

RISK MANAGEMENT BRIEFINGS

A Publication for Law Firms



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Avoiding Suits For Fees



By Robert A. Vozza, Esq.
PCIA Account Executive

Desperate to increase billings and revenues, an attorney engages in the representation of a relatively unknown corporate client. The matter proceeds to litigation and the attorney bills and generates invoices which are forwarded to the client for payment. The matter proceeds though the initial pleadings and discovery stage. The client has yet to make a payment. Additional invoices are submitted to the client, discovery approaches case evaluation, yet still, no payment from the client. After

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60 days of litigation, the frustrated attorney motions the court to be removed as counsel for the corporate client, citing a breakdown in the attorney client relationship.

The Judge, bound by the need to conduct a speedy and tidy docket, denies the attorney's motion in light of the delay it would cause in adjudicating the matter in a timely manner. The litigation proceeds to trial and a judgment is entered against the corporate client. The client has yet to pay an invoice. Months go on without payment and



ultimately a decision is made to sue the client for the unpaid fees prior to the expiration of the applicable statute of limitations. Upon receipt of the complaint, the corpo-

rate client retains counsel and files a countersuit alleging professional negligence.

After months of litigation, the matter is resolved for a fraction of the amount sought. Upon renewal of the firm's professional liability policy, the firm's professional liability carrier contemplates non-renewal and settles for a significant increase in premium.

This all too familiar scenario drives home the adage that suits for fees greatly increase the likelihood that your firm will face a claim for professional liability. The odds are about one in four that if you sue for fees, your client will file a counterclaim alleging professional liability.

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These suits place your firm at risk for ethical challenges, professional liability claims and business losses in the form of litigation expenses and lost attorney time that may very well outweigh any potential recovery in court.

Some professional liability insurers have revised their policies to avoid exposures relating to fee disputes entirely. Firms that consistently sue for fees should not be surprised when they encounter difficulty placing their professional liability insurance and/or experience a significant increase in premium. Firms should check with their professional liability agent/broker to determine whether or not their current policy excludes claims arising out of suits for fees.

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SUGGESTIONS TO REDUCE SUITS FOR FEES AND RELATED PROFESSIONAL LIABILITY EXPOSURES

Effective management of the billing cycle from client engagement through payment can virtually eliminate the need for fee suits. Fee suits are avoided through clear, timely and documented communication of expectations to clients. Firms should:

- Utilize concise billing guidelines that outline the firm's expectations of timely payment and the consequences for the client's failure to perform pursuant to the terms of the guidelines. These guidelines should be reviewed and a copy of same executed by the client.
- Utilize a concise engagement letter outlining the scope of the attorney's representation.
- Address delinquent accounts quickly and consistently.
- Perform an in depth costs/benefit analysis prior to filing a fee suit. This analysis should involve calculation of the statute of limitations for professional liability. For example, in Michigan, MCL § 600.5805(4) provides for a two year statute of limitations for professional negligence.



Attorneys can significantly impact cash flow by being concise with potential clients as to the firm's expectations regarding fees and payment.

CLIENT INTAKE PROCEDURES

Evaluate potential clients and check their credit.

Discussing a client's credit may seem unprofessional, yet, no good attorney would advise a client to extend credit to someone without first obtaining a clear understanding of that entity's ability and intention to pay. Unless you obtain a replenished retainer, you are essentially giving your client an unsecured loan.

Don't presume that potential clients will be offended by such an inquiry. Most businesses are required to

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provide this information on a regular basis. If a potential client objects to such questioning, that may be a good indication of their inability or unwillingness to pay.

Review fees and payment expectations prior to representation. Attorneys can significantly impact cash flow by being concise with potential clients as to the firm's expectations regarding fees and payment.

Delays between bills - or between work performed and the bill for that work - increase the likelihood that the perceived value of the work will diminish as other events unfold.

Assisting a client in understanding what is expected and identifying the potential repercussions of their failure to abide by the terms of representation will help avoid the necessity of fee suits later. The clearer

the attorney is, the less likely it is that a client will be surprised by the amount of an invoice or your firm's insistence on payment at previously agreed upon intervals. Even more so for clients with little to no litigation experience.

Use an engagement letter and fee contract that concisely outlines fees and the firm's scope of representation. Such documents should outline invoicing and

remittance practices and procedures and make clear that your firm expects to be paid on a timely basis. It should clearly identify what the firm may do in the event the client fails to abide by the terms of the agreement.

Have the client execute the documents indicating a clear understanding of the terms contained therein.

BILLING PROCEDURES

Use descriptive billing entries. Be sure to provide the who, what, where, when and why in your billing entries. Large one hour entries for "file review" or "telephone conference" will undoubtedly spawn suspicion and cause a client to presume the attorney is inflating the invoice. Conversely, entries such as "analyzed deposition testimony of Mr. X for excerpts for use in Brief in Support of Motion for Summary Disposition" or "analysis of relevant case law for formulation of case evaluation summary" explain exactly what the client is getting in exchange for fees.

The engagement letter and fee contract should clearly define the cost and scope of the firm's services. The documents should outline billing and payment practices and procedures and make clear that the firm expects to be paid timely.

Invoices should be generated and submitted for remittance at regular and consistent intervals shortly after the fees are incurred. This allows the billing cycle to keep moving, keeping consistent patterns for the client which encourages a payment routine and keeps

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invoices at a reasonable size. This makes payments easier and more likely.

Delays between bills or between work performed and the bill for that work increase the likelihood that the perceived value of the work will diminish as other events unfold. This makes the reasonable charge appear unreasonable and prompts disputes. The time to bill for a Motion for Summary Disposition is immediately after drafting the motion, not six months after the motion has been denied. At that point, the client is disappointed and hindsight would indicate that the filing of the motion was unwarranted.

Organize your invoices for clarity. An invoice should not be easily mistaken for correspondence advising the client of the current balance, instead it should look like an invoice, a demand for payment.



COST BENEFIT ANALYSIS PRIOR TO FILING SUIT FOR FEES

Even using these techniques, there will be instances where the firm is confronted with a significant balance of uncollected fees. Consider these items prior to filing suit.

Will your performance on the file stand up to a malpractice counterclaim? Factor the odds of winning and adjust the amount of fees sought accordingly. If your odds are 70%, reduce the bill by 30% and re-evaluate

whether or not the suit is worth pursuing. If you believe the matter is still worth pursuing, assess the amount of fees you are seeking. You cannot recover excessive fees.

Still want to pursue it? Subtract legal fees and the value of your time and that of others assisting in the pursuit of the fees and the possible defense of a counterclaim. Recall, some carriers exclude claims stemming from suits for fees. If your carrier does provide a defense for such claims, factor in the potential increase in premium or prospect of non-renewal.

Still want to sue? If you are seeking fees and not expenses, subtract the appropriate percentage for taxes, deduct damage to public relations and good will and remember that often times clients don't pay because they can't and may very well be uncollectible.

The best way to avoid this scenario is through solid management of your client intake, billing practices and collection efforts.

Robert A. Vozza, Esq.

PCIA may be able to help you by providing referrals to consultants, providing guidance relative to insurance issues, and even to certain preventives, from case management through fee collection, and application of sound human resources management policies and procedures.

Please call Robert at (810) 224-5278, or visit our website at www.pciaonline.com.