Avoid being sued when collecting legal fees

By Andrew R. Jones

Numerous risk management guidelines advise lawyers that the last thing they should ever do is sue for fees. That is good advice. In response, however, many attorneys ask: “Well, what should I do? I have to get my bills paid!” The standard reply given is: “Don’t get behind on your bills in the first place.” That usually appeases people (or deters them from asking further questions), and is also very good advice. However, it does not adequately address how to handle situations where the attorney or law firm has no reasonable alternative but to attempt to collect on unpaid fees. This article addresses how to collect such fees with slightly more sophistication, and to minimize the chances of being sued in response. It also notes the emergence of Fee Suit Avoidance insurance coverage. That is, coverage offered by certain professional liability insurers up to a specified amount (say $10,000) in reimbursement for an unpaid fee.

Suing For Fees Usually Results in Counterclaims Against You

Your law firm or carrier is absolutely right to be very concerned about any efforts you take to attempt to collect outstanding fees. Attempts to collect legal fees almost inevitably generate counterclaims asserting legal malpractice, breach of fiduciary duty, breach of contract, fraud/misrepresentation and worse. Therefore, the statement “Don’t get behind on your bills in the first place” has significant merit. There are a number of articles on ways to “stay on top of” or “avoid getting behind on” your bills and so we will not recite them here. Suffice to say that a methodical system of sending bills out timely, following up for payment promptly and consistently is highly advisable – indeed, perhaps one of the best preventative risk management tools available.

What You Can Do To Recover Your Fees

If you must attempt to collect on outstanding fees, there are some things you can do to minimize or reduce the risk of being sued and/or to make the collection effort more worthwhile:

i. Carefully use arbitration clauses in your retainer agreements.

ii. If you must sue, consider waiting the appropriate number of years for the statute of limitations for a legal malpractice claim to run before suing (for example, in New York, claimants have three years to sue for legal malpractice from the time of the alleged malpractice, whereas attorneys have six years from the date of the breach to sue for fees). Note the continuous representation doctrine and certain state rules permitting counter-suits for recoupment, discussed further below.

iii. If you really cannot wait the required number of years to sue, make sure to evaluate your legal malpractice liability first, be prepared for a counterclaim, take necessary precautions with respect to advising your insurance carrier, and try to establish an “Account Stated” or equivalent, if applicable in your jurisdiction.

Arbitration Clauses

Arbitration can offer a relatively quick, inexpensive, and informal means of resolving fee disputes. Litigation in the courts can take longer and cost more. Unlike litigation, arbitration is also confidential and closed to the public. The speed, informality and less confrontational nature of arbitration arguably allows the parties to more quickly resolve disputes and get on with their lives.

Under certain Statewide Fee Dispute Resolution Programs, a client is entitled to demand mandatory arbitration in certain types of disputes (typically where the dispute is below a certain monetary threshold – in New York it is $50,000). Under New York’s Fee Dispute Resolution Programs (“FDRP”), an attorney can also set forth in the retainer agreement that any dispute must be resolved through FDRP arbitration or a different pre-determined arbitral forum. Attorneys should carefully consider what type of venue they wish to proceed in should a conflict with a client arise.

While the FDRP provides a streamlined process for proceeding with fee disputes, it has been held that that an award of fees under the FDRP does not provide a collateral estoppel effect to bar a separate legal malpractice claim. As such, attorneys should consider setting forth mandatory arbitration outside FDRP as part of their retainer agreements. By doing so, the attorney better assures that any award has a collateral estoppel and/or res judicata effect. Otherwise, an attorney may successfully obtain a fee award through FDRP only to be subject to a separate suit for legal malpractice at a later date.
Statute of Limitations Issues and the Continuous Representation Doctrine

An attorney pursuing outstanding fees from a former client should be cognizant that counter-claims for legal malpractice are common, if not likely, in fee collection actions. As such, regardless of the mechanism used to secure outstanding fees (i.e., plenary action, charging lien or retaining lien), it is generally advisable for an attorney, whenever possible, to wait to pursue outstanding fees until the statute of limitations for legal malpractice has lapsed. This may not always be practicable, but if an attorney can afford to wait until the statute of limitations for legal malpractice has lapsed before pursuing outstanding fees, that attorney can significantly reduce his or her exposure to a counter-claim from the former client.

