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Billing Blues: Best Business Practices for Fee Collection

As attorneys, we routinely litigate, arbitrate, and negotiate on behalf of our clients. With regularity, we analyze, synthesize and scrutinize certain facts, precedent and regulations. We often find comfort in a courtroom, boardroom, or conference room. Managing accounts receivable, however, seems to befuddle the best of us. Collection of overdue client invoices is an important law practice management skill, and in order not only to survive but thrive as a solo practice or firm, attorneys should master this talent as well. While often times an uneasy task, the discomfort can be lessened if you are proactive on the front end and institute a process and procedure for debt collection on the back end.

Be Proactive: Set Expectations and Know Your Client

Outstanding or delinquent bills are not unique to the legal profession. On average, U.S. households pay about 13 bills per month,¹ and they often have to prioritize which debts are paid timely or at all. While nearly three in four U.S. adults continue to pay all their bills on time and have no debts in collection, one in four admit they do not pay their bills timely, representing a sustained increase when compared to 2017 (25% in 2018, 22% in 2017 and 2016).² It is important to note that it is not only the individual client who may fall behind in bill payment, as corporations and other institutions also fail to pay on time. Further complicating matters, is “collection realization” or the fact that attorneys will not collect all the fees that they bill. In fact, research demonstrates that attorneys can expect to collect only 83% from their hours billed

to clients.³ The best way to combat these statistics and avoid collection issues is to remain proactive – clearly establishing expectations at the outset regarding the cost of representation and reviewing the potential client’s ability to pay.

Setting Expectations

Whether you are a solo practitioner or work in a firm setting, client expectations should be established at the outset of the attorney-client relationship by communicating material information about fees and expenses during the initial consultation and client intake process.

Topics that should be discussed with the client include the type of billing (retainer or hourly, flat or contingency fee), the rate, responsibility for expenses/costs, the frequency with which invoices will be sent and the time period within which a bill must be paid. If you represent a corporation or organization, your billing practices may require a different structure in order to accommodate its internal accounting procedures per its Outside Counsel Guidelines.⁴ For example, it may be necessary to agree to a different pay schedule, register you or the law firm as an “approved vendor” in its accounts payable system, and to understand that the organization’s accounting department may have strict guidelines to which adherence is a prerequisite to timely payment. By engaging in this discussion at the beginning of the attorney-client relationship, neither you nor the client will encounter surprises as you move forward in the representation.

¹ Postal Regulatory Commission, The Household Diary Study: Mail Use & Attitudes in FY 2015 (2016).
² 2019 Consumer Financial Literacy Survey.

³ 2017 Report on the State of the Legal Market, Thomson Reuters (2017).
⁴ See CNA’s *Fighting the Trojan Horse*, by Ronald Minkoff.

Assessing the Client's Ability to Pay

Assessing the client's ability to pay and conducting due diligence represent critical steps in staving off later fee collection problems. You want a client who has the financial wherewithal to pay for your legal services. Often, clients who do not possess the proper funding for their legal issue will be more prone to dispute the accuracy of your invoices or to delay in remitting payment. A best practice is to perform some basic research into your prospective client's financial situation prior to entering into the relationship. You may wish to consult various websites for information, such as the Federal Trade Commission, Secretary of State, as well as federal and local court dockets. Lexis Nexis, Westlaw and other sites offer services such as debtor locator, asset reports and identity verification and authentication. While credit checks are not appropriate in every circumstance, they can be a practical approach for a client whose matter will probably incur significant legal fees. It will, of course, be necessary to obtain the consent of the prospective client and ensure compliance with federal and state laws before requesting the credit report.

The Importance of the Written Fee Agreement

You can address the issue of client collections before it even becomes a problem by clearly structuring your fee and attorney-client representation agreements. By memorializing all of the terms discussed during the initial consultation and clarifying all details of your payment terms, your protocol will be documented appropriately. For example, you should list the types of payment you accept (cash, check or credit card), outline your expectations for payment, fee structure and how delinquent payments or failure to pay will be handled. In addition, depending upon your jurisdiction, you may wish to consider including language authorizing your withdrawal from the representation if the client fails to pay, charging interest on outstanding balances, the ability to retain a collection agency and shift the associated costs to the client, and your right to assert a lien on any client judgment or settlement. The agreement should be executed by both the attorney and the client. For sample language in an engagement agreement addressing these points, see CNA's *"Lawyers' Toolkit 4.0: A Guide to Managing the Attorney-Client Relationship."*

Engage in Ongoing Discussions with the Client Regarding Fees

The conversation regarding billing does not stop after the first meeting. In most instances, your representation of the client will take weeks, if not months or years. A consistent dialogue and the issuance of periodic invoices can assist in ensuring consistent and timely payment. In so doing, you can then answer any questions about the invoice or professional services billed as they arise. Also, clients may find it more difficult to accumulate the funds for a large bill for multiple months of legal services submitted at one time. It is preferable to avoid any "sticker shock" for the client. Issuing timely and regular bills may help ensure that the client is satisfied with the services, and also increases the likelihood that the client will pay the bill in a timely manner. Moreover, if a serious non-payment issue occurs during representation, you have the option of temporarily stopping work, determining the least costly means to conclude the matter or timely withdraw.

Best Practices for Collecting on the Delinquent Invoice

If all of your proactive efforts have not resulted in prompt payment by the client, the first step in collecting on an overdue invoice is to contact the client immediately following non-payment. Direct client communication will prove to be more effective than a generic form letter sent by your accounting department. In addition, remember that a client's failure to pay does not necessarily mean that there is a dispute or that the client is dissatisfied with your services. It could be something such as an address change, and the client did not receive the invoice, or simply forgot to pay the bill. Sometimes, a timely and polite reminder is all that is required for the client to submit payment.

