



Chapter Eleven – 0250LK

## **Avoiding that “Big Little Lie:” Navigating Fee Missteps When Making Getting Paid A Reality**

**Hosted by the Solo, Small, Mid-Size Firm Committee**

## Course Summary

The popular dark comedy-drama HBO miniseries, based on the novel by Liane Moriarty, “Big Little Lies” has been the talk of pop culture circles and social media across the country. This miniseries highlights a collection of missteps and dangerous little lies we tell ourselves just to survive that lead up to one inevitable fatal lie.

In this CLE session, panelists will address how to avoid the most disastrous lie when attempting to navigate fee agreements -- not getting paid after your back-breaking, soul crushing labor. Panelists address fee agreements both from the plaintiff and defense perspective, setting fees with clients, discussing fees with clients, the boundaries between fees and retainers, fee issues that arise when a claimant retains you after they have already received a settlement offer, as well as, ethical considerations.

Course Planner/Moderator:

**Maureen M. Farrell, Esq.**

Law Offices of Maureen M. Farrell

Panelists:

**Danielle R. DeRosa, Esq.**

Dickie, McCamey & Chilcote, P.C.

**Kevin V. Mincey, Esq.**

Partner, Mincey & Fitzpatrick, LLC

**Eric H. Weitz, Esq.**

The Weitz Firm LLC

# BIOGRAPHIES

## *Avoiding that “Big Little Lie:” Navigating Fee Missteps When Making Getting Paid a Reality*

### **COURSE PLANNER/MODERATOR:**

#### **Maureen M. Farrell, Esq.**

Maureen M. Farrell is the owner and principal at Law Offices of Maureen M. Farrell. Ms. Farrell’s boutique firm concentrates on practical solutions for families and small businesses. Ms. Farrell is a trusted advisor who represents a diverse clientele in preparing prenuptial agreements, wills, trusts, guardianship and Medicaid applications as well as nursing home contract review. Ms. Farrell has a wide breadth of knowledge in organizational development and management to advise as outside general counsel and strategic advisor to various start-ups and growing companies. Ms. Farrell is the current Chair of the Solo, Small, and Mid-Size Committee of the Philadelphia Bar Association. As such, she moderates many different forums for members of the Solo, Small, and Mid-Size Committee.

Ms. Farrell actively serves a number of national, local, and charitable and civic organizations. Ms. Farrell is an elected member of the Board of the Philadelphia Bar Association. She has published numerous articles as an Associate Editor of the Philadelphia Bar Reporter. Ms. Farrell’s pro bono efforts include fundraising for many organization; The Support Center for Child Advocate, Community Legal Services, St. Mary’s Interparochial School, and Women’s Way. Ms. Farrell serves as the current Vice President of the Brehon Law Society, an organization which fosters the development of Irish lawyers in the Philadelphia area. Ms. Farrell is a frequent lecturer and moderator with past engagements at Rosemont College, the Philadelphia Bar Association, and the Brehon Law Society. She has been repeatedly recognized as a Pennsylvania Super Lawyer’s Rising Star from 2012 and 2017. She has been recognized as an Irish 100 Rising Star in 2017. She received her J.D. from Widener University School of Law, and her Ed.M magna cum laude from Temple University, and her B.A. from Villanova University.

### **PANELISTS:**

#### **Danielle DeRosa, Esq.**

Danielle DeRosa is an associate of Dickie, McCamey & Chilcote, P.C. She concentrates her practice in the area of workers' compensation, specifically in defense matters on behalf of insurance carriers, self-insured entities, and third-party administrators. Ms. DeRosa was a co-chair of the Philadelphia Bar Association's Workers' Compensation Section in 2016 and is presently serving a three year term as Secretary to the Section.

#### **Kevin V. Mincey, Esq.**

Mr. Mincey is a purebred trial lawyer. While the strategy he employs in each case is often what gains attention, for Kevin, it’s the people he’s working for that matter most. He approaches each case as a unique opportunity to right a wrong and improve a family’s

future circumstances. Simply put, standing up for individual rights is what motivates him. Case by case, over the course of many noteworthy trials and settlements, Mr. Mincey has built a reputation for out-preparing his opponents and finding new ways to effectively try or mediate a case.

