http://www.abanet.org/cpr/disenf/rule1.html>.

describing the success of mediation, mediation is the only alternative that would allow the parties to communicate in a non-adversarial manner and work on creative solutions to their fee dispute. In a relatively simple case like Bcrenshaw's, where there is a lack of communication and understanding on both sides, this ability to share new facts and ideas may be just what the parties need. Lawyers should take fee disputes very seriously and consider using mediation, either privately or if it is available through the state bar association. Since lawyers and clients have the same interest- settling the dispute in a timely manner- mediation provides a good outlet to find a solution where both the client and the lawyer "win."