Fee Suits and Professional Liability Claims

Suing for fees significantly increases the risk that a professional will face a malpractice claim. Generally, a motivated client can develop an argument that at least a portion of the services he or she received fell below the standard of care for that profession. A lawsuit by the professional to collect unpaid fees can cause the client to pursue that argument. Fee suits place the professional at risk for liability claims and business losses, in the form of litigation expenses and lost professional time that may outweigh any potential recovery in court.

In light of this, there are several issues to consider before bringing a fee suit. Professionals should:

- Determine how well their performance will stand up against a malpractice counterclaim.
  - Try to objectively assess their work or, if possible without violating ethical or privacy obligations, ask a colleague to assist in this process.
  - Gauge the odds of winning and adjust the amount they are seeking to recover accordingly. For example, if they believe the odds of winning are 80 percent, reduce the outstanding fees by 20 percent and re-evaluate whether it is worth pursuing.

- Attempt to objectively re-evaluate the reasonableness of the fees they are seeking to recover.
  - If the fees could be considered excessive, reduce the amount to a figure that may be more likely to be considered reasonable by an independent third party.

- Deduct the cost of legal fees and the value of the total man hours that will be spent pursuing the action and possibly defending a counterclaim.
  - Keep in mind that a professional liability insurance policy may not cover the counterclaim. Even if there is coverage for the counterclaim, there typically is no coverage for the expenses incurred in prosecuting the fee suit.
  - Subtract the amount of the deductible on the professional liability policy, which will likely be spent on defense costs associated with the counterclaim.

- Deduct an appropriate percentage for applicable income taxes.

- Consider the value of the firm’s reputation and the public relations impact a negligence counterclaim could generate.

- Determine whether the clients would even be able to pay a judgment. Many professionals go through the trouble of suing for fees and winning a judgment, only to discover that it will be difficult, time consuming and ultimately impossible to enforce if the client cannot or will not pay it voluntarily.

If the professional has considered all of these issues, done the math and concluded the adjusted outstanding balance is still large enough to warrant filing suit, he or she should then discuss the matter with an experienced collection attorney.

Limiting potential fee suits

Professionals cannot control how, when or if clients will pay them. Nonpaying clients are always a risk. However, there are proven risk management processes firms can employ to reduce the likelihood that fee collection will become problematic. With respect to future matters, they should consider re-evaluating their approach to receivables management using the following criteria:

- *Client and engagement review and acceptance procedures should consider a potential client's ability to pay for services and their history of paying bills timely.*

  To achieve long-term solutions to collection problems, firm management needs to focus on creditworthiness in client and engagement acceptance. While some professionals may feel uncomfortable requesting financial or credit information from prospective clients, they would never extend credit in any other situation without first getting this information. They also should investigate the credit history of potential clients. This includes asking clients why they left their previous professional relationships, and asking the previous professionals about prospects' bill-paying histories. If a prospective client is uncomfortable with such questions or asks that the predecessor firm not be contacted, this may be an indication that service and collection problems could develop during the engagement.

- *Require retainers under certain circumstances.*

  The circumstances surrounding some engagements increase the risk of nonpayment of fees, and may present heightened liability risk, as well. For example, a prospective client may approach a firm seeking help with significant work that needs to be done quickly in an attempt to meet a deadline or to perform a special project. If this happens, in addition to employing appropriate client- and engagement-screening procedures, professionals should estimate the time and expenses to be incurred and require a cash retainer prior to undertaking the engagement. Additionally, if they become aware that a client is unlikely to be able to pay for services on a timely basis, they should consider requiring a retainer.

- *Discuss fees and payment obligations at the outset of the relationship, in the contract, and during the engagement.*

Professionals should discuss these issues with the client and address them in a contract requiring their signature before services commence. During the engagement, clients should be kept well informed about prices, billing policies and payment terms. They also should be alerted regarding additional work in excess of the original estimate -- understanding, in detail, what work is needed, why it's needed and what it will cost. When professionals guide client expectations, they reduce the likelihood of encountering collection problems later. This is especially important for clients with little experience in working with professionals.

There should be a provision included in the contract that the professional reserves the right to withdraw from the engagement without completing the work if the client fails to comply with the terms of the contract, or as professional standards require. The contract also should include a provision that the client agrees -- in the event payment is not received by the due date -- that the professional will not be responsible for damages incurred by the client for failure to meet deadlines, in addition to any resultant damages. These include, but are not limited to, consequential or indirect damages, lost profits or punitive damages.

- *Bill promptly and at regular intervals.*

  Long delays between the completion of work and billing increase the risk of experiencing collection problems. The best time to present a client with a bill is concurrently with the delivery of the work product. In ongoing engagements, firms should bill at least monthly, depending on the volume of work performed.

- *Manage accounts receivable collection.*

  Fee disputes sometimes result from poor receivables management. Establishing firm policies regarding collections and write-offs, and assigning billing and collection responsibilities to a firm administrator rather than a professional, can help ensure that collection practices are administered on a consistent basis across the firm. This allows engagement personnel to devote their time to billable services and reduces the risk that small delinquencies turn into significant ones. Firms should examine their attitudes regarding billing and any incentive programs that may exist. If a firm is not large enough to support a firm administrator, it should consider assigning this task to other administrative personnel.

- *Be willing to walk away from a bad situation before it gets worse.*

  One of the most effective ways to avoid fee suits is to resign from a client engagement before the outstanding bill grows too large. Clients with large outstanding bills often attempt to pressure their professional service providers to defer billing; arguing their business is seasonal or they expect to receive payment from a key customer on some future date. For some clients, this is their *modus operandi* for deferring payment or attempting to receive a significant discount on their professional-services invoices. In addition, a client's failure to pay his or her bills may cause the professional to have a negative attitude toward the client and lead to the professional performing subpar work, resulting in further problems.

Professionals should examine their approach to fee management carefully and objectively. The best ways to avoid fee disputes is by maintaining effective client communications, implementing appropriate controls over billing and collection, and making timely, prudent business decisions. In the end, avoiding fee disputes is both good business and good risk management practice.

CNA, Professional Liability Risk Control.
June 2011