Mr. Mincey is a well-trained trial attorney who honed his trial skills and earned his reputation prosecuting and defending criminal cases. As a result of his remarkable success, his law practice has expanded into the areas of personal injury and civil rights. Through noteworthy trial victories, Mr. Mincey has demonstrated that his attention to detail and insistence on excellent client representation can transform cases with dire outlooks into wins. Mr. Mincey is committed to defending those whose voices may seem small when placed next to state organizations.

Due to the consistent quality of Mr. Mincey's work, he has been awarded many honors and has held countless esteemed positions. For example, in 2013, Mr. Mincey was added to the Board of Directors of the Pennsylvania Innocence project while simultaneously being recognized as "Lawyer on the Fast Track" by the *Legal Intelligencer*. Mr. Mincey is also a member of the National Bar Association (NBA), the oldest and largest association of African American lawyers and judges in the country. He currently serves the NBA as a member of the Judicial Selection Committee, and previously served as Director of Region 3 (an area that covers PA, NJ, & Delaware), and Deputy Director of region 3. Additionally, Mr. Mincey is a member of Alpha Phi Alpha Fraternity, Incorporated.

Mr. Mincey honed his professional outlook at the Howard University School of Law in Washington D.C.; culminating in the completion of his Juris Doctorate degree. Prior to achieving his Juris Doctorate, Mr. Mincey attended the University of Maryland Eastern Shore where he received his undergraduate degree in Criminal Justice, *magna cum laude* honors

#### **Eric H. Weitz, Esq.**

Eric H. Weitz is the founding member of The Weitz Firm, LLC. Mr. Weitz represents individuals in a wide variety of complex trial matters. Mr. Weitz's clients range from families seeking answers surrounding the death or catastrophic injury of their loved ones to individuals and entities who have been harmed by misconduct of others. Mr. Weitz's boutique practice focuses on select cases involving catastrophic injuries caused by medical malpractice and other torts as well as complicated commercial disputes.

With 25 years of national trial experience, Mr. Weitz has achieved many multi-million dollar verdicts and results for his clients. Likewise, Mr. Weitz represents also numerous companies in high-stakes commercial disputes that require the skills of a seasoned trial attorney. Mr. Weitz is a 1989 graduate, cum laude, of the S.I. Newhouse School of Public Communications at Syracuse University and a 1992 graduate, cum laude, of the Villanova University School of Law.

Mr. Weitz is an active trial lawyer and teacher. Mr. Weitz commits a great deal of time to studying and lecturing on past and future courtroom techniques, effective presentation with new technology and modern presentation theories. When Mr. Weitz is not trying cases, he actively serves a number of national and local professional, charitable and community organizations. Mr. Weitz served as an officer of the Philadelphia Trial Lawyers Association

and as a member of the Executive Committee of the Pennsylvania Association for Justice. Mr. Weitz has also been appointed by the Pennsylvania Legislature to serve as one of the 11 Directors of the Pennsylvania Patient Safety Authority. In 2014, Mr. Weitz served as Chairman of the Board of the Philadelphia Bar Association after serving in many leadership positions over the years. Currently, Mr. Weitz is the Chair of the Philadelphia Bar Association Commission on Judicial Selection and Retention. Other legal association activities include his being an invited participant in the Temple American Inn of Court and membership in the Philadelphia Lawyer's Club. Mr. Weitz is a Fellow of the Academy of Advocacy. For many years, Mr. Weitz has been named a Pennsylvania Super Lawyer by *Law & Politics* magazine and *Philadelphia Magazine*, including Top 100 Pennsylvania and Top 100 Philadelphia every year from 2011 to 2017. Mr. Weitz was nominated and selected by his peers as a 2015, 2016 and 2017 *Best Lawyer in America*.

