A Lawyer's Guide To Collecting Fees From Nonpaying Clients

By **Joshua Wurtzel** (July 26, 2022)

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You've done the work and sent the bill, but haven't been paid. What do you do?

This is unfortunately a question that lawyers, from solo practitioners to BigLaw partners, confront all too often. But most lawyers struggle with the answer. And even worse, many end up doing nothing — leaving significant receivables on the table from clients who have the ability to pay.

Struggle no longer. Here, I offer some recommendations on how to deal with a nonpaying client. The article focuses on the law on account stated in New York. These principles and advice are generally applicable in most U.S. jurisdictions, though you should of course consult the specific law in your jurisdiction.

Make Sure Your Retainer Agreement Gives You Adequate Protection

Good collection starts with a good retainer agreement. There are several important clauses any retainer agreement should have.

Thirty Days to Object

Your retainer agreement should include a clause stating that if a client has an objection to an invoice, the client must make a specific objection in writing within 30 days. Courts have upheld these types of clauses, and have further held that a client that fails to make a specific, timely objection in accordance with this clause waives objections to the invoice.[1]

Fee Shifting

Many lawyers avoid suing clients for unpaid fees because the time spent doing so can be better spent on other, billable tasks. But if you include a fee-shifting clause in your retainer agreement, a nonpaying client could end up being responsible for fees you incur in bringing the suit. Make sure, however, that the fee-shifting clauses run in favor of the client as well if he or she is the prevailing party, or else it will be unenforceable.[2]

Choice of Forum and Acceptance of Service of Process

Your retainer agreement should also include a forum selection clause in the state in which you practice so you don't have to go out of state to sue a nonpaying client. And it should also include a clause stating that the client agrees to accept service of process by mail or email, in case you have trouble serving the client personally.

Rely on the Retaining Lien and Charging Lien

New York law strongly favors attorneys who are stiffed by their clients. So there are some tools you can use to try to collect without having to bring a lawsuit.[3]

Retaining Lien

When a client has an outstanding balance with his or her former lawyer, the lawyer can

assert a retaining lien over the client's file. This allows the lawyer to refuse to turn over the file to the client or his or her new counsel until the outstanding balance is paid or otherwise secured. To lift the retaining lien, the former client must either pay the amount owed to the lawyer or post a bond for that amount.[4]

Charging Lien

Under Section 475 of the New York Judiciary Law, "from the commencement of an action," the lawyer who "appears for a party has a lien upon his or her client's cause of action," which attaches to a verdict, settlement, judgment or final order in his or her client's favor.

This section gives the lawyer a lien on the proceeds of the former client's case to the extent of the amount owed to the lawyer, with the result that no proceeds can be distributed to the former client or his or her new counsel until the former lawyer is paid.

In 1995, the New York Court of Appeals in LMWT Realty Corp. v. Davis Agency Inc. held that this lien "does not merely give an attorney an enforceable right against the property of another," but instead "gives the attorney an equitable ownership interest in the client's cause of action."[5]

Sue for Account Stated

If all else fails and you need to sue a nonpaying client, the account stated cause of action will be your best friend.

Indeed, in New York, this cause of action allows a professional services provider to sue a client for nonpayment of an invoice if the client has retained the invoice for at least a few months and has failed to make timely, specific, written objections. This cause of action thus provides lawyers with a substantial tool to pursue a nonpaying client.

Invoice Requirement

To state a claim for account stated, you must show only that you sent the invoices to the client and the client retained them — usually for at least a few months — without making specific, written objections.[6] It is thus important to maintain a record of when invoices are sent and to whom — ideally by email to an email address the client gave to receive invoices.

Oral Objections

Generally, a client must make specific, written objections to an invoice; general or oral objections will not be enough to defeat a claim for account stated. Nor will general claims by a client that he or she is dissatisfied with a particular outcome suffice.[7]

Reasonableness of Fees

Many nonpaying clients will defend against a nonpayment suit by claiming that they were overbilled or that the quality of the work was not to their liking. But if these objections are not made in a timely way, with specificity and in writing, courts generally hold that they are waived.[8]

This is significant for a lawyer pursuing a nonpaying client, as most clients will defend by claiming that there was something wrong with the work done by the lawyer. And so if an account is stated by virtue of the client's retention of the invoices, the reasonableness of the

fees and the quality of the work has no bearing on the merit of the account stated claim.