Prepare, Prepare, Prepare

Prior to contacting the client, remember that preparation is critical. Just as you rehearse an opening or closing argument, preparing and practicing what you want to say, as well as anticipating your client's response and your reaction to the client's reasons for non-payment, are important. For most of us, discussing finances and money owed to us is unsettling. We do not have much experience with these types of conversations, and it is easy to become emotional or flustered, especially when it becomes evident that the client is avoiding payment. Therefore, adhering to your internal script, or even a written one, will help you remain calm in the moment. Have the client's file before you, including the executed fee agreement and past due bill, as well as the ability to take notes during the conversation. Monitor your tone and remain professional. Issuing ultimatums and threatening the client will not have the desired effect.

Permit the client time to explain the reason for non-payment. If a client says that “the check is in the mail,” confirm that you will follow up with the client in five days to confirm receipt or advise that the check has not yet been received. During this conversation, you also may discuss and determine the reason for non-payment, answer any questions about the invoice and any possible compromise options, such as a slight fee reduction or adjusted payment schedule/payment plan. If the client is being unreasonable, remind the client of the payment dispute procedure delineated in your fee agreement/engagement letter. Memorialize this discussion and/or agreement to pay and any terms in a letter or email to the client. Finally, remember...your goal in this communication is getting the client to pay, rather than alienating the client or the filing of a collection action.

The Evasive Client

If your client does not return your email/voicemail messages and has not yet remitted payment, you must consider your next course of action. First, subject to the amount owed and the financial circumstances of your client, further collection efforts may not be worth your time. You may consider the loss of the fee a hard-learned lesson and take a second look at your billing policies and procedures. If permitted within your jurisdiction, you also may consider contracting with a commercial debt collection service and writing it off as a business bad debt on your law firm accounts. A second option, depending upon your jurisdiction, is to consider bringing an action before a state bar attorney-client fee dispute resolution program. Typically, these services are complimentary, may take several months and resolution of the dispute depends on the cooperation of both parties. Committees may hold hearings and issue recommendations of the amounts to be paid or refunded by either the attorney or client. Third, a final demand letter should be sent to the client, which includes a copy of the engagement letter, outstanding invoice and details the time within which the client has to make payment, as well as any potential actions you or your firm will take if payment is not remitted payment, e.g., commencing a collection action, withdrawal from the representation and/or filing a lien on any settlement.

Deciding to File the Fee Collection Action

Ultimately, you or your firm may be left with the decision to file suit. This decision involves weighing the pros and cons of such an action. Before making the determination to proceed, the following should be considered⁵:

- Compliance with your jurisdiction’s laws/regulations on assertion of attorneys’ liens, debt collection and the Fair Debt Collection Practices Act. For more information, see CNA’s *“Collect with Caution: Avoiding the Traps of the Fair Debt Collection Practices Act.”*
- Potential Legal Malpractice Claim: Studies show that there is a 42-47% chance that your client will file a counterclaim for legal malpractice in response to your collection action.⁶ You or your firm may be required to pay the costs of defense up to the amount of any deductible (or any excess costs not covered by the policy), which may exceed the fees actually owed. If possible, you may decide to wait to file the collection action until the statute of limitations for legal malpractice has lapsed. By doing so, you can significantly reduce your or your firm’s exposure to the counterclaim. Finally, you will be required to report the collection action and any counterclaim on future lawyers professional liability insurance applications.
- The client may file a disciplinary grievance against you requiring additional time, cost and reporting to your carrier. Further, there may be enhanced scrutiny into the reasonableness of your fees and you must ensure that you have fulfilled all of the conditions required under Rule 1.5(a) of the ABA Model Rule of Professional Conduct.
- There may be media coverage resulting in negative publicity and potential damage to you and/or your firm’s reputation.
- The court may find that your fees were excessive and order you or your firm to disgorge legal fees previously paid by the client.
- Your client may file bankruptcy and/or be judgment proof.
- Any litigation costs and expenses over the fees paid by the client that the client is now seeking to recover may not be covered by most typical lawyers’ professional liability policies.

⁵ See CNA’s *Fee Suits & Professional Liability Claims*.

⁶ Weiss, Debra Cassens. “NY Law firms Aggressively Pursue Fees; Up to Seven Suits Filed Weekly in Manhattan,” *ABA Journal*, 23 Oct. 2012. Web. 20 Feb. 2014

Conclusion

Fee collection from a client can be unpleasant and cause a loss of valuable time from the real business at hand – representation of clients’ interests and objectives. Being proactive and transparent about fees, costs and expenses from the outset and throughout the representation can preempt many issues. If all preventive efforts fail, employing some best practices for debt collection will not only help you or your law firm survive, you can financially thrive.

This article was authored for the benefit of CNA by:

Tracy L. Kepler

Tracy L. Kepler is a Risk Control Consulting Director for CNA’s Lawyers’ Professional Liability Program. In this role, she designs and develops content and distribution of risk control initiatives relevant to the practice of law. Prior to joining CNA, Tracy previously served as the Director of the American Bar Association’s Center for Professional Responsibility (CPR) and has over 20+ years of experience in attorney regulation through her positions as an Associate Solicitor for the U.S. Patent & Trademark Office and as Senior Litigation Counsel for the Illinois Attorney Registration and Disciplinary Commission.

For more information, please call us at 866-262-0540 or email us at lawyersrisk@cna.com