For example, in New York, a legal malpractice claim must be brought within three years of the accrual of such a claim (i.e., the date of the alleged error or omission). In other words, an action to recover damages for legal malpractice accrues on the date that the alleged malpractice is committed, not when the alleged malpractice is discovered. On the other hand, a plenary action to recover outstanding fees is governed by a six year statute of limitations applicable to traditional breach of contract cases (accruing from the date of the breach). Similarly, an action to enforce a charging lien is six years, which may be deemed to run from when the underlying matter is commenced.

Should an attorney commence an action to recover unpaid fees more than three years after the attorney-client relationship ended, any ensuing counter-claim seeking affirmative recovery for legal malpractice will be subject to dismissal on statute of limitations grounds. A pre-answer, pre-discovery motion to dismiss, pursuant to CPLR 3211(a)(6), would be an appropriate means of discharging the counter-claim to the extent it seeks affirmative recovery (the claims may still be considered with respect to “off-setting” the fees).

Attorneys intending to bring a fee action after a potential legal malpractice claim has lapsed should be mindful of the “continuous representation” doctrine, which may serve to toll the statute of limitations when there is continuous representation of the client on the same matter by the attorney. Under that doctrine, a legal malpractice action is tolled until the attorney’s on-going representation of a party in connection with the particular matter in question is completed. However, recurring use of a professional’s services does not constitute continuous representation if the later services are unrelated to the original services. For example, if an attorney represented a client in a real estate transaction then subsequently represented the same client in litigation, the two representations would arguably be “unrelated” for continuous representation purposes.

Additionally, as noted, certain states permit counter-suits for recoupment regardless of whether the statute of limitations on the primary lawsuit has expired. Recoupment provides a right to the client to demand deduction from the amount awarded to the attorney for a sum due to the client that stems from the underlying transaction. In permitted states, a client can bring an action of recoupment even if previously barred from bringing an independent cause of action for legal malpractice. For example, in Florida, if a lawyer waits until the statute of limitations runs on a legal malpractice claim to run in order to sue a former client for fees, the client can counter-sue in a recoupment action regardless of the statute of limitations.

i. If You Cannot Wait 3 Years: (a) Evaluate Your Legal Malpractice Liability/Be Prepared For A Counterclaim; (b) Take Necessary Precautions With Respect To Advising Your Insurance Carrier; and (c) Try To Make Sure That You Have A Viable Account Stated.

(a) Evaluate your malpractice liability

When assessing whether to bring suit against a client it is important that an attorney evaluate the claim for fees as well as any potential counterclaims. Where a client had a generally successful outcome but is refusing to pay attorney fees, an attorney can typically rest assured that any counterclaim filed by the client will fail for a lack of damages. However, where the result of the matter is negative for the client, it is important for an attorney to impartially evaluate his conduct to determine if he departed from the standard of care before seeking to collect his fees.

(b) Take necessary precautions with respect to advising your insurance carrier

Professional liability (“Errors and Omissions,” or “malpractice”) insurance policies typically require attorneys to promptly notify their insurance carrier of any “claim” or “circumstance that may lead to a claim” (i.e. a potential claim). Failure to do so can be problematic and even result in the denial of coverage. Accordingly, it is important to know whether and when you need to give notice of any fee collection efforts as they could constitute a potential claim and, as noted above, frequently result in actual claims at some point. Check your policy and/or speak with your insurance broker if you are unsure as to whether and when you should give notice.

The courts utilize varying “objective-subjective approaches” to determine whether attorneys have provided appropriate notice of potential claims. These “objective-subjective approaches” typically seek to understand what a reasonable attorney would have foreseen given his or her specific knowledge at the time. Whether someone in the same position would reasonably have believed that the fee dispute would amount to a “claim” and therefore need to be reported is typically a fact-sensitive inquiry. As such, attorneys should attempt to avoid such factual inquiries considering the potential adverse consequences associated with a finding of “late notice” or “prior knowledge” (the latter being failure to provide adequate notice of a circumstance in an insurance policy application). This can be done: (1) by erring on the side of caution; and (2) seeking assistance if uncertain.

