



## Exercise Care When Suing for Unpaid Fees

by Anthony Davis<sup>1</sup> & Michael Downey<sup>2</sup>

When a client does not pay, should a law firm file suit to collect unpaid fees?

For a long time, many have suggested the answer to this question is, “No. Never.” More recently, experts including risk management lawyers (like the authors) stop short of advising that a law firm should never sue to recover unpaid fees. Rather, they allow that a lawsuit may be appropriate in certain circumstances, but the law firm should exercise extreme care before filing suit against a client to recover a fee.

The recent litigation involving the New York firm Debevoise & Plimpton stands as a reminder of the dangers that accompany a suit to recover unpaid attorney fees. Debevoise sued its client for \$6 million in unpaid fees. The client responded with a \$55 million counterclaim, alleging Debevoise “made critical errors, missed major points and billed excessively for the work of inexperienced lawyers.”<sup>3</sup>

Debevoise has characterized the counterclaim as “specious,” stating the firm provided “superior service with a successful outcome.”<sup>4</sup> Whatever the outcome in the Debevoise litigation, this story and numerous others serve as reminders that law firms suing to recover unpaid legal fees risk receiving a counterclaim, ethics complaint, or other troubling response. In addition, the client often criticizes the law firm’s billings and work, resulting in negative publicity, harmful references, and other uneasy clients for the firm.

In light of these risks, as well as the impact the economic downturn is having on law firm’s outstanding accounts receivables, this article examines the risks that firms face when they sue a client for unpaid legal fees and provides suggestions for evaluating whether a suit is worth the effort and risk.

### Risks Faced When Suing for Fees.

---

<sup>1</sup> Anthony Davis is a partner in the national lawyer ethics and risk management practice at Hinshaw & Culbertson LLP. Anthony works in the New York office and can be reached at (212) 935-1100 or [adavis@hinshawlaw.com](mailto:adavis@hinshawlaw.com).

<sup>2</sup> Michael Downey is also a partner in the national lawyer ethics and risk management practice at Hinshaw & Culbertson LLP. Mike works in the St. Louis office and can be reached at (314) 241-2600 or [mdowney@hinshawlaw.com](mailto:mdowney@hinshawlaw.com).

<sup>3</sup> Andrew Longstreth, *Ex-Debevoise Client Raises Nasty Counterclaims in Unpaid Bills Case*, *The American Lawyer* (Jan. 14, 2010), available at <http://www.law.com/jsp/article.jsp?id=1202437930237>.

<sup>4</sup> *Id.*

Law firms face four types of risks when they bring suit to recover unpaid fees:

\* *Failure to Recover.* The firm faces the risk that it may bring the claim, but not recover any unpaid fees. Failure to recover may result from weakness of the claims, strong defenses for the client, or the client's inability to pay even after judgment is obtained. A firm that sues but cannot recover will incur the monetary and other expenses of pursuing a claim, without receiving a related benefit.

While this is a danger with any civil suit, the risk for law firm leaders is more serious: often the firm's partnership will be financing the claim. A failure to recover will impact the firm's profitability and partners' income, while raising questions about firm leadership.

Where the concern is that a client may be unable to pay, the firm faces additional risks because the client may declare bankruptcy. This may jeopardize the firm's ability to retain past payments. In addition, another party – most likely a bankruptcy trustee – may assume control of the client, and show a greater willingness to pursue claims, waive privilege, or otherwise take actions to the detriment of the law firm. In addition, the firm may become trapped in lengthy, expensive bankruptcy litigation if it decides to file a claim and continue to pursue its right to be paid.

\* *Review of Law Firm's Legal Work.* A law firm that files a claim against a client should anticipate that every aspect of its representation will be carefully scrutinized and second-guessed. Often such review arises in the context of a counterclaim, normally for malpractice or breach of fiduciary duty, or an ethics complaint. It may also result in an ethics complaint, often for excessive fees, for acting despite a conflict of interest, or for failing to adequately inform the client of the risks and status of the representation.

When such a review occurs, the lawyer's work will often be compared to a "gold standard" of client service, with little concern for the fact that client was not paying the lawyer's bills in a timely fashion and was also likely a difficult client for other reasons.

\* *Review of the Firm's Business Operations.* The law firm should also anticipate that a fight with a client will result in a review of the firm's business operations. The client may challenge how a matter was staffed, how time was billed, and how expenses were handled. Often the client will also publish information about any improper billing or other business operations through the media, causing other clients to wonder if their representation suffered from similar legal problems.

\* *Negative Publicity.* Often suits to recover attorney fees attract attention from the legal media and popular press. Debevoise's suit, for example, appeared on the front page of the *New York Times*. Such media coverage may provide the client, who is very likely disgruntled (after all, the client was not willingly paying for all legal fees received), with a forum to blast the law firm and its services. These dangers are heightened when the client or a fact-finder finds billing, legal, or other mistakes in the representation at issue.

In addition, technology – and in particular the internet – has made it very easy for unhappy clients to publicize their view of a fight with their law firm. Considering the importance of lawyers’ and firm’s reputations, the damage to reputation and good will often easily exceed the firm revenues that may ultimately be recovered.

