

Dealing with Loser Case When Client Won't Settle

Client refuses to settle a case that client will lose. Client actually referred to case (long after retaining counsel) as a "blood vendetta".

Client's claim is valid but OP's counterclaim is much stronger and larger. Client refuses to consider settlement. Counsel hates the idea of going to trial on such a case, regardless of the hourly fee that will be paid.

Anything counsel can do to GTFO of the case? Or should counsel just bite the bullet and ride the train to its inevitable fiery crash, knowing such crash will be very bad for client's bottom line.

Any and all suggestions appreciated.

CYA letter, outlining everything you've mentioned here, leaving out the GTFO out. Let the client know that in your estimation the client will lose, and lose big. And that the client was advised to settle.

Tom Simchak, Texas

If I'm being paid hourly (versus being on contingency), I'd give it my best shot and hope for the best. I'd counsel the client, of course, on what their odds are, but there are some clients who can't let things go and really just do need to feel that they've had their day in court and had a judge rule on it. A lot of small claims cases over petty and stupid things present like this, but for whatever reason, the parties can't let it go. For a lot of clients, they want to know that someone cares and winning/losing is actually secondary.

If I'm not being paid hourly and have somehow agreed to take a contingency of a losing case, I'd still give it my best shot, but just bear the financial loss. I generally don't take large-value contingencies for this reason unless I've vetted the absolute hell out of the facts, the client, etc.

However, hopefully your retainer has an escape clause that says that you can withdraw if the client refuses to take your advice, insists on doing something unethical, or your continued representation is not in the client's interest, etc. It'll be up to your judgment on whether you think you can invoke that.

Andy I. Chen, California

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File a Motion to Withdraw? I would have a hard time representing this person as well. I feel your pain once you get to the point where it doesn't matter how much they pay you, you just want out.

Deborah Zaccaro Hoffman, Ohio

Client and attorney have reached a difference of opinion that cannot be rectified, therefore I request the court to allow me to withdraw as attorney of record.

Erin M. Schmidt, Ohio

How do you advance your motion to withdraw without negatively impacting the client? With the possible exception of, "your honor, my client has not and cannot pay me," everything else would seem to be against the client's interests.

Tony LaCroix, Missouri

It's called irreconcilable differences

Erin M. Schmidt

If you do stay in, make sure you get a hefty retainer that will cover you through trial. "Millions for defense, not once ounce for tribute" sounds great until the bill comes due.

Kevin W. Grierson, Virginia

Do you have a provision in your retainer that allows you to require them to refresh it up to the original limit? If so, invoke it and when they don't pay (I've never had anyone pony up a second retainer although I've had a couple screw me on fees in the end when I didn't), you withdraw.

Deborah Zaccaro Hoffman

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Sometimes it helps to explain to the client that you understand his or her feelings about the matter but that you don't think proceeding to trial is a good use of the client's resources. Then ask the client how he or she is going to feel about the matter (and the expense) six months after the trial, especially if the outcome involved writing a check to the opposing party.

Bert Krages, Oregon

I think if it's gotten to the point where the client's demands are compromising your integrity and/or you dread hearing the sound of their voice when you call in to check messages, your ability to represent them is already in question. (Not you personally, hopefully you know what I mean :-))

Deborah Zaccaro Hoffman

1. State court practices vary on exiting a case. In a Texas civil case, an exit would be easy on a motion to withdraw. If going down the road, then providing an opportunity to substitute counsel may be a consideration.
2. Stating plainly to the client, as simply as possible, factors to consider will be of benefit to you. I will typically follow up oral communications with a letter or email.
3. Having accomplished and reinforced item 2, you could elect to stay in the case, having dutifully advised your client. Envisioning the end result with the client can sometimes be beneficial. Sometimes, it never sinks in, but other times the light dawns eventually.

Darrell G. Stewart, Texas

If you have informed them of what you perceive to be the prospects of the case and the anticipated cost forecast - in writing, you've arguably done your duty. Now, make sure that the outcome doesn't impact YOUR bottom line; make it clear that you need retainer to cover the balance expected before you'll proceed. In case it offers you any benefit for future cases, here is how I deal with this in my fee agreement.

-Rick

SETTLEMENT OFFER BEFORE LITIGATION: If the Firm recommends, in writing, that the Client accept a particular settlement offer at any point in the process prior to litigation (i.e., before suit has been filed with the court), and the Client accepts this recommendation, the Client agrees by accepting these terms that the contingent fee will be equal to XX% of the value of that settlement, after deducting any outstanding expenses.

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SETTLEMENT IN LITIGATION: If the Firm recommends, in writing, that the Client accept a particular settlement offer at any point in the process of litigation (i.e., after suit has been filed with the court, but before the court issues a judgment), and the Client accepts this recommendation, the Client agrees by accepting these terms that the contingent fee will be equal to XX% of the value of that settlement, after deducting any outstanding expenses.

NO SETTLEMENT OFFER: If no settlement is tendered or accepted, and we continue to move forward in litigation, the Client agrees by accepting these terms that the contingent fee will be equal to XX% of the value of the settlement or award resulting from that litigation, after deducting any outstanding expenses.

HYBRID FEES / FINAL FEE: Where the Fee agreed upon includes a contingent fee AND either an hourly fee or a flat fee, the Final Fee shall be equal to whichever fee is greater. If the contingent fee is greater than the hourly fee (and the flat fee if any), any hourly or flat fees already billed and collected (or held in trust) will be credited against the Final Fee.

CLAIMS LACKING SUBSTANTIAL MERIT: If it becomes clear at any point that the claims are without sufficient merit to warrant going forward (or if the Opposing Party presents an affirmative defense that the Firm does not see a reasonable possibility of overcoming), the Firm will notify the Client in writing of its intent to terminate the representation (subject to the permission of the court, where required). At that point, the Client may be presented with the option of continuing based on an hourly fee at the Reference Rate, plus Costs. In this event, if the Matter was originally undertaken on a pure contingency basis, the Client would not be charged for representation up to that point. If the Client was paying a reduced fee on a hybrid fee agreement, the full fee stated here would apply to all work performed by the Firm going forward from that point. Under this circumstance, the Firm may require that the Client advance a retainer equal to full anticipated remaining cost of litigating the Matter as a condition of proceeding without withdrawal.

RETAINER / COMMENCEMENT OF WORK / SUSPENSION FOR NON-PAYMENT: It is the normal practice of the Firm to require that Client advance a deposit ("Retainer") against which Fees are periodically charged as they are incurred. The Retainer balance - which is held in the Firm's trust account - is then replenished by the Client when bills are received. Work on the matter will not begin until the Client has submitted the required Retainer. The Firm reserves the right to cease working on a Matter, to the extent permitted by law and the courts, in the event the Client fails timely to replenish the Retainer balance as agreed.

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Work will not commence on the Matter until this Fee Agreement has been signed by an authorized representative or agent of both the Firm and the Client, and the firm has received the initial retainer of \$X,X00.00.

The Firm reserves the right to suspend work on the Matter, to the extent the Client's position is not prejudiced, in the event of non-payment. If non-payment is not remedied within 30 days of notice to the Client, the Firm will petition the Court (if required) for permission to withdraw due to conflict of interest.

Richard J. Rutledge, Jr., North Carolina

CYA, big-time. BIG TIME. Letters, letters, letters.

IMO, trying to withdraw now is detrimental to the client.

Plus, GET TRIAL, EXPENSE FEES UP FRONT!

Good luck.

Russ Carmichael