While every situation is different and attorneys should always be guided by their policy, broker, and/or counsel, we believe the following steps are useful “best practices” when assessing whether to bring suit against a client:

1. When contemplating initiating a fee claim, contact your insurance broker and ask them whether they believe you should notify your insurance carrier. Memorialize this discussion in writing – a simple email to your broker confirming their advice offers you a degree of protection.

2. If you are advised to – or simply believe you should – notify your insurance carrier, do so promptly and memorialize that notification in writing, too. Thereafter, “work with” your carrier to keep them informed and listen to any advice they may offer. Most lawyers’ professional liability insurance carriers have sophisticated claims representatives who can and will offer you excellent (usually free) advice.

3. Always answer your insurance policy application/renewal questionnaires accurately, to ensure that you are conveying the correct information and that you are accordingly covered.

These steps will help protect you and your practice in the event that your fee collection efforts result in a claim against you.

Moreover, as noted below, certain insurance carriers may offer Fee Suit Avoidance coverage – i.e. insurance coverage up to a specified amount in reimbursement for an unpaid fee,
in an effort to reduce the likelihood of a counter claim for malpractice.

Establish an Account Stated

Regardless of the outcome of the underlying matter, attorneys who regularly bill their clients are in a better position as the issuing of invoices may create an “account stated” that entitles an attorney to fees (discussed infra). For example, New York law is clear that an account stated is “an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due.” An attorney may meet her “prima facie burden of establishing entitlement to judgment as a matter of law, tendering evidence it generated account statements for the defendant in the regular course of business, that it mailed those statements to defendant on a monthly basis, and that defendant accepted and retained these statements for a reasonable period of time without objection, and made partial payments thereon.”

An attorney or law firm, in turn, may “recover under such cause of action with proof that a bill, even if unitemized, was issued to a client and held by the client without objection for an unreasonable period of time.” Notably, the attorney or law firm in question need not “establish the reasonableness of the fee since the client’s act of holding the statement without objection will be construed as acquiescence as to its correctness.”

Furthermore a defendant-clients’ statements that they made oral protests about the invoices in question are generally facially insufficient to establish that they protested the invoices. If those objects are raised with enough specificity they may raise an issue of fact. However, any such alleged objection is typically overcome where a client has made a partial payment on a standing invoice. A plaintiff-attorney’s failure to provide a written retainer agreement, as required by 22 NYCRR 1215.1, does not bar its claims for account stated.

As such, while an account stated claim will not defeat a claim for legal malpractice, it can provide for an easy basis to collect owed attorney fees. Where an attorney feels confident in her ability to overcome potential counterclaims, an account stated is an effective cause of action for quickly resolving fee disputes in the attorney’s favor.

Fee Suit Avoidance Insurance Coverage

The recent emergence of Fee Suit Avoidance insurance coverage should also be considered. This is insurance coverage offered by certain professional liability insurers up to a specified amount (say $10,000) in reimbursement for an unpaid legal fee. The rationale from an insurer perspective is that any such payment may well be significantly specified amount (say $10,000) in reimbursement for an unreasonable period of time. “Notably, the attorney or law firm in question need not “establish the reasonableness of the fee since the client’s act of holding the statement without objection will be construed as acquiescence as to its correctness.”

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Conclusion

The risk management guidelines and articles advising lawyers not to sue for fees and to stay on top of their bills should continue to do so, since that is excellent advice. However, if aggressively pursuing fees is required/anticipated, attorneys should consider: (i) carefully using Arbitration clauses in retainer agreements; (ii) waiting the appropriate number of years for the legal malpractice statute of limitations to run, being mindful of the continuous representation doctrine and any state rules permitting counter-suits for recoupment; and (iii) making sure to evaluate legal malpractice liability first and taking all necessary precautions with respect to advising insurance carriers; (iv) trying to establish a viable “Account Stated” or equivalent, if applicable in your jurisdiction; and (v) being conscious of any available Fee Suit Avoidance insurance coverage. These steps can help minimize or reduce the risk of being sued and make collection effort more worthwhile permitting attorneys to focus on the practice of law and helping their clients.