Underlying Agreement to Pay

While account stated is a powerful cause of action, it works only if there is an underlying agreement to pay for the services rendered. So a person who randomly sends out invoices without having an underlying agreement with the recipients of the invoices can obviously not rely on account stated.

But if you have a retainer agreement that properly covers the scope of the work you will be doing, you shouldn't have a problem. Nor is there a requirement that the client has agreed to pay for the specific invoices at issue, as long as the client has agreed to pay for your services generally.[9]

The Dreaded Malpractice Claim

Most nonpaying clients faced with a lawsuit by their former lawyer will assert counterclaims for malpractice — even if the malpractice claim has no merit.

While the lawyer must, of course, still deal with the malpractice claim, courts generally go out of their way to sever a lawyer's account stated claim from a nonpaying client's malpractice counterclaim. This is especially so if the alleged malpractice relates to different work from what is at issue on the unpaid invoices.[10]

Further, as a strategic matter, unless the malpractice counterclaim has merit, most nonpaying clients will drop it after the lawyer obtains a quick judgment on summary judgment at the outset of the case.

Conclusion

Suing a former client is never pleasant, and is a last resort after the attorney-client relationship has broken down. But using efficient, streamlined ways to collect from nonpaying clients can allow a law firm to provide greater value to the rest of its clients.

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[1] See CITGroup/Commercial Servs. v. Prisco, 640 F. Supp. 2d 401, 407 (S.D.N.Y. 2009).

[2] See Ferst v. Abraham, 140 A.D.3d 581, 582 (1st Dep't 2016) ("provision of the retainer agreement holding defendant liable for attorney's fees incurred in the collection of fees, without a reciprocal allowance for attorney's fees should defendant prevail, is void and unenforceable").

[3] More information about these tools is available here: https://www.schlamstone.com/blogs/practical-insights/2020-01-03-how-you-can-protect-yourself-against-the-nonpaying-client-the-retaining-lien-and-the-charging-lien.

[4] See Concrete Flotation Sys., Inc. v. Tadco Const. Corp., 2009 WL 1209141, at *1 (E.D.N.Y. May 2, 2009) (lawyer not required to produce papers over which he asserted a retaining lien "without a resolution of the fee dispute or the posting of an adequate bond").

[5] LMWT Realty Corp. v. Davis Agency Inc., 85 N.Y.2d 462, 467 (1995).

[6] See Perine Int'l Inc. v. Bedford Clothiers, Inc., 143 A.D.3d 491, 493 (1st Dep't 2016) (summary judgment granted on account stated claim when email to defendant "listed each invoice and the amount due," and was thus "proof that the invoices were received" by defendant; plaintiff's principal "averred that no objections were made to the invoices"; and in opposition, defendant submitted affidavits that "failed to specify any objections made to any of the invoices"); Emery Celli Brinckerhoff & Abady, LLP v. Rose, 111 A.D.3d 453, 453–54 (1st Dep't 2013) (summary judgment granted on account stated claim when plaintiff showed that defendant "'received, retained without objection, and partially paid invoices without protest'").

[7] See Berkman Bottger & Rodd, LLP v. Moriarty, 58 A.D.3d 539, 539 (1st Dep't 2009) ("Defendants' contention that they orally objected to the amounts billed are facially insufficient to establish that they protested the invoices."); Cohen Tauber Spievak & Wanger, LLP v. Alnwick, 33 A.D.3d 562 (1st Dep't 2006) ("'bald conclusory allegations of fraud, mistake and other equitable considerations are insufficient to defeat a motion for summary judgment'" on account-stated claim).

[8] See Emery Celli Brinckerhoff & Abady, LLP v. Rose, 111 A.D.3d 453, 454 (1st Dep't 2013) ("[i]t is not part of a plaintiff's prima facie case on a claim for an account stated to show the reasonableness of the retainer agreement or its legal services").

[9] See Cohen Tauber, 33 A.D.3d at 562–63 (client's act of "'holding the statement without objection will be construed as acquiescence as to its correctness'") (citation omitted).

[10] See Morrison Cohen Singer & Weinstein, LLP v. Ackerman, 280 A.D.2d 355, 356-57 (1st Dep't 2001) (malpractice claim was not "so intertwined" with, and thus did not preclude grant of summary judgment on, account stated claim because "vast majority, if not all, of the alleged conduct on plaintiff's part, which forms the basis of the malpractice claim, occurred prior to the billing period covered by the invoices in question").