

# Should You Sue Your Former Client for Your Fee?

Professionalism Committee  
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[Editor's Note: This article is a collaborative effort of the Professionalism Committee's Articles Subcommittee. It is the first in a two-part series on the down economy's impact on the legal profession, and the challenges hard times can pose to our obligation of professionalism. The second article in the series will focus on tips for managing relationships with economically stressed clients.]

In these tough financial times, it is particularly difficult to provide legal services to a client with whom you have a signed fee contract and then have the client renege on the client's obligation to pay. This article will discuss the aspects of professionalism that are involved in the decision whether to bring a suit against a former client for your fee. In this article, it is assumed that you have gone through the proper steps to withdraw from any litigation representation of the client and have obtained a court order allowing you to withdraw. The litigation withdrawal process is not within the scope of this article.

## Traditional View of Attorneys' Fee Suits

The traditional or historical view of the Bar toward suits by attorneys against former clients to collect legal fees was set out in the Canons of Ethics that were adopted by the ABA in 1908. These Canons, with some local modifications, governed the practice of law in North Carolina from at least 1942 (See 221 N.C. 592 - 606) until North Carolina adopted its Code of Professional Responsibility in 1973.

Canon 13 (Fixing the Amount of the Fee) provides insight into the attorneys' fee philosophy of the authors of the 1908 Canons of Ethics.

Canon 13 provided, in part:

In fixing fees, lawyers should avoid charges which overestimate their advice and services, as well as those which undervalue them. . . . In fixing fees it should never be forgotten that the profession is a branch of the

administration of justice and not a mere money-getting trade.

With specific reference to disputes with the client over a fee, Canon 14 (Suing a Client for a Fee) provided, in its entirety, as follows:

**Controversies with clients concerning compensation are to be avoided** by the lawyer so far as shall be compatible with his [sic] self-respect and with his [sic] right to receive reasonable recompense for his services; **and lawsuits with clients should be resorted to only to prevent injustice, imposition or fraud.**

The above language of Canon 14 appears to have been designed to discourage such controversies and formulated to make attorneys extremely wary of bringing lawsuits against clients to collect attorneys' fees.

Despite the rhetoric of the above Canons, the courts of North Carolina have, of course, entertained suits brought to collect attorney's fees. For example, in a case where there was an agreed "flat fee" for legal representation, the plaintiff lawyers were awarded the full contract fee, despite being discharged by their client. *Higgins v. Beaty*, 242 N.C. 479 (1955). This case shows that attorneys' fee suits were not unknown under the Canons of Ethics. [Note that the amount of attorneys' fees recoverable would be limited to a reasonable fee for services rendered prior to discharge if the case were decided today. See *O'Brien v. Plumides*, 79 N.C. App. 159 (1986).]

There is also an established view of the matter that contradicts the position that suits to collect attorneys fees are undesirable. The Supreme Court of Vermont in the case of *Swanson & Lange v. David Miner*, 159 Vt. 327, 623 A.2d 976 (1992), was confronted with an assertion that attorneys' fee suits violated public policy unless there was proof of fraud or gross imposition by the client. The court concluded that legal action to collect unpaid attorneys fees is not a violation of public policy. To the contrary, the court ruled that "it is in the public inter-

est that attorneys receive fair compensation for their services. Adequate compensation is necessary in order to assure effective representation and to maintain the integrity and independence of the bar."

The traditional or historic Bar position appears to have been that suits to collect fees were discouraged, but were not barred.

## Current Ethics Rule Regarding Attorney-Client Fee Disputes

Rule 1.5 of the Rules of Professional Conduct (2003 version) provides, in part, as follows:

(a) A lawyer shall not make an agreement for, charge, or collect, an illegal or clearly excessive fee . . . .

(f) Any lawyer having a dispute with a client regarding a fee for legal services must:

(1) make reasonable efforts to advise his or her client of the existence of the North Carolina State Bar's program of fee dispute resolution at least 30 days prior to initiating legal proceedings to collect the disputed fee; and

(2) participate in good faith in the fee dispute resolution process if the client submits a proper request.

The current ethics rule set out above does not attempt to admonish against suits for unpaid attorneys' fees, provided the suit does not involve an "illegal or clearly excessive fee." The current rule does, however, encourage the fee dispute resolution process.

