



How to Get Paid in a Fee Dispute

Playing Offense in a World of Defenses

By Jocelyn R. Nager

Changing times and business practices are making it harder for professional advisors to get paid. The stack of past due accounts gathering dust in many CPA offices is increasing. Whatever the reason might be, the reality is that some clients pay and others do not. How can CPAs recover monies owed in such an economic landscape? In short, by being proactive and following good credit policy, CPAs can maximize their chances of getting paid by anticipating issues that can arise in fee dispute cases. Understanding the most popular

defenses in a fee dispute case will allow a CPA to anticipate the client's excuse for not paying and, by doing so, increase the rate of recovery on in-house collections.

Malpractice

Malpractice is a popular recourse of clients when CPAs attempt collection of unpaid fees. Liability carriers have gone to great lengths to dissuade CPAs from enforcing their right to be paid, convincing the firm that a counterclaim is certain. This author, however, has handled claims to recover accounting fees for more than 25 years,

and an internal audit of past litigation reveals a defense counterclaim of malpractice in fewer than 10% of cases. Firms should independently audit all claims, checking for irregularities or a possible malpractice defense before placing them for collections. Internal procedures and controls, as well as an independent evaluation of the file before sending it to the legal department, should predict the likelihood of malpractice. If chances of a counterclaim are great and the client's business is not in jeopardy or closing, consider waiting until the statute of limitations has lapsed before proceeding. Once the statute has lapsed, the former client loses the ability to counterclaim and the allegation will serve as a possible offset only.

Doctrine of Unclean Hands

The consequences of any bad behavior on the part of the firm may mean forfeiting the right to be paid. The "doctrine of unclean hands" can prevent a party from benefiting from their own negative actions. If a party acted dishonestly or fraudulently with respect to the claim, the courts may deny the creditor's right to be paid, in whole or in part.

Accord and Satisfaction

Sometimes, a CPA makes it clear in writing to the customer that he will not pursue future payment, accepting a past payment as payment in full. Other times, a CPA receives payment from the customer for less than the full amount due, but the customer clearly intends for the payment to represent "payment or settlement in full." According to New York State law, accepting payment that is in some way marked "payment in full" may qualify as an "accord and satisfaction," that is, full resolution of the outstanding balance. If such an accord is not explicitly understood, the CPA should contact counsel before negotiating payment.

Usury

Entering into a payment agreement with a former client that includes interest in the unpaid balance may impact ability to collect due to usury laws. Usury is the charging of interest above the legal limit that can be charged on personal loans. Although the defense of usury is usually inapplicable in a commercial case, it does apply to consumer claims. CPAs should be aware of usury laws, as they are strict and can vary from state to state. New York's usury law provides that if a loan is less than \$250,000, the interest rate cannot exceed 16%.

Failure To Perform Properly

The creditor bears the burden to prove that the services were rendered properly; only then does the burden shift to the non-paying client. CPAs should keep sufficient documentation to support a position that services were indeed rendered properly.

Unauthorized Services

Clients may claim that they never authorized the services billed. An engagement letter should specifically state the services to be provided for the client. In the event the scope of work is limited or enlarged, the engagement letter should be amended and signed by the client. The four corners of the agreement will speak for themselves.

Billed for Services Not Rendered, Exaggerated, or Overcharged

On occasion, a client may accuse a CPA of overcharging, exaggerated billing, or billing for services not performed. In this case, the burden of proof again rests on the CPA creditor. To protect against such a claim, the engagement should be thoroughly documented. Account for time spent with a contemporaneous detailed entry for work performed. Review notes and check for duplicate entries before billing the client.

Failure To Disclose Fees and Present a Written Agreement

Sometimes an engagement moves forward quickly and there is not sufficient time to complete the paperwork in advance. This step is not worth skipping, and in the digital age, there is no reason to do so. CPAs in a rush should use a preformatted engagement letter. (CPAs not in a rush should set aside time to create a library of such letters for future use.) The letter can then be e-mailed to the client to be signed and e-mailed back with a wire for the retainer. Work on the engagement can wait an hour or two.

Barred by Statute of Limitations

In New York, the statute of limitations to recover for professional services is six years. After this time, payment is not recoverable, so the longer one waits to pursue payment, the greater the risk. The client may go out of business, or engagement partners or other necessary witnesses may move on to another firm—all of which can impede a successful collection.

A client's on-account payment or acknowledgment of the debt in writing may restart what is known as the limitations period. Extending (or "tolling") the limitations period is not automatic. The payment must be made under circumstances where it can and will be deemed an acknowledgment of the entire debt or a portion thereof. Payment records on all accounts should be maintained. You never know when a partial payment will save the day by preserving the debt for collection.

Failure To Satisfy a Statutory Condition Before Commencing Suit

An engagement letter may provide that notice of nonpayment, mediation, or arbitration is required prior to a suit commencing. If any such requirement is not satisfied prior to suit, the case can be dismissed on motion by the nonpaying cus-

tomor or by the judge at any time during the litigation.

Doctrine of Laches

Whenever possible, avoid late billing. Granted, sometimes prompt billing is not possible—perhaps a job has not been closed out or a partner has not submitted his time and an invoice or two falls behind. Nevertheless, late billing can affect the outcome of future debt collection litigation. If the invoices were not sent in a timely manner, the debtor may have a valid defense in a suit to recover a long past-due balance. This defense, known as the Doctrine of Laches, allows the client to win because of the CPA's late billing.

Be Proactive, Get Paid

Most of the standard fee dispute defenses can be avoided through simple means. The engagement letter should delineate the scope of work, the agreed fee, the term of the engagement, and a favorable fee dispute clause for the CPA. The retainer should be signed and returned, with a retainer, before work begins. Good communication throughout the engagement will also facilitate payment. And of course, bills should be sent on time and in accordance with the engagement letter. □

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