Collective Wisdom Sought - How Candid to be with Opposing Counsel about My Limited Xcope Retention?

I'm in the process of signing up a small company as a client. The small company has been sued for $14k by a very large company. I am being hired only to try to negotiate a settlement. My retention agreement excluded litigation.

Question: When communicating with opposing counsel, is it best to bluff that a vigorous defense will be coming if the case does not settle on acceptable terms, or just let opp counsel know that I am only hired on a limited retention basis. Or maybe avoid the topic altogether?

I feel like a total neophyte in posing this question as I usually try to avoid smaller cases.

Thanks in advance for any feedback or hints.

I don't think you should bluff it. I would be up front with the guy. If this ends up in a default or a motion to set aside a default, do you want someone saying you didn't represent the actual scope of your employment?

Especially if the company is an LLC or a corporation, opposing counsel can reasonably assume you are retained for all purposes. So, I would be extra careful.

Jonathan Stein, California

I have always just said "before I charge my litigation retainer" let's try to work something out. And I have a largish litigation retainer. I think that approach is up front and gives incentive to settle, as those funds won't be available for settlement once you are retained for litigation and the money is in your trust account. You can still ask for time to respond for the client to pursue settlement even though you haven't entered your appearance. You can even be clear that you probably won't take the case due to schedule or type of case, but "before you pass it on (and the client will need time to retain counsel)" you want to see if you can put such a small amount to rest. Just realize that you usually have a short settlement window this way. When the shoe is on the other foot, I'll certainly see what's on the table and negotiate a bit but if it's not heading the right direction, I'll push the "entry of appearance issue and let's talk some more."

What I don't like is the ambiguous OC that calls to feel out the case and wastes my time. So I'm with Jonathan on this one. Just be up front but indicate the client is intent on retaining litigation counsel if it can't be resolved.

Bret Cook, California

I don't think it wise to inform opposing counsel that you have a limited retention, as that fact might properly be considered a confidence that belongs to the client. Also, I never bluff about litigating the matter if the client has not confirmed that it is willing go forward with litigation if the matter cannot be resolved otherwise. However, if pressed, I will tell opposing counsel that I although I have not yet been authorized to litigate the matter, I would certainly litigate the matter if so authorized.

Small matters, although many clients would not consider $14K to be small, can be really difficult to resolve. If there are no attorney fee provisions at issue, the trick is being able to litigate the matter without incurring fees that approach or exceed the matter at issue. If there is an attorney fee provision, the matter often becomes one where the issue of the award of attorney fees overwhelms the underlying one.

Also, keep in mind that attorney fee awards are often less than the amount actually incurred. Often the primary factor in reaching a settlement is that plaintiff and defendant face the same economics.

Bert Krages, Oregon

I agree with Bert on this one. I serve on our state bar professional responsibility committee and we have frowned on anything remotely revealing a client confidence, unless the client consents. From a strategic point of view, I do not think it is advantageous to reveal it, as the OC may simply think he or she is wasting their time talking to you as they will need to restart with another attorney of the case is filed. Once the case is filed, then they will know that the client is represented by another attorney. I see no upside to revealing this information.

Barry Mortge, Illinois

I agree, don't bluff but also refrain from mentioning scope of representation. In fact, use facts to bolster your client's side as much as possible.

Alex Salmu, Michigan

I would refuse to take such a case. Your hands are unfairly tied.

Jim Winiarski

In contrast to what some here have said, I would note that it can be a useful fact to reveal. It can be spun as illustrating that your client just doesn't have much money, and therefore the putative plaintiff should accept a lowball settlement offer.

David M. Nieporent, New York