

Is the pursuit of unpaid fees worth the risk of litigation?

By Emily Eichenhorn

If you were a banker whose customer defaulted on a loan, you wouldn't hesitate to foreclose on the property. If you were a supplier to a manufacturer that repeatedly ignored your invoices, few would challenge your decision to employ a collection agency. But as an attorney, if you have a fee dispute with a client, you have to think long and hard about how aggressively to pursue payment.

That's because suing for fees, logically, increases the risk that you will face a claim for professional liability. It's not difficult or unusual for a motivated client to develop an argument that at least some portion of your services fell below some reasonable expectation and standard of care. Filing a lawsuit against the client can be just the motivation the client needs to pursue that argument, rather than just walk away without complaining.

Fee suits place you and your firm at risk for ethical challenges, professional liability claims and businesses losses, in terms of both litigation expenses and lost attorney time. And that doesn't even take into account the potential impact of negative publicity and damage to one's reputation in the event of a countersuit.

To sue or not to sue

It would be easy to say lawyers simply should avoid fee suits altogether, just as mugging victims are advised to surrender their cash. It's often a no-win situation, and fighting back can actually make matters worse. Of course, if writing off fees was standard operating procedure – and clients knew it – there would be no incentive for anyone to settle their debts. As lawyers, we all are well aware that the mere prospect of litigation can make owed payments appear out of thin air.

The key, from a risk management viewpoint, is determining how much money makes a battle worth waging. Would you really want to risk a costly countersuit over a few hundred dollars? Probably not, since the added financial burden very likely would outweigh any potential recovery in court. On the other hand, if you believe you have an open-and-shut case with little or no risk of a counter suit, the risk might be more tolerable.

If you have a client that is withholding payment and you are considering bringing a fee suit, it helps to ask yourself the following questions before moving forward:

- Is this client even able to pay? Some clients ignore your invoices not because of any dissatisfaction with your services, but simply because they don't have enough money in the bank. Even if you file suit and win, all or part of the amount owed could be uncollectible.
- If you believe recovery is possible, ask yourself, "How well will my performance stand up against a malpractice counterclaim?" Consider every action you've taken, every letter you've written, every conversation you've had. Is there anything you could have or should have done better? Be brutally honest with yourself – ask the tough questions you'd likely hear from a plaintiff's attorney. Then, assess your odds of winning and adjust the amount you are seeking to recover accordingly. For example, if you believe your odds of success are 80 percent, reduce the amount of fees owed by 20 percent and re-evaluate whether it is worth pursuing.
- If you believe your odds are favorable enough to go on, ask yourself another tough question: "Are the fees I'm seeking to recover reasonable?" There are few clear guidelines about what is reasonable and what is excessive. You may believe your fees are perfectly acceptable, but a jury might feel otherwise if your billing practices or fees compare unfavorably to other local attorneys. Remember, you cannot recover excessive fees, including in contingency situations. Reduce the potential award accordingly.
- What would it cost to pursue this fee case and, if necessary, defend a counterclaim? Not only would you be responsible for your legal fees, but you also must consider the value of your time and that of others who may be needed to assist in your defense. Keep in mind that your professional liability insurance may cover some of the costs of a counterclaim defense, but it likely will not be available to address expenses related to prosecution of the fee suit. Deduct your potential out-of-pocket amount from the possible award.
- Do you still want to sue? If you are seeking to recover fees as opposed to expenses, deduct an appropriate percentage for taxes.
- Finally, what damage might you sustain to your reputation if a countersuit exposed even minor malpractice or billing irregularities? Would appearing on the front page in a negative light impact your business by 30 percent? Ten percent? Even 1 percent? Deduct some amount for possible damage to public relations and good will.

Once you've weighed the all risks and costs, if the adjusted potential recovery is still large enough to prompt you to file suit, then move forward. But, you should ask yourself one more important question: "How did I get myself in this situation in the first place?"

Preventive measures

If fee disputes are a common occurrence with your firm, you probably need to re-evaluate your approach to receivables management and your interactions with clients concerning the business aspects of the representation. The best way to avoid fee disputes is through good management of the business aspects of the lawyer-client relationship.

Fee disputes and lawsuits are best avoided through communication with the client, good billing and collection practices, and timely, prudent business decisions on the part of the lawyer and law firm.

Discuss fees and payment expectations at the outset of a representation and include those issues in an engagement letter. Helping the client to understand up front what is expected and what could happen if problems arise may, in turn, help you avoid litigation over unpaid fees later on. The more you can guide clients' expectations, the less likely it is that they will be surprised by the size of a bill or your insistence on payment at appropriate times.

This is especially true for clients with little or no experience with legal representation. Keep the client apprised as expenses are incurred. Note when you hit plateaus or costs you anticipated in your initial discussions and letter. And alert the client promptly whenever a new twist is likely to significantly affect expected costs or fees.

Bill promptly and at regular intervals. Long delays between bills, or between work performed and the bill for that work, increase the possibility that the perceived value of the work will diminish as other events unfold. That could make a reasonable charge appear unreasonable and possibly prompt a dispute.

Get your bills out on time and as soon as possible after the fees are incurred. The time to bill for drafting the summary judgment motion is immediately after the motion is drafted and delivered to the client – not six months later when the judge has denied the motion, the client is disappointed, and hindsight seems to suggest you should never have tried the motion in the first place.

Address delinquent accounts quickly and consistently. For some law firms, fee disputes are the result of poor receivables management. Lawyers or firm managers typically don't have the knowledge, skills, interest or time to manage the firm's receivables effectively. As a result, small delinquencies can blossom into outstanding amounts large enough that fee suits appear to be cost effective.

If you find that your firm frequently considers or institutes fee suits, or that fee delinquency is more the norm than the exception, you may be helped by collaborating with consultants specializing in professional service firm cash management and collection.

Be willing to walk away from a bad situation before it develops into an even worse one. One of the most effective ways to avoid fee suits is to extricate your firm from a problem situation before the outstanding bill grows so large that you feel compelled to try to recover at least a portion of it.

For some lawyers and firms, however, this is not an easy task. A compensation structure tied strictly to billable hours or to origination credit, for instance, can prompt lawyers to accept and continue representations they should have abandoned in order to meet their quotas or goals.

Examine your firm's attitudes and incentives toward business risk and professional liability risk management to ensure that they mesh sufficiently to allow you to execute good choices in the face of various risks.

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