NOTES

## ***Avoiding that “Big Little Lie:” Navigating Fee Missteps When Making Getting Paid A Reality***

Most common to the practice of law are disputes about fees. The attorney may have recourse, but it is often difficult to recover. The problem with fee disputes is they manifest way before the actual dispute. Good communication with your client is a cornerstone to avoid missteps.

### **I. INTRODUCTION**

#### **a. Communication**

- i. Communication with the client about fees.
  1. Transparency.
  2. Communication expectations clearly on both sides.
  3. Does the client believe you are providing value for your services?
  4. Does the client pay you on time?
  5. Give an honest appraisal of the matter.
  6. Budget for the client.

#### **b. Engagement letter**

- i. Set out terms clearly in your Engagement letter about fees will be paid and recourse if they are not.
- ii. Withdraw if the client does not pay the bill.
- iii. Discuss time and fees expended on behalf of the client.
- iv. Comply with the Rules of Professional Conduct when entering into agreements.
- v. Rules of Professional Conduct recognize that various fee agreements can be made between attorneys and clients.
  1. Subject to limitations of Rule 1.5 lawyers can otherwise be creative in structuring their fee agreements. As long as the fee arrangements are not “clearly illegal or excessive” Pa. R.P.C. 1.5(a).

### **II. CIVIL DEFENSE**

#### **a. Informing the Client**

- i. Get your client to buy in to your process including your fees.
- ii. Status reports.

- iii. More frequent billing.
- iv. Keeping track of time is a measure of cost.

**b. Traditional Hourly Billing or Time Based Billing**

- i. Time based billing is so prevalent that other billing arrangements are referred to as alternative fee arrangements. Hourly rates range from \$100 to \$1,000 and the factors that influence rates include the size of the firm, its practice and environment, the size and maturity of the local market for legal services, and the experience and expertise of the particular lawyer. Rates are quoted on an hourly basis and are usually charged in smaller increments, ordinarily tenths or quarters of an hour.
- ii. Lawyer based system vs. client based system
- iii. Criticisms of time-based fees are that they reward inefficient legal work, encourage dishonest billing and create significant strains on lawyers and thwarts efforts to improve work-life balance.

**c. Legal Bill Auditing/Review**

- i. Insurance companies pay large amounts to lawyers but in small increments. They are finding ways streamline their reviews, by requiring firms to submit their bills electronically in a specified format that facilitates a computerized review for certain easily-recognized problems, making them cost-effective for bills of only a few hundred or thousand dollars.
- ii. Face of bill is reviewed. If available in electronic form or may be scanned electronically, some parts of bill review can be automated. Words and phrases that reveal questionable billing practices can be searched and flagged. Most auditors also have trained personnel review each line of the bill for problems a computer cannot spot.
- iii. Pros: Audit can result in positive recommendation and more work.
- iv. Ethics: Professional and ethical duties include responsibilities to report to the client (ABA Model Rule of Professional Conduct 1.4(b)), abstain from “false or misleading communications” to the client (Model Rule 7.1) and to explain the basis for a fee (Rule 1.5(b))

**d. Alternative Fee Arrangements (“AFA”)**

- i. Clients want to promote efficiency, success and thinking “outside the box” while fostering trust, loyalty and a “partnership” mentality with attorneys. There is perception that traditional hourly billing does not provide incentives for lawyers to work efficiently or seek an early resolution that is best for client but rather rewards excessive billing without necessarily achieving value for client.
- ii. Common AFA:
  - 1. “Risk Collars”
  - 2. Fixed fees or flat fees



3. Fee cap pricing
  4. Task-based billing
  5. Blended hourly pricing
  6. Reverse contingency arrangements
- iii. Advantages: Predictability allows client to budget costs more accurately and allows firm to predict income from client. Align with interests of client. Eliminates administrative time preparing/reviewing budgets and bills. Eliminates billing disputes.
  - iv. Disadvantages: Must accurately price services to be profitable; legal matters often do not proceed as predicted and firm may have to absorb cost overruns. Also require significant investment of resources on front end to evaluate case to set fee (time that is not compensated) – this risk is lessened where you have significant experience representing that client. Client’s demands change – they may want partner not associate or may make unreasonable demands. Or on the contrary, a firm may push work to junior attorney so senior attorneys can do billable hour work.

