

UNPAID FEES AND MALPRACTICE

By William E. Loucks

Unpaid attorney fees and malpractice suits are like bees and honey. Suits to collect unpaid fees produce malpractice counterclaims. The Company's file cabinets contain too many Claim files that substantiate this fact. This article suggests ways to prevent or substantially minimize unpaid fees and eliminate the need to bring suit against your (former) client for unpaid fees.

To realize payment of earned fees, lawyers must be accomplished communicators and business minded practitioners before and at the time of acceptance of the client's engagement. Use of the following checklist may assist you in avoiding the economic loss of unpaid fees.

- *Talk with client about legal service fees, costs and expenses during the initial conference.*
- *Determine whether each prospective client has ability to pay your required fees before accepting the engagement.*
- *Require fee and costs advances when and as appropriate.*
- *Address fees and costs in an engagement letter.*
- *Bill client frequently for small amounts.*

Often lawyers fail to discuss fees and costs at the initial conference. To further complicate this circumstance, prospective clients who seek legal advice and services may be reluctant to ask, "How much will this cost me?" These factors require effective communication between the attorney and prospective client, require the skill and ability to pre-determine the probable cost and expense of the legal services requested and require the exercise of good business judgment.

Frequent and effective communication between the attorney and client pays huge dividends to both. It is vitally important

that you anticipate the client's reluctance to discuss the subject of fees and costs and initiate the subject. During the discussion it is appropriate and beneficial to address matters regarding the overhead of your professional practice. Explain that your hourly rate or total engagement fee is based upon the cost of your office operating expenses as well as your time in



delivering the legal services. An attorney friend told me that immediately after his initial conference and acceptance of the engagement, he takes his client on a tour of the office to make the "overhead explanation" more meaningful. He wants his clients to see the salaried secretary and paralegal as well as the telefax, copier, computers, file cabinets, furniture and other items needed to deliver the desired legal services. He introduces them to the employees who will be communicating with the client and assisting him in providing the legal services required by the client.

You choose your clients; don't blindly let the client choose you. Don't let the compliment of being chosen by the client distract you from considering matters pertinent to your accepting the offered engagement; namely, the absence of ethical constraints, the absence of prior personal and professional commitments

that preempt your time availability, the client's legal issues fall within your practice area, you have sufficient knowledge and experience to fulfill the engagement and, lastly, you are truly interested in involving yourself and your staff with the client's legal problem. Next and equally important, the economic factors: determine whether the prospective client has the ability to pay your required fees and cost advancements and the best method to assure payment. Consider whether you can and should charge and collect the total fee and costs in advance of performing the legal services. If total fees and costs cannot be reasonably determined or paid in advance, does the prospective client have the financial ability to pay periodic billing statements over the course of the engagement? Terminating a client for non-payment of fees is time consuming, costly and productive of ill will and client retaliation. It is so much safer and cost effective to avoid providing any service to an identifiable non-paying client by declining the engagement in the first instance.

If full payment, in advance, is not an option, requiring an advance partial payment of fees/costs in an amount appropriate to the circumstances of the client and proposed engagement and payment as a condition of your acceptance of the engagement, serves several important purposes. First, it confronts the client with the fact that legal services are not free and, sometimes, are quite expensive. Requiring an appropriate partial payment causes the client to perform the "ritual of payment" that brings the client face to face with the reality, magnitude and importance of the client's responsibility. The act of delivery of the retainer fee, cash or check, is a ritual similar to the historical act of the seller of land delivering a hand full of dirt

continued from front

to the buyer. Both rituals impress the performing party with the legal significance of the contract.

A plain language engagement letter (providing an adequate description of services you have been engaged to deliver and, if and as applicable, those matters outside your engagement is useful and necessary) should address legal fees and costs; how much, how determined, when payable and other matters pertinent to this issue.

If your legal services and costs payment arrangement provides for periodic billings, provide multiple statements in smaller amounts rather than infrequent and few statements in large amounts. It is

a great way to show your attention and activity to the client's file, good news to all clients. Moreover, your client is much more likely to remit payment by return mail of a billing statement for \$3,000 covering 30 days than a \$10,000 statement for legal services rendered over a 90 day period. This practice probably better serves your cash flow needs and the client's cash flow abilities. And, your retainer is more likely to cover the 30 day than the 90 day statement. Human nature governs predictable responses. You are likely to give most, if not all, of your attention to paying client files and disregard non-paying client's matters, especially if your fee arrangement is

based on an hourly rate or requires installment payments of a fixed fee. Ignoring client files breed errors and omissions and resulting malpractice claims as well as complaints of ethical violations by the client.

Bringing suit against a client for unpaid fees is virtually guaranteed to result in a counterclaim alleging malpractice. Avoid the need to even consider this action by careful selection of your clients. And, in the event of non-payment, whatever the reason for or cause, we urge you not to compound this unpleasant economic event by initiating a suit for unpaid fees and end up reporting and defending malpractice allegations.

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