

The Law of Unintended Consequences

By Michael Caryl

Life in general and the private practice of law, specifically, have become more complicated than ever before. The economy, technology, communications and even the way we relate to others have undergone enormous change since the early 1990s. Law practice has changed enormously as well, with the explosion of computer technology, cell phones, email and electronic legal research, and in many other ways.

The demands of the law and clients upon lawyers have burgeoned. Clients have become more sophisticated in their understanding and expectations, and those expectations include lawyers answering cell phone calls in the evening and on weekends, and almost 24/7 response to email. Every year the bar licenses hundreds of new lawyers, and more now than ever these young lawyers hang out shingles rather than apprentice in existing law firms or serve in a government lawyer capacity. We have a considerably younger bar and many members are very inexperienced.

Law office management pundits frequently comment how poorly most lawyers manage the business side of their own practices. This is not limited to small firm lawyers and solos. One of Seattle's largest firms imploded a decade ago, purportedly relating in part to management issues.

To my knowledge, law schools teach almost nothing on law office management. Very few continuing education seminars address practical law practice management issues and few practitioners take advantage of what little is offered.

My practice is largely involved with serious lawyer-client fee problems (or lawyer-lawyer fee problems) where money is the primary or only issue. When lawyer-clients come to me, there

is usually a crisis or a serious problem — an associate is leaving with 68 cases or the lawyer's client has gotten way behind in the payment of fees and trial is approaching. Or the client simply refuses to pay. It is this situation that I address here.

The Large (or Not So Large) Client Receivable

Common sense and (virtually every book and article on the subject) teaches that it is unwise to work for months while your client is not paying you. Yet we all do it occasionally and some lawyers have let this bad habit reach crisis proportions.

I have given several CLE presentations on the general subject of "how to get paid without getting sued." Remedies include suing clients and asserting attorney's liens and collecting on them. But the truth is that the ounce of prevention (not letting a large receivable grow) is much preferable to a ton of cure (suing for fees).

Simply getting out early when not getting paid is the only wise move in 90% of cases. Walking away from \$2,500 or even \$5,000 is far better than what might happen if you build a large receivable (or even a small one) and then sue to collect it, once the result is decided.

Cases in Point

I sued one lawyer's client about four years ago for \$72,000 in fees. He counterclaimed for malpractice, breach of fiduciary duty and violation of the Consumer Protection Act, among other claims. Discovery was extensive and expensive, motions practice abounded and, well before trial, my client's fees with me well exceeded what we were fighting over. To make matters worse, the trial judge threw out my client's fee agreement and awarded fees to the former client for getting it voided.

We largely won at trial, including all but a small amount of the fees we were seeking. Now two years later, we have largely (but not totally) prevailed in the Court of Appeals; the other party has petitioned the Supreme Court for review and the bleeding in fees goes on. My client's cost of pursuing this far exceeds what he will ever get out of it and he has largely won the litigation.

Not long ago, I was called in to defend a lawyer at trial in a fee dispute. He had sued a client for a relatively small amount in fees when the client had refused to pay the final billing. There had been some minor bad blood on his client's part at the end and my client withdrew. His client — now pro se — counterclaimed for fraud, legal malpractice, breach of fiduciary duty, CPA violations and breach of contract. The lawyer hired by his malpractice insurer managed to get the tort claims all dismissed.

Nonetheless, this is worth repeating for all lawyers in private practice. My lawyer-client was engaged and did produce a piece of work product. Through no fault of his own, the client did not obtain the result he wanted. He became angry, unhappy and blamed my client, who clearly did what he was hired to do. When he was not fully paid, he filed suit.

Due to the vagaries of motions practice and despite the fact that my client had performed his agreement exactly as he was obligated to do, and in the face of a disclaimer of warranties as to result, the judge found that my client had breached his own agreement. The end result was that in a case where my client had sued for a very small amount of fees, the case had to be settled for a relatively enormous sum.

The Law of Unintended Consequences

The law of unintended consequences was at play in both cases here. Suing a client over a relatively large amount of fees, with a signed fee agreement and an attorney's fees clause, seemed a safe bet. Nonetheless, the end result was a nightmare. Suing over a relatively small amount of fees opened my second client to something wholly unanticipated — a terrible result, where his former client had no valid claim for breach, but which nonetheless resulted in significant adverse consequences.

There are some valid lessons to be learned from these two cases, lessons that should be taken to heart by all lawyers in private practice billing hourly.

Letting clients get behind in fees over the course of many months or years is extremely unwise because it encourages the client to think of the fee obligation in contingency or value-based terms.

- Getting out of a case where the client cannot or will not pay your fees is essential, and the sooner the better, so long as you meet the requirements of RPC 1.16.

- An angry client spewing criticism and other libels will do more damage than the goodwill of 10 pleased clients.
- Suing a client over a small amount of fees is very unwise, regardless of the merits. The District Court may not be well-equipped to deal with such a case. Further, spurious counterclaims (or possibly meritorious ones) can and will be asserted, dragging the lawyer-client into a costly battle that cannot possibly be won in the larger sense, no matter the result.

- Suing a client for fees, regardless the size of the receivable or the merits, may necessitate informing your malpractice insurer when counterclaims of negligence or breach of fiduciary duty are raised.

- Whenever you sue a client, the law of unintended consequences may come into play. The end result might well be a catastrophe, compared with the original goals of the litigation.


- Even if you win, you may well lose in the cost of your own lawyer's fees, the interpersonal stress and the interruption of the law practice that actually pays your livelihood, not to mention the bad will generated by litigating with a client in a public forum.
- Suing a client for fees is usually a questionable strategy. Suing a client over a small amount of fees is almost always a bad strategy.

- Improve your fee agreements and your intake process so you can defend your fee arrangements as compliant with RPC 1.5. Make clear in your fee agreement that withdrawal will occur as promptly as ethically possible if the client does not pay timely. When that situation occurs and the client does not remedy the delinquency, simply get out.

- Keep relations with your clients amicable, even where there are unpaid fees, and do not threaten to sue them for fees. And when you find that you have no choice but to sue a client to prevent a gross injustice by the client, sue the client in a court that is geared up to handle the legal issues that are likely to arise. ■

¹ "The 'law of unintended consequences' (also called the 'law of unforeseen consequences') states that any purposeful action will produce some unintended consequences. ... This maxim is not a scientific law; it is more in line with Murphy's law as a warning against the hubristic belief that humans can fully control the world around them. Stated in other words, each cause has more than one effect, and these effects will invariably include at least one unforeseen side effect. The unintended side effect can potentially be more significant than any of the intended effects." Wikipedia, "The Law of Unintended Consequences," http://en.wikipedia.org/wiki/Unintended_consequence.

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