**e. Ethical Considerations**

- i. Setting the Fee – ABA Model Rule of Professional Conduct 1.5 addresses reasonableness of attorney fees. Rule 1.5 states:
  1. A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:
    - a. the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
    - b. the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
    - c. the fee customarily charged in the locality for similar legal services;
    - d. the amount involved and the results obtained;
    - e. the time limitations imposed by the client or by the circumstances;
    - f. the nature and length of the professional relationship with the client;
    - g. the experience, reputation, and ability of the lawyer or lawyers performing the services; and
    - h. whether the fee is fixed or contingent.

- ii. Documenting the Fee – Model Rule 1.5(b) requires that the basis of the fee agreement be communicated to new clients in writing before or within a reasonable time of the start of the representation of the client. It is not necessary to state all of factors in determining the basis of the fee. Rule 1.5(c) that a *contingent fee agreement must* be in writing and must set forth the method by which the contingent fee will be determined. A well-thought-out and continually reexamined attorney fee agreement is an essential tool for managing the risks of not getting paid.
- iii. ABA Model Rule 1.4(a)(3) requires a lawyer to “keep the client reasonably informed,” and Model Rule 1.4(b) provides that the lawyer must explain to the extent reasonably necessary to permit the client to make informed decisions.
- iv. Securing the Fee – Taking the fee in advance is the best security, and ABA Model Rule 1.15 (c) provides that “a lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.” When the representation terminates, unearned fees and costs must be refunded to the client (ABA Model Rule 1.16(d)). Where the fee will be secured with client’s property, ABA Model Rule 1.8(a) provides that a lawyer may not take an ownership, possessory, security, or other pecuniary interest adverse to a client unless the transaction is fair and disclosed in writing, the client is given written notice of the right to independent counsel, and the client thereafter agrees in writing.
- v. Model Rule 8.4 prohibits fraud, deceit, and misrepresentation by lawyers
- vi. Model Rule 7.1 prohibits false statements about a lawyer’s services
- vii. American Bar Association Formal Opinion 93-379 entitled *Billing for Professional Fees, Disbursements and Other Expenses*
  - 1. Provides guidance against inflating hours and billing multiple clients for the same time or same work.
  - 2. “In matters where the client has agreed to have the fee determined with reference to the time expended by the lawyer, a lawyer may not bill more time than [he or she] actually spends on a matter, except to the extent that [lawyer] rounds up to minimum time periods (such as one-quarter or one tenth of an hour).” “[T]he lawyer who has agreed to bill on the basis of hours expended does not fulfill [his or her] ethical duty if [that lawyer] bills the client for more time than [was] actually spent on the client’s behalf.”
  - 3. Addresses problematic billing conflicts:
    - a. Court appearances scheduled for three different clients on the same day. The attorney spends three hours at the

courthouse, the same amount of time he would spend for each client individually but for the fact that several cases were scheduled for the same day. This does not earn the attorney nine hours of billing.

- b. While traveling six hours for one client, attorney performs five hours of work for another client. This does not earn the attorney eleven hours of billing.
  - c. Research performed on a topic for one client is then relevant for another client. Reusing old work product does not earn the attorney hours previously billed.
- viii. Under the traditional billable hour, billing several clients for the same time or work product results in an unreasonable fee and violates Model Rule 1.5 in addition to rules against engaging in fraud or deception. However, under certain alternative fee arrangements, if the attorney and client agree the fees will be based on something other than the time spent (such as a fixed fee for each appearance in court or document prepared), the lawyer may be able to bill multiple clients for a single court appearance or for largely recycled work as long as the billing is consistent with the agreement and the total fee is reasonable.