This article was prepared by Andrew R. Jones of the New York City-based law firm of Purman Kornfeld & Brennan LLP. For more information about the above topic or the author, please visit: www.americanbar.org/news/anews/publications/youraba/2014/july-2014/sue-and-be-sued/ See e.g. https://www.americanbar.org/content/dam/aba/publications/law_practice_today/getting-paid/pdf

1 The American Bar Association (ABA) reports that: “It is estimated that two-thirds of legal malpractice claims come about as counterclaims to suits for fees.” See: https://www.americanbar.org/news/youraba/2014/july-2014/sue-and-be-sued/ See e.g. https://www.americanbar.org/content/dam/aba/publications/law_practice_today/getting-paid/pdf

1 Id.

2 Legal malpractice claims, and related claims such as breach of fiduciary duty and breach of contract are generally barred by the doctrines of collateral estoppel and res judicata where there has been a determination of the value of legal services in the underlying action, necessarily deciding that there was no improper conduct by the attorney. See WIN Radio Broadcasting Corp. v. Fletcher, Heald & Hildreth, PLC, 94 A.D.3d 985, 942 N.Y.S.2d 211 (2d Dep’t 2012). The rationale is that an attorney may not collect a legal fee in the face of legal malpractice; thus, if a court awards a legal fee, it has determined there was no wrongful conduct. This principle applies to arbitration awards as well. See Wallenstein v. Cohen, 45 A.D.3d 674, 845 N.Y.S.2d 428 (2d Dep’t 2007) (the determination fixing the value of the defendants’ services by an arbitrator necessarily determined there was no malpractice).

22 NYCRR § 137 (Part 137) sets forth the rules and terms of New York’s FDRP. However, Part 137 expressly provides that it does not apply to “claims involving substantial legal questions, including professional malpractice or misconduct.” 22 NYCRR 137.1 (b)(3). As such, the Second Department Appellant Division has held that the doctrines of collateral estoppel and res judicata do not apply to bar later claims related to legal malpractice against the attorney despite an award of fees through the FDRP. See Mahler v. Campagna, 60 A.D.3d 1009, 1012, 876 N.Y.S.2d 143 (2d Dep’t 2009) and Soni v. Pryor, 102 A.D.3d 856, 857-858, 958 N.Y.S.2d 721, (2d Dep’t 2013). If the representation began prior to January 1, 2002, it would still be governed under the old rules and the doctrines of collateral estoppel and res judicata would apply. See Pickard v. Tarnow, 18 Misc. 3d 1102(A), 856 N.Y.S.2d 26, 2007 NY Slip Op 52377(U) (N.Y. Sup. Ct. 2007).

5 See §214(6).


7 See CPLR § 213(2).


12 In addition, when applying for or renewing professional liability coverage the policy application will almost universally ask whether there are any pending fee disputes or other claims or circumstances that may lead to a claim. Failure to answer these questions accurately can result in the denial of coverage. In the event of a “material” misrepresentation on the insurance application, an insurer is generally entitled to rescind the policy (cancel as if it never existed). See Schirmer v. Penkert, 41 A.D.3d 688, 690, 840 N.Y.S.2d 796 (2d Dep’t 2007).


17 Id.; see Miller v Nadler, 60 AD3d 499, 875 N.Y.S.2d 461 (1st Dep’t 2009); see also Lapidus & Assoc., LLP v Elizabeth St., Inc., 92 AD3d 405, 405-406, 937 N.Y.S.2d 227 (1st Dep’t 2012).


19 See Zanani v Schvimmer, 50 AD3d 445, 856 NYS2d 65 (1st Dep’t 2008).

20 Id.

21 See Kramer Levin Naftalis, Id., 73 A.D.3d 604, 604-605, 900 N.Y.S.2d 646 (1st Dep’t 2010).