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THE RECORDER

YOUR BUSINESS

# Show me the money

## Hours billed don't always translate into dollars earned, but better practices increase the likelihood of prompt compensation

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Every law firm that is organized on a "for profit" basis professes to strive to maximize profits. Too often, however, lawyers equate maximizing profits with simply maximizing billable hours, ignoring realization rates (the percentage of dollars actually collected divided by the dollar amount billed), as well as the cost side of the equation.

From the perspective of an insurance brokerage that counsels several thousand law firms on managing risk, we have seen focus on the following three areas pay substantial dividends, both in terms of loss avoidance (reducing costs) and getting paid.

### CLIENT INTAKE

It is vital to have in place robust procedures in order to identity good potential clients. The flip side of this coin is perhaps even more important; identifying poor potential clients, and having the discipline to send them packing.

If the following issues arise during the interview process, the putative client has a markedly higher potential for not paying bills down the line:

1. Reticence to pay a reasonable retainer. This is probably the single biggest red flag. If a potential client balks at paying a $5,000 retainer for a matter the firm budgets will cost $25,000, there is no reason to continue the interview.

2. Multiple prior law firms. While there can be good reasons for folks to seek new counsel, if a potential client has had problems with other reputable law firms prior to coming to see you, failure to pay their bills is often at the root of the problem. At a minimum under these circumstances, heightened due diligence on the putative client's bill paying history is called for.

3. Potential clients who say, "I'd rather pay you (the lawyer) than them (the adversary)." The correct response is, "How would you feel about paying both of us?" followed by a frank discussion making clear that hiring a lawyer is no guarantee that the client will not (potentially) have to pay the adversary as well.

It is also critical that all decisions not to move forward with a potential engagement be documented by a nonengagement letter. We have seen too many law firms over the years become embroiled in malpractice allegations made by plaintiffs who, in the law firms' minds, had been unequivocally sent on their way as nonclients. The plaintiffs' recollections, of course, differed. Such spurious claims can be dispatched much more easily if there is correspondence in the file confirming the nonengagement.

### STRONG COMMUNICATION AND BILLING PRACTICES

Unfortunately, many attorneys let months go by with their only communication to the client being the monthly bill. Per California Rule of Professional Conduct 3-500, "A member shall keep a client reasonably informed about significant developments relating to the employment or representation." Given that clients are significantly more likely to pay their bills when they understand them, and have a good relationship with their attorney, the following best practices are recommended:

1. Bills should not be sent on a unilateral basis. Ideally, they should be reviewed by a peer or senior lawyer (or at least a senior paralegal or legal secretary) prior to going to the client. A second set of eyes is invaluable for catching typos and providing a "reality check" on the time expended and amount billed. Clients may not read everything sent to them, but bills are usually reviewed with a fine-tooth comb.

2. Consider putting down "No Charge" in bills as opposed to just writing off time. There will always be instances where lawyers look at a bill and determine that, for whatever reason, it is just too high. Rather than pretending that the time was not expended, keeping the time entry and entering "No Charge" can be an effective way to let the client know that their bill has already reduced after careful examination, and efforts to secure further reductions will be justifiably resisted.

3. Consider using "Evergreen Retainers." Having in place a requirement that work cannot continue unless the retainer is funded at a predetermined dollar amount can help both the client and the billing attorney focus on the billings and amount owed sooner rather than later.

Lawyers will also do well to keep in mind that time passes much more quickly for us than for our clients. While six months may seem like a very short time frame for a lawyer (well familiar with the fact that the wheels of justice do, in fact, typically turn slowly), that same six months can often feel like an eternity to a nonlawyer client. Even if nothing objectively "significant" by the standards of RPC 3-500 has occurred, lawyers interested in having their bills fully and promptly paid will make a brief call or drop a short email to their clients at least once every 30 days.

### CUT LOOSE NONPAYING CLIENTS

Prompt action must be taken on accounts in arrears. Payment problems invariably deteriorate the longer they are not addressed. We have seen far too many instances over the years of lawyers who spend "good hours after bad," with a thought process along the lines of "I know they owe us $10,000 and haven't paid us for six months and haven't returned our phone calls, but this brief I'm working on for them now is brilliant. Once they see this work product and we win our motion, they'll pay us everything they owe immediately." No, in the vast majority of cases, they won't. Unfortunately a $10,000 problem has been transformed into a much bigger $50,000 problem.

In addition to having the discipline to be able to dispassionately take off the lawyer's hat and put on the creditor's hat early in the course of a representation, other considerations to keep in mind are:

1. The decision to withdraw from a representation needs to be contemplated in the context of Rule of Professional Conduct 3-700 (2), which states: "A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client." Attorneys' actions taken at the time of disengagement will be subject to strict scrutiny. There may be times during the course of an engagement when an attorney is effectively stuck, where withdrawal would almost certainly be prejudicial (i.e., on the eve of trial).

2. Suing for fees should occur extraordinarily rarely, only after a careful cost/benefit analysis taking into account the risk factors involved (not least of which is anticipating the likely malpractice counterclaim). In fact, many risk management experts maintain that fee suits should never be contemplated.

3. Withdrawals should always be accompanied by a disengagement letter (for many of the same reasons outlined above in connection with documenting nonengagement).

Finally, cutting ties with a client can be much more straightforward if a well-drafted engagement letter is in place, since Rule 3-700 also contemplates permissive withdrawal by an attorney if "the client breaches an agreement or obligation to the member as to expenses or fees."

Firms that put in place procedures based on the foregoing strategies should also have a solid plan for implementation. Having the discipline to follow procedures can be difficult, and the tendency to make allowances should be avoided. While an occasional exception may be warranted under certain circumstances, consistent adherence to these principles should result in benefits on both sides of the cost/benefit ledger.

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