

### Fee Disputes and Binding Arbitration – Impact on PLF Coverage

To thrive over the long term as a professional, you must be able to consistently and timely collect legitimately earned fees. A clearly written retainer agreement with the client is vital to avoid misunderstandings over payment of fees and to foster a satisfactory relationship. In drafting the retainer agreement, however, you need to be aware of how its terms might impact your coverage for legal malpractice claims under the Professional Liability Fund (PLF) Primary and Excess Claims Made Plans (Plans).

Consider the following hypothetical. A malpractice claim is made against an attorney arising out of the attorney's work on a matter for a former client. The attorney's assignment is documented by a retainer agreement which, after describing the nature of the matter to be handled, provides that "all disputes arising under this agreement shall be resolved through binding arbitration, with the prevailing party entitled to an award of reasonable attorney fees and costs." The malpractice claim is made by the claimant as a counterclaim in a lawsuit filed by the attorney for the purpose of collecting an unpaid fee. The claimant seeks economic damages allegedly due to the attorney's negligence, as well as the return of legal fees previously paid and forgiveness of unpaid fees, plus reasonable attorney fees and costs incurred in the pending action.

How might a retainer agreement containing terms such as those quoted above impact coverage under the PLF's current Primary and Excess Plans? Both Plans are located on the PLF's Web site at [www.osbplf.org](http://www.osbplf.org), and you should familiarize yourself with the current versions of the Plans. Terms of both Plans are substantially identical for purposes of answering this question.

#### Fee Disputes Are Not Covered By the Plans

Setting aside for a moment the former client's counterclaim for economic damages for legal malpractice and focusing only on the attorney's effort to collect the fee, Oregon attorneys in private practice need to be aware that disputes over payment of legal fees and costs are not within the coverage provided under the PLF Plans. This is true for three reasons.

First, subject to all other terms and conditions, the Plans cover liability of an attorney and the attorney's law firm (referred to in the Plans as Covered Parties) arising out of a Covered Activity as defined in Section III of both Plans. Among other elements, a Covered Activity requires that the alleged act, error, or omission on which the claim is based was committed by the Covered Party in rendering professional services in the Covered Party's capacity as an attorney in private practice, or in failing to render professional services that should have been rendered in that capacity. Comments following Section III (which are included throughout the Plans following each section as an aid to interpreting the Plans) provide that the definition of Covered Activity is intended to limit coverage to the Covered Party's conduct as a lawyer so that it does not include coverage for the commercial aspects of the practice of law, such as collecting fees or costs.

Second, the remedy sought against a Covered Party must be Damages as defined in Section I of the Plans. Damages is defined as "money paid as compensation for harm or loss [and] does not refer to fines, penalties, punitive damages or exemplary damages, or equitable relief such as

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restitution, disgorgement, rescission, injunctions, accountings, or damages otherwise excluded by this Plan.”

Third, coverage for fee disputes is excluded under Exclusion 10 of the Plans. That Exclusion provides that the Plans do not apply to any claim:

“a. For the return of any fees, costs, or disbursements paid to a COVERED PARTY (or paid to any other attorney or LAW ENTITY with which the COVERED PARTY was associated at the time the fees, costs, or disbursements were incurred or paid), including but not limited to fees, costs, and disbursements alleged to be excessive, not earned, or negligently incurred;

b. Arising from or relating to the negotiation, securing, or collection of fees, costs, or disbursements owed or claimed to be owed to a COVERED PARTY or any LAW ENTITY with which the COVERED PARTY is now associated, or was associated at the time of the conduct giving rise to the CLAIM; or

c. For damages or the recovery of funds or property that have or will directly or indirectly benefit any COVERED PARTY.”

Consequently, in the above hypothetical, the former client’s counterclaims for the return of legal fees previously paid to the attorney and for forgiveness of the balance still owing are not within the scope of a Covered Activity or of Damages under the PLF’s Plans, and are excluded under Exclusion 10. Thus, those remedies are not covered by the Plans. Neither is the former client’s claim to be awarded attorney fees and costs as the prevailing party under the retainer agreement since, again, the retainer agreement itself is entered into as part of the commercial aspects of practicing law.