### **Eight Step Review before Filing Suit.**

In light of these dangers, what should a law firm do if it is considering filing a suit to recover unpaid fees. We recommend an internal review encompassing eight steps:

- \* *Assess the Amount Really at Issue.* First, the law firm should carefully review any engagement letter, as well as the outcome of the matter, and determine what amount the firm can realistically expect to recover.
- \* *Exhaust Non-Litigation Options for Fee Collection.* The firm should first realize that filing a public lawsuit to recover unpaid legal fees should generally be treated as a last resort. Before such efforts are undertaken, the firm should have multiple people speak with the client to discuss the matter, learn what (possibly legitimate) gripes the client has, and attempt to obtain payment without filing suit. Often a non-paying client will provide the best information if an attorney not directly involved in the matter calls the client to learn the status of payment and any justification for non-payment.
- \* *Discuss the Potential Claim with All Involved Staff and Attorneys.* Law firms often carefully interview potential witnesses before filing a claim for a client. Yet many firms omit such protections when suing a client. A law firm that is considering filing a claim should make sure that it discusses the representation in detail with all involved attorneys and staff, including non-billing assistants. These discussions should center on the representation, and also on business aspects including how time was recorded and billing statements prepared.
- \* *Review the Relevant Documents.* Just as the firm should interview potential witnesses, the firm should also review potential documents. This review has four aims: first, the firm should ensure that, as the representation progressed, the firm provided full disclosure of the risks and problems in the representation. Second, the firm should assess whether any communications were unnecessarily critical or hostile to the client, or embarrassing or damaging to the firm. Third, the firm should review engagement and billing documents and internal communications (such as emails) to ensure the firm is prepared to stand behind all communications. Fourth, the firm should ensure that it has retained documents relating to the representation, and that it continues to do so throughout the litigation, to avoid spoliation claims.

In conducting the review of documents, the firm should presume that all communications – even internal communications with the firm’s risk management counsel – will be produced to the client during the resulting litigation. Ultimately, the firm may succeed in preventing a client from receiving certain documents. A firm should not, however, base its decision whether to

litigate on a hope or belief that the client will not be entitled to receive all of the documents in the firm's files (especially including internal emails).

\* *Assess the File Internally.* Having gathered relevant evidence and conducted interviews, the firm should be careful to determine whether the lawyers involved violated any ethical rules or internal policies of the firm. As noted earlier, a firm should expect a countersuit or ethics complaint if it brings a claim against a client. The firm should make sure that it can defend all its conduct before it puts that conduct at issue in litigation. Further, the firm must be mindful that it owes fiduciary duties – including obligations of loyalty, confidentiality, competent representation, and independent judgment – to its client. Before commencing any suit for fees, the law firm should also carefully evaluate the possible impact of defenses or counterclaims – including a counterclaim or setoff for malpractice – on the likely net gain to the firm. Again, a firm should confirm that economic and non-economic factors – including the loss of time, distraction, and likely bad publicity – all support that a claim should be filed against a former client. This assessment should be thorough and objective.

\* *Subject the File to Independent Review.* Having decided internal review supports filing suit, the law firm should next request that a trusted lawyer conduct an independent review of the file. This lawyer should be asked to assess the quality of legal services provided, the accuracy and reasonableness of fees charged, and the outcome of the representation. The ultimate goal is to have an independent lawyer consider whether the firm can prevail on its claim, how much it is likely to recover, and what dangers it may encounter in the way of counterclaims, ethical complaints, and negative publicity.

Often the external review is entrusted to a respected lawyer who has practiced in the area of legal services provided. Alternatively (or, possibly, in addition), firms should consider having a lawyer with significant experience in defending legal ethics or malpractice claims review the file, to evaluate the likelihood of success of any counterclaims.

\* *Communicate with the Professional Liability Insurer.* As part of the independent review process, firms should consider discussing potential lawsuits against clients with the firm's professional liability insurer. Often the insurer's claims staff will have additional insights and suggestions of issues to consider before a claim is filed. Also, in some instances the insurer may point out that the filing of a claim may implicate insurance coverage for related claims or counterclaims.

\* *Consider Waiting Out the Statute of Limitations.* Once the seven previous steps are completed, the firm should still consider whether it would be prudent to wait to file a claim until after the statute of limitations has run. Often the claim the firm intends to bring against the client for unpaid fees will have a longer statute of limitations than a legal malpractice claim would have. In these circumstances, it may be best to wait for the shorter legal malpractice statute of limitations to run, hoping this will prevent or limit the scope of a malpractice counterclaim. As most litigators know well, however, many means exist to extend a statute of limitations period. In addition, the law firm may face other claims or counterclaims – such as breach of contract or

fraud – that have longer statutes of limitations or that permit the statute to be tolled for fraudulent concealment or the like. However, waiting for the malpractice statute of limitations to run should not be seen as giving the firm immunity from a counterclaim.

### **Addressing the Causes of Unpaid Fees.**

Whether or not the firm ultimately decides to file a claim to recover fees, it is prudent for firms considering such suits also to take the opportunity to assess why the fees were not paid in a timely fashion, and to make sure that the firm does not face similar problems in the future. In most instances, unpaid fees result from shortcomings in one or more of the following risk management categories: client intake management (acceptance of clients or matters that should not have been accepted in the first place); management of the quality of the services provided to the client work (resulting in dissatisfied clients); or in managing the firm’s business practices (slow billing or failure to direct that work cease, and if necessary that the firm withdraw from an engagement at a much earlier stage, thereby avoiding the need to contemplate suit). If an unpaid bill has reached a level where the firm is considering filing a claim, conducting a study aimed at avoiding future repetitions of the same problem is almost always a useful (and valuable) exercise.

### **Conclusion.**

As indicated at the outset, when clients are seeking to take unfair advantage of lawyers’ general reluctance to sue for fees, it may be prudent for a law firm to file a claim to recover unpaid legal fees. But a suit against a client involves significant risk for the firm, and should only be undertaken where after extensive, careful consideration the firm is confident, based on thorough investigation, of vindication at the end of the day.

# # #