

Think Twice Before Suing for Unpaid Fees

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Lawyers enjoy getting paid. It makes them smile. Lawyers resent not getting paid. It makes them sue. I count on that to keep my book of legal malpractice defense business full.

The decision of whether to pursue a client for legal fees should never be an emotional one. Too much is at stake. It should start with an objective response to a simple question: Why are the fees unpaid? The fact is, behind every problem account-receivable is a substantial problem.

Setting aside lost mail, procrastination and simple forgetfulness, there are three reasons why invoice for legal services are not paid:

- The client cannot pay the invoice;
- The client has an unresolved complaint about his legal representation; and
- The client believes integrity is for the other guy.

In short, clients do not pay fees because they can't, shouldn't or won't. Inherent in each of these reasons for nonpayment are problems for the lawyer. If the client has no money, a judgment for fees may be uncollectible. If the client is dissatisfied, a counterclaim for legal malpractice is almost guaranteed, as is correspondence to the ARDC. And if the client does not feel bound by legal obligations or the truth, the lawyer is in for a very rough ride.

The cause of nonpayment alone often presents reason enough to forego collection proceedings; but if it does not, one should then evaluate the entire matter objectively from a legal and financial perspective before deciding to sue a client for fees.

On the legal side, one should consider, for example, how the case will sit with the finder of fact. Was the result obtained favorable for the client? Are fees proportionate to the size of the problem? Does the file reflect personal attention or indifference to the needs of clients? Are billing invoices accurate? As there any aggravating circumstances, such as possible claims of professional impropriety?

In short, what are the chances of success on the claim for fees as well as any counterclaim that may be brought. A suit for less is not an automatic winner, as some lawyers would like to believe. Clients swing back.

As for financial considerations, lawyers often grossly underestimate the true cost of a suit for fees. Because such an action brings into issue the lawyer's competence and ethics, it

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must be taken seriously. That means time and lots of it. It means expert witnesses' fees, court reporters, transcripts and photocopy expense. Moreover, there are likely to be substantial hidden costs. For example, a counterclaim for malpractice may be covered by insurance, but what is its impact on future insurance premiums and future insurability? And, of course, what price should one put on peace of mind? ARDC proceedings and claims of tortious misconduct can be quite unsettling.

Obviously, there are times when lawyers should pursue unpaid fees. But the decision to do so should be a calculated one. Be prepared to compromise, as it is usually cost effective. Consider less drastic and costly alternatives to litigation, such as arbitration or mediation.

The best time to address a fee problem is not at the end of the attorney-client relationship or after the problem has become acute. Fee problems almost always get worse with time. If you are interested in being paid, pay attention to fees from the outset.

Make certain the terms of retention are clear, understood and agreed to by the client. Do not take on clients who express reluctance to accept the terms offered - i.e., clients who say they will talk about fees later. Address fee problems early. If you do not receive an adequate explanation for why an invoice is unpaid, you have no rational basis upon which to expect payment for subsequent invoices.

The moral of the story is obvious. Because there may be no good solution to a fee problem, avoid the problem. If you cannot avoid the problem, do not allow it to get larger. Simple, huh? Now if you will excuse me, I have some sizeable accounts receivable to deal with.

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