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Should You Ever Sue a Client? (And Alternatives If You Don't)

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A simple fact of practice life in recent years for almost all lawyers is that some clients haven't paid their bills. At some point in the collection process, many lawyers wonder whether they should sue a delinquent—and by then likely former—client for the amount owed. The reasons are understandable: you might have done a great job and the client agreed without qualification to the financial terms of your representation. At the same time, lawyers are uniquely vulnerable to tactics by delinquent former clients that, at minimum, diminish the economic value of almost any receivable.

Although the old saw "never say never" applies to collection suits against former clients, the ones that make economic sense are few and far between. In this column, we'll first survey common tactics that delinquent clients use to let the economic air out of collection cases. We'll then turn to steps you can take before, during and after a representation to protect your hard work without suing former clients.

Collection Counterclaims

It's not news that clients sued for fees often counterclaim for malpractice. Bruce Schafer, Director of Claims for the Professional Liability Fund, puts it this way in his chapter on legal malpractice in *The Ethical Oregon Lawyer*:

> "A lawyer who sues a client for fees runs a great risk of being sued for legal malpractice in the same suit. Whether or not the retaliation suit or counterclaim is meritorious, the lawyer may regret having ever initiated the fee-collection action against the client." (2006 rev ed at 15-19.)

In the past decade, counterclaims in collection cases have grown increasingly sophisticated.

The "old" standard was a simple negligence claim. It undermined the worth of the work involved, made the economic return less certain and provided the former client with settlement leverage.

A newer and more complex variant is to combine an allegation of negligence with an asserted conflict on the part of the firm seeking to collect a bill. In *Kidney Association of Oregon v. Ferguson*, 315 Or 135, 144, 843 P2d 442 (1992), the Oregon Supreme Court held that an unwaived conflict under the professional rules equates to a breach of the fiduciary duty of loyalty. The Oregon Supreme Court's position is by no means unique, with, for example, its counterparts in Washington (*Eriks v. Denver*, 824 P2d 1207 (Wash 1992)) and Idaho (*Blough v. Wellman*, 974 P2d 70 (Idaho 1999)) reaching the same conclusion. The practical significance is that a disloyal agent may not be entitled to some or all fees—including those already collected under the companion remedy of "disgorgement." On this point, the Supreme Court in *Kidney Association* (315 Or at 144) noted: "When a court reduces or denies attorney fees as a consequence of a lawyer's breach of fiduciary duty, it is a reflection of the limited value that a client receives from the services of an unfaithful lawyer."

A knowledgeable former client (or at least one with a knowledgeable lawyer), therefore, may not just use a supposed conflict as a “shield” but also a “sword” to argue for the return of fees already paid.

Still more inventive forms of legal attack include claims for unlawful debt collection practices (*see, e.g., Hendrick v. Spear*, 138 Or App 53, 907 P2d 1123 (1995)), failure to satisfy contractual prerequisites (*see, e.g.*, *Varner v. Eves*, 164 Or App 66, 990 P2d 357 (1999)), and asserted statutory deficiencies (*see, e.g.*, *Bechler v. Macaluso*, No. CV 08-3059-CL, 2010 WL 2034635 (D Or May 14, 2010) (unpublished)).

A counterclaim for malpractice or breach of fiduciary duty usually requires the delinquent client to hire a lawyer. For financially hard pressed clients, a bar complaint offers a less expensive way to retaliate against a lawyer. Although the Bar’s web site reminds potential complainants that pure fee disputes are not within its regulatory jurisdiction, many clients today are savvy enough to craft a bar complaint that—at least on the surface—casts issues in a way that appear to fall within the Bar’s regulatory purview. Many clients today are also savvy enough to understand that responding to a bar complaint will invariably inflict an economic cost on a lawyer while ORS 9.537(1) affords a complainant absolute immunity from civil suit for filing even a baseless bar complaint. In short, a bar complaint can be what the military calls an “asymmetrical” attack: cheap for the delinquent client while effectively undermining the economics of the lawyer's collection effort on at least small to medium size bills.

Alternatives to Litigation

Lawyers can take steps at each stage in a representation to increase the probability of payment or at least minimize the risk of being left with a large receivable.

At the beginning of a representation, there are several tools available to enhance the prospect of payment. *First*, lawyers are permitted to obtain "replenishable" advance fee deposits. Rather than a static fund that simply diminishes as work is done and fees are earned, replenishable advance fee deposits require the client to maintain an agreed minimum in trust that will be used to satisfy the lawyer's final bill. It is the legal equivalent of a landlord obtaining the last month's rent up front. *Second*, lawyers have long been allowed to accept credit card payments. OSB Formal Ethics Opinion 2005-172 discusses the logistics of credit card payments from the lawyer's perspective in detail. Credit cards shift the risk of nonpayment to the card issuer rather than the service provider. *Third*, in appropriate cases, fixed fees paid in advance offer an assurance of payment for work that is reasonably predictable. OSB Formal Ethics Opinion 2005-151 addresses proper documentation of fixed fee agreements and appropriate handling of client funds in the fixed fee setting. *Fourth*, although not an everyday occurrence, lawyers are permitted to take security for payment of fees. Lawyers who do will want to carefully document the agreement. *Welsh v. Case*, 180 Or App 370, 43 P3d 445 (2002), discusses security for fees extensively in the collection context.

During a representation, lawyers can take three additional steps to manage receivables. *First*, lawyers need to remain attentive to the business side of their relationship. Keeping clients informed of upcoming major case events assists them in budgeting for significant expenses and reduces "sticker shock" when bills come due. *Second*, lawyers should consider including an additional "trial deposit" in the original fee agreement that is payable three to six months before trial so that sufficient funds are reserved for that very significant expense. Because such deposits are included in the original agreement, they should not typically fall within the additional disclosure required for modifications of existing fee agreements. *Third*, if you determine that you should withdraw for nonpayment, do it sooner rather than later. Although nonpayment is definitely a proper reason for withdrawal, courts don't necessarily have to permit withdrawal if the lawyer waits until the eve of trial (*see, e.g., In re Ryan*, No. 08-6250-HO, 2008 WL 4775108 (D Or Oct 31, 2008) (unpublished)).

Even after a representation has concluded, lawyers still have options short of the courthouse. ORS 87.445 creates a potentially powerful collection tool in the form of a "charging" lien:

> "An attorney has a lien upon actions, suits and proceedings after the commencement thereof, and judgments, decrees, orders and awards

> entered therein in the client's favor and the proceeds thereof to the extent of fees and compensation specially agreed upon with the client, or if there is no agreement, for the reasonable value of the services of the attorney."

Charging liens have great practical import for at least a prevailing party's lawyer in the event of either a judgment or settlement short of a judgment. Under ORS 87.475(2)-(3), a judgment is not fully satisfied until the lawyer's lien is paid. With settlements that may simply result in a dismissal order, the Oregon Supreme Court in *Potter v. Schlesser Company, Inc.*, 335 Or 209, 63 P3d 1172 (2003), held that liens on settlement proceeds are "charges on the action" itself and are enforceable against either the prevailing or the settling party.

Summing Up

Chasing delinquent accounts is always difficult. Chasing them through litigation, however, exposes lawyers to unique risks that may quickly sour the economics involved. The alternatives aren't perfect and involve both careful planning and equally careful monitoring. But, they generally won't make a bad situation even worse.

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