## Practical Considerations in Deciding to Sue a Client for a Fee

To be in the position to decide whether to sue a client for a fee, first you must have done the groundwork to establish the fee. Rule 1.5 of the Rules of Professional Conduct sets forth that all fee agreements should "preferably" be in writing, and that fee arrangements be established "before or

*continued on page 13*

July 2009  
20F3

within a reasonable time after commencing the representation.” See Rule 1.5(b). Further, contingency fee agreements “shall be in writing, signed by the client and shall state the method by which the fee is to be determined . . . .” Rule 1.5(c). If there is an arrangement in a contingency fee agreement for multiple law firms to represent the client, then it is further required that such an agreement is “confirmed in writing and the arrangement should provide for the scope of such a division including the share each lawyer will receive . . . .” Rule 1.5(e) (2).

Thus, the first question in any inquiry whether one should proceed with a claim against a client for fees is whether the documentation available in the file is sufficient to meet the requirements of Rule 1.5, particularly in disputes involving a contingency fee. Given the wording of Rule 1.5, it appears that a prudent lawyer would seek to get any significant fee, contingent or not, well documented in writing at the onset of his or her representation.

A second issue to be considered is the net economic outcome of a fee dispute, using basic concepts which lawyers often apply to their analysis of other people’s cases. This analysis is thoroughly covered in an excellent article entitled, “The Pitfalls of Suing Clients for Fees,” by Jeffrey M. Smith in the ABA Journal (69 ABA J 776, June 1983). Smith observes that if one is going to proceed through the formal process to obtain payment of a fee, the percentages and numbers at issue can be daunting. First, he suggests that representing yourself in a lawsuit is often ill-advised, and right away it should be anticipated that the original fee sought through the formal process would be reduced by paying another law firm either hourly or on a contingency basis to recover the fee amount. Second, even if the fee amount is recovered, there will be taxes on the recovery. Third, undoubtedly the firm will expend a number of hours attempting to prosecute the claim, even with use of an independent firm as counsel in the fee litigation. The net cost of the time of the lawyer or lawyers in prosecuting the claim (after taxes) should be subtracted, further reducing the real financial benefit of such

a claim. Additionally, Jeffrey Smith asks how many lawyers advise their clients that the chance of success in litigation is 100% and applies the same rule to the percentage chance of prevailing in a fee dispute lawsuit. This further reduces the statistical predicted amount of fee that might be recovered. As a pragmatic consideration and certainly true in our times as well as when the Smith article was written, even if one assumes a win on the claim for fees, what is the likelihood that the client will ultimately pay all or a portion of that sum of money. Finally, Smith reminds attorneys that it cannot be forgotten that requirements such as burden of proof, expert testimony, admissible evidence on contract terms, and other evidentiary matters will likely govern a contract dispute involving an attorney’s fee, with all the attendant legal issues that these points might raise. The Smith article is a must-read for any pragmatist getting ready to sue a client for a fee.

A very real additional problem in suing a client is evaluating the likelihood of a counterclaim, perhaps involving allegations of malpractice, or other attacks on the attorney’s work. A claims attorney for one legal malpractice insurer insuring many North Carolina lawyers has observed that over the last 25 years approximately 90% of those clients who have been sued for a fee, and who file a responsive pleading when sued, included a counterclaim, usually for legal malpractice. If one submits such a counterclaim to the legal malpractice insurer for a defense of the counterclaim, the defense costs would first be paid under the insured’s deductible. Many times that deductible is greater than the unpaid fee, which would make the collection effort cost more than any possible recovery.

The practitioner may wish to consult other related articles from the Professionalism Committee available online at the archived Bar Flyers at the Wake County Bar Association Website ([wakecountybar.org](http://wakecountybar.org) – click on “Bar Flyer” and then click on “Back Issues”). See for example:

- A Quick Guide to Ethical Fee Agreements, Feb. 08
- Don’t Buy Off the Rack: Use a Tailored Fee Agreement, Mar. 08
- A Legal Fee By Any Other Name, Apr. 08

- A Professionalism Challenge: The “Difficult” Client, July 08
- Getting Back On Track With A Client, Oct. 08
- Parting Ways With A Client, Dec. 08
- Professionalism and The Out of Control Client, Jan. 09

### The 10th Judicial District’s Mandatory Fee Arbitration Process

Let’s assume that you have weighed the alternatives and have decided to bring a suit against a client to collect an unpaid fee. Before filing the complaint, the State Bar Rules insert an extra step or two, with the purpose of assisting lawyers and clients in settling disputes over attorneys’ fees.