## **Binding Arbitration May Jeopardize Coverage**

The PLF’s mission is to pay, in accordance with all terms and conditions of the applicable Plan, all sums a Covered Party becomes legally obligated to pay as money damages because of a covered act, error, or omission in rendering or failing to render professional services. Clearly, in the above hypothetical, the former client’s counterclaim for economic damages arising out of the attorney’s alleged negligence in working on the matter described in the retainer agreement is potentially covered under the PLF Plans. Absent other considerations, the PLF would therefore owe a duty to defend, and to potentially pay, those economic damages.

However, suppose the judge assigned to the lawsuit ruled that, pursuant to the parties’ retainer agreement, the entire dispute, including the claimant’s counterclaim for

damages due to the alleged malpractice, must be decided by binding arbitration. Suppose further that the arbitrator decided to award the claimant compensatory damages because of the malpractice, plus attorney fees and costs incurred in the action.

If the parties’ retainer agreement did not contain an arbitration clause, the claimant’s malpractice claim would be decided in a court of law, with each party having the right to a jury trial and the right to appeal an adverse result. In the absence of the prevailing party attorney fee clause, neither side would be awarded attorney fees in the action because, as a general proposition, attorney fees are not recoverable in an action for legal malpractice. *See Brookshire v. Johnson*, 274 Or 19, 21, 544 P2d 164 (1976) (in the absence of express authorization by statute or contract, under Oregon law neither party in a lawsuit is entitled to an award of attorney fees).

Two provisions of the PLF Plans are relevant. One is Exclusion 20 in both Plans, which provides in relevant part that the Plans do not apply to any claim “for liability based on an agreement or representation, if the Covered Party would not have been liable in the absence of the agreement or representation . . . .” As a result, coverage for payment of the attorney fee award would be excluded, since that liability would not have existed in the absence of the retainer agreement. As an aside, perhaps you should consider whether you realistically stand to gain anything from routinely including a prevailing party attorney fee provision in your retainer agreements. Chances are that if you are having such difficulty collecting the fee that enforcement procedures are necessary, it may be because the client has no money to pay your fee. Thus, including such a clause is often unwise since in many cases only the client stands to benefit from it.

With respect to potential application of Exclusion 20 to coverage for the arbitrator’s award of compensatory damages for the malpractice, without the retainer agreement the case might still have been assigned to arbitration, but the arbitration would not have been binding. Because the retainer agreement makes the arbitrator’s award binding, coverage for liability imposed by the arbitrator for the compensatory damages may also be subject to the same exclusion.

Beyond that, Section IV of both Plans gives the PLF the “sole right to investigate, repair, settle, designate defense attorneys, and otherwise conduct the defense and repair of any claim.” Any retainer or other agreement made with a prospective client that reduces or negates the PLF’s rights under its Plans may prejudice its ability to defend the Covered Party or to satisfactorily resolve an otherwise covered claim. For example, the right to appeal from an adverse result at trial is often vital to the successful defense of a malpractice claim. There is, of course, no right to appeal an award made in bind-

ing arbitration. By committing the PLF to binding arbitration, the Covered Party potentially jeopardizes coverage that may otherwise exist.

## Summary

The PLF's goal is to serve Oregon lawyers and the public in a way that fully protects Covered Parties within the plain meaning of the Primary and Excess Claims Made Plans. The PLF also respects the importance of clear and unambiguous retainer agreements, including those that provide for resolving fee disputes through binding arbitration.

On the other hand, it is important to understand that fee disputes are not covered by the Plans. Fee disputes are not within the scope of a Covered Activity because they arise out of the commercial aspects of practicing law rather than out of the attorney's professional services as a lawyer. In addition, claims for the reduction or forgiveness of fees, or for the return of fees already paid, are not within the definition of Damages. Further, fee disputes are excluded under Exclusion 10 of the Plans.

For claims that are potentially covered by the Plans, it is important to make sure your retainer agreement does not inadvertently obligate you or the PLF to a course of action in handling claims that is different from what the Plans themselves provide. Exclusion 20 in both Plans excludes coverage for liability assumed by contract. Moreover, to the extent your contractual obligations prejudice the successful defense or settlement of claims that are potentially covered, you could be jeopardizing the protection you paid for as a Covered Party.

The bottom line is that a carefully drafted retainer agreement is vital to a satisfactory relationship between you and your client. Just be mindful of the above considerations when preparing yours so that any commitment you make for binding arbitration and a prevailing party fee award applies only to the fee dispute and not to a potential malpractice claim.

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