SUING YOUR CLIENT FOR UNPAID FEES

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Let's start out with the obvious question. Should you sue your client? Before we get to some of the considerations and the answer, I need to add a preface. In my "life" before law firms, I managed the financial matters of various corporations. All had one thing in common: They were troubled and they needed my talent in the area of cash and financial management.

I had what employers sometimes referred to as "Midas tonsils" back then, meaning that my quick wit and considerable verbal skills brought money to the door. Yes, I had the gift, and despite my young age, I wasn't afraid to use it on behalf of my employers.

I handled collections during a time when it was actually fun to collect — before all those pesky consumer protection, collections, and privacy laws spoiled the fun — and I excelled at it.

Why do I tell you this? Because I want to firmly establish at the outset that I strongly believe people should pay their bills. And I strongly believe you have the right to be paid for every minute you've diligently worked for your clients.

To me, people who purposely avoid paying what they rightfully owe, even though they can afford it, even though they know they received good value, are lower than low. I hate the thought of ever walking away from rightfully owed money without first putting up a raucous fight for it. Right is right, and fair is fair, after all. At least is used to be. If only it were really so black and white anymore. Life would be so much simpler, as would our day-to-day decisions.

Before you even ask whether you *should* sue, you need to determine if you *can* sue. Some of you will be surprised to discover you lost that right along the way. How did that happen? Insurance carriers have, for the most part, decided that they do not want to underwrite the risk of malpractice countersuits which are sometimes filed as a result of suing a client for unpaid fees. Let's put the blame for that where it belongs – lawyers teaching clients that if they threaten a malpractice suit, the former lawyer will back off and eat most or all of the debt. Except that the cat's out

of the bag big time now. It's no longer a dirty little inside secret. The whole world of potential deadbeat clients knows this fact.

One question which seems to perpetually beg an answer is that of exactly what the statistics really say about the percentage of claims resulting as countersuits of suits regarding fees. And in those instances, what are the actual insurer losses? Is the fear actually borne out of claim statistics? Or fear alone? Or is it an urban legend generated by an industry intent on impacting law firm behavior? To be honest, my colleagues and I in North America keep hearing about this risk. We know and acknowledge there is a risk. But we can't honestly say we can get our hands on numbers. So how big a threat it actually is . . . who knows?

At any rate, some insurance carriers now specifically exclude coverage for any such countersuit in their policies. If you haven't read your current policy carefully, pull it out and take a look under exclusions. Some of you will find it, and wonder when it became part of the policy language. It's only been in the last couple of years that I've started seeing this language become much more pervasive.

I can understand making this an option, and charging an additional premium if someone elects coverage for countersuit claims. Makes sense: more of a threat, more of a premium. My understanding falls short, however, when the insurer *requires* you to sign an Addendum to your policy which states you agree not to sue any clients for fees while insured under the policy.

Not only will they (in fact they may already) exclude coverage for claims resulting from a countersuit, but if you sign the Addendum and then violate the policy by suing a client for fees during your coverage term, you will invalidate your entire policy.

As you are well aware, even though insurance coverage is not required in PA, certain immediate notification requirements are triggered if your coverage ends or falls below a minimum threshold of $100,000/$300,000 [Rule 1.4(c) Communication]. In addition, having an in-force policy cancelled for non-compliance, or just about any reason for that matter, makes you a virtual pariah to other insurers. Believe me when I tell you this, because I've lived this nightmare at more than one firm. How would you feel about having to complete ten different applications just to secure coverage again? And when you finally get a quote for a policy, no one gives you a kiss first, if you catch my drift. Trust me it isn't worth it.

At the least, just about every single insurer now requires you to answer a

direct question on your application for insurance, "Do you sue clients for unpaid fees?" If you answer **YES**, I strongly suggest you take the time to provide full details regarding the due diligence process you engage in before you actually file suit.

Let's move on to the due diligence process, since it has much to do with assessing the risk factors and making a right decision about whether or not to sue. Before you even get to this point, however, take a backward look. Make sure you gave the client ample opportunity, which is well documented, to report and discuss any dissatisfaction with the work or the bill. If you can't answer affirmatively, there's no reason to proceed further.

Did your engagement agreement specify a procedure to be followed in the event of a fee dispute? We'll come back to this concept, because it is definitely a "best practice" to implement. If it did, did you follow it?

Assuming you've explored and addressed these questions amply, then on to due diligence. Someone other than you needs to look at the file. Frankly, you're too emotionally vested to make an honest arms-length appraisal of the matter and the results you've achieved. You need someone with a dispassionate set of eyes to determine whether you've crossed the t's, dotted the i's, and achieved a highly favorable outcome for the client. One countersuit in Montgomery County prevailed because a jury believed the lawyer did not get the "most" favorable outcome. No one needs to tell you how unpredictable a jury can be.

How is your claim history? If you have some other legitimate claims, regardless of whether or not you believe they will prevail, you have to seriously ask yourself whether you want to risk a "decline to renew" based on claims history. That stink is about as easy to remove as skunk on a backyard dog. On the other hand, if you have a completely clean claims-free history —more and more difficult in today's environment — do you want to risk staining it for an unpaid fee?

How much is your deductible, and how much is the receivable? If the potential payoff after inevitable accommodation isn't way beyond your deductible, the risk/reward ratio is out of whack. It's just not worth it.

By the way, for information on how to more effectively manage your receivables so as to help you avoid this whole issue, write for a copy of my article "*Dialing for Dollars,*" a version of which appeared in the May/June 2003 issue of The Pennsylvania Lawyer entitled "*How to Collect Your Receivables.*"

Let me also mention that the language in your Engagement Agreement or Letter can have a tremendous impact. You should strongly consider adding fee dispute language specifying the procedure that will be used to resolve disputes. There is a comment to an ABA Opinion which states that a lawyer cannot take an adversarial position to a client before first exhausting all non-adversarial means to resolve the dispute. If your bar has a fee dispute committee, that would certainly constitute a non-adversarial method. I recommend it be your stated method of choice to resolve disputes.

Some lawyers resist including fee dispute language in their engagement agreement or letter because they don't want to give up a right to sue. But in the absence of the language, your options become limited, and suing may become your *only* method to collect. Why box yourself into a corner unnecessarily? Better to avoid walking down that path at all if you can.

The bottom line? Come on, at this point do you really need to hear it from my lips? You know the answer. In *most* cases, even if you *can* sue under your policy, you *should not* sue. Yes, it pains me to say it. But that's the pragmatic, unvarnished truth. There will be exceptions with happy endings and the rewarding engorgement of the bank account. But for the most part, you will need to take your lumps and walk away. Consider it —in fact make it— a lesson on identifying clients and cases to avoid taking on in the future. Hindsight is 20–20, admittedly, but **only when actually engaged**. Reflect on it. Learn from it. And then move on.