Before suing a client over a fee dispute, you must give the client written notice of the State Bar’s fee dispute resolution program (the “Program”), State Bar Rule .0706, 27 NCAC 2.0706. Generally, the lawyer must then wait 30 days after the client has received the notice before filing a lawsuit. There is a narrow exception allowing a lawyer to file a lawsuit prior to the expiration of the 30 days in order to preserve the statute of limitations, but pursuing a client over a nearly-3-year-old debt would likely be ill-advised.

If, within the 30-day notice period, the client decides to participate in the Program, then the lawyer must also participate before filing a lawsuit. The Program is free. There is no filing fee paid to the Bar and there is no fee paid to the mediator assigned to the dispute by the Program. A client also can file a fee dispute petition in the absence of notice from the attorney about a potential suit.

The client elects to participate by filling out a “Petition for Resolution of a Fee Dispute” form provided by the Program. The lawyer is then given the opportunity to respond by submitting a “Response to Petition for Resolution of a Fee Dispute” form. From there, the Program’s coordinator performs a gate keeping role and can dismiss Petitions which are determined to be frivolous or moot or the Program lacks jurisdiction (for instance, the Program does not cover

*continued on page 14*

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*continued from page 13*

disputes among attorneys or between attorneys and service providers like court reporters and expert witnesses). In addition, the Program's coordinator can also dismiss a Petition if "the facts stated support the conclusion that the fee was earned and is not excessive." However, cases are not often dismissed on this basis.

While lawyers may sometimes refer to the fee dispute Program as "mandatory arbitration," it is instead predominately a process of voluntary mediation. Assuming the case is not dismissed by the Program, it proceeds to mediation. In the 10th Judicial District, the assigned mediators are usually ones who have been certified by the Dispute Resolution Commission. The mediator is responsible for scheduling and arranging a place for the mediation convenient to all the parties.

From there, the mediation process is not materially different than other mediations, with three notable exceptions: (1) the mediator may determine that it is appropriate to hold the mediation conference over the phone or through a series of phone conferences, rather than meeting in person; (2) while the client should attend the mediation, the lawyer identified in the Petition is *required* to attend and may

not send a substitute or associate; and (3) the mediator may determine, after talking with the parties, that the case should be dismissed because one or more of the gate-keeping grounds exists, as mentioned above. This last exception necessarily involves discussions between the mediator and the Program to determine whether dismissal is appropriate. For example, if the client repeatedly fails to meet deadlines without good cause, then the case could be dismissed.

Although the Program is free of charge, it is not without cost to the lawyer. The lawyer is going to invest some amount of uncompensated time responding to the fee dispute Petition and attending the mediation. The amount of time in mediation obviously varies depending on the amount at issue and the complexity of the underlying fee dispute. Given that the lawyer is faced with a prospect of diminishing returns on time spent in the mediation, it is in the lawyer's interest to get to a reasonable deal as soon as possible. However, if the case cannot be quickly settled, then, as with any mediation, the parties are not permitted to leave the mediation prior to the mediator's declaration of impasse.

If the mediation fails, then the lawyer may proceed with litigation against the client or the parties may voluntarily agree to submit the fee dispute to binding arbitration. In recent years, only one or two cases per year have gone the route of binding arbitration, according to Joe Eason, Chair of the 10th Judicial District's Fee Dispute Committee. Fortunately, the Program has been able to successfully resolve roughly half of the cases mediated.

### Conclusion

Suing a client for a fee is not a decision to be made lightly. However, if you have carefully weighed the merits of such a suit, have knowledge of the practical pitfalls and recognize the procedural prerequisites, you will have given yourself the best possible chance to collect a meaningful amount justly due. In a nutshell, proceed with an abundance of caution.

***Coming soon: "Tips for Managing Your Relationship with an Economically Stressed Client."***