1. Example concerns:

- a. If a fixed/flat fee is made with expectation that case will go to trial but case ultimately resolves in early dismissal motion, the court will likely not enforce fee. Rule 1.5
- b. Under a flat fee arrangement, in order to maximize profitability attorney decides to spend as little time possible on case or appoint junior associates without regard for whether they have requisite skills. Rule 1.5
- c. Fee arrangement may present scenario where interest of client and law firm are divergent, creating ethical violation of lawyers' obligation to act in best interests of client.

**f. Liens to Protect Entitlement to an Unpaid Attorney Fee.**

- i. Retaining lien
- ii. Charging lien
- iii. Pa.R.P.C. 1.16(d) "The lawyer may retain papers relating to the client to the extent permitted by other law."

**III. PLAINTIFF'S PERSONAL INJURY AND BUSINESS TORTS**

**a. The Contingent Fee Agreement**

- i. Definition:

1. [A]n agreement express, or implied, for legal services . . . under which compensation, contingent in whole or in part upon the successful accomplishment or disposition of the subject matter of the agreement, is to be in an amount which either is fixed or is to be determined under a formula . . .

*Eckell v. Wilson*, 597 A.2d 696 (Pa. Super. 1991), quoting, *New England Telephone & Telegraph Co. v. Board of Assessors of Boston*, 468 N.E.2d 263, 266-67 (Mass. 1984)

ii. Who Is the Client?

1. Spouse
2. Guardian
3. Investors

iii. Percentage or Amount

1. Percentage of gross recovery
2. Percentage of net recovery
3. Percentage to include/exclude certain types of damages

iv. Tiers

1. Solely based on amount recovered
2. Based on status of litigation (i.e. through discovery, through trial, through appeal, etc.)
3. Timing (i.e. within three months, prior to jury selection, following judgment, etc.)

v. Ethical Limitations

1. Must be in writing
2. Must not be excessive - R.P.C. 1.5:
  - a. Fixed or contingent;
  - b. the time and labor required, novelty and difficulty, requisite skills;
  - c. the likelihood that handling this matter will preclude handling other matters;
  - d. the fee customarily charged in the locality for similar matters;
  - e. the amount involved and results obtained;
  - f. the time limitations imposed by the client or the circumstances;
  - g. the nature and length of the professional relationship with the client; and

- h. the experience, reputation, and ability of the lawyer or lawyers performing the services.

**b. Costs**

- i. Define the Costs
  - 1. Who pays
    - a. What needs approval
  - 2. When paid (before, during, at the end)
  - 3. Categories of costs
    - a. Experts
    - b. Filings
    - c. Discovery costs
      - i. Will there be electronic discovery
      - ii. Travel
      - iii. Record retrieval
    - d. Office costs
    - e. Consultants
  - 4. Inside or outside of the amount for the fee calculation

**c. Scope of Work**

- i. Which Claims
- ii. Are appeals included
- iii. Are there other firms involved
  - 1. How will fees be split
  - 2. How will costs be split
  - 3. How will work be split
  - 4. Who makes final decisions

**d. Ethical and Practical Considerations**

- i. Hybrid Agreements
  - 1. Flat fee plus contingent fee
  - 2. Offsets for statutory fees
    - a. Tracking versus estimating time.
  - 3. Varying fee based upon degree of success
- ii. Authorizations in the Agreement
  - 1. To contact potential lienholders
    - a. Lien resolution vendor

2. Communicate with the press
    3. Receive confidential information
  - iii. Limited Power of Attorney
    1. Receive client funds
    2. Endorse client's name before placing funds in trust account
  - iv. Discharge
    1. What, if anything is owed if client discharges attorney
    2. What, if anything is owed if attorney discharges client
    3. Arbitration
  - v. When court approval is required
    1. Minor or incompetent
    2. Wrongful Death and Survival
  - vi. Sharing Fees
    1. R.P.C. 1.5
      - a. Client is advised and "does not object;" and
      - b. the total fee is not excessive