

## THE UNPLEASANT REALITY OF MONEY AND TRUST ACCOUNT BALANCES: OUR POLICIES

In addition to being a professional calling, the practice of law is a business. We cannot remain as attorneys of record without a sufficient retainer balance; this is an attempt to explain why, for existing and prospective clients.

### I. WE CANNOT WORK “ON CREDIT”

Unfortunately, it is not possible for us to continue working on a case “on credit,” even with a “promise” that the bill will be paid when the case is completed. As a small firm, we have to rely on every case paying its own way to allow our employees and creditors to be paid each month. Even one case falling behind can create problems.

Asking us to continue working without being paid is no different than any employer asking an employee to continue working for weeks or months without receiving a paycheck – with the “promise” that his wages will be paid sometime down the road. Such an employee would be hard pressed to pay his mortgage, electric bill, and put food on the table. In this scenario, we are the employee, and promises don’t pay bills.

Or, put another way, just how much in groceries do you think you can get from Vons based on the promise to pay for them sometime later? Practicing law is a business, as well as a profession. If we don’t pay our employees, they don’t work; if our clients don’t pay us, we can’t keep the doors open.

The harsh reality is that litigation is risky business, often very expensive, and with an uncertain result. That is why all of our retainer agreements, for decades, have included the statement, in bold print, that **“It is understood that it is impossible to predict how long a case will take, how much it will cost, or what the resulting outcome may be.”**

This is not a new situation. Ambrose Bierce defined a “litigant” 100 years ago as “A person about to give up his skin in the hope of retaining his bones.” The risk is the client’s, and cannot be shifted to us. We are lawyers, not lenders. Besides being prohibited by the ethical rules, it would strain and distort the attorney-client relationship for us to be both your advocate and your creditor.

Both attorney and client have responsibilities to one another. At its simplest, the lawyer’s task is to competently and diligently perform legal work, and the client is to make decisions as to the objectives of representation, cooperate and assist in preparing the case, and provide the funds necessary for the legal work being requested. Both attorney and client have to meet their respective obligations.

We ordinarily expect that our trust account balance for each client will have sufficient funds for at least two months’ anticipated work, and when the retainer becomes too low, we are forced to ask the client to make some hard choices. You don’t have to *like* your available options, but you have no choice but to live with them.

## **II. ALTERNATIVE METHODS FOR RAISING FUNDS**

Essentially, you should give priority to ensuring you have funds with which to keep counsel employed on your behalf. Consider using credit cards, lines of credit, signature loans from banks, etc. Or borrowing money from family members, friends, or acquaintances who might help out. But you cannot ask us to finance your litigation.

There might be funds in house equity which can be “pulled out” through a refinance or a home equity line, or borrowed from savings or retirement accounts. Presuming only marital or community property funds exist, and your spouse refuses to cooperate in borrowing or withdrawing the funds, it is possible that relief could be ordered by the Court, by way of an order of preliminary or interim fees and allowances.

We typically discuss with our clients whether this is necessary or advisable at the original consultation, or as the situation arises. But if the relief is not ordered, we will have to withdraw. And if it is ordered, you should presume that any funds ordered will count against your ultimate share of the total assets to be distributed, essentially as an advance on your final settlement.

## **III. SETTLEMENT OF A CASE**

If you are low on funds, but have enough retainer to try to negotiate a settlement, we are always willing to assist.

We approach every case with the thought of both settlement and litigation to conclusion, so if you are in the position where your retainer is depleted, presumably the parties have already found themselves at impasse. If so, moving to settlement may will require your willingness to compromise a position previously taken in order to reach a swift settlement. Also be aware that some opposing parties and sometimes even opposing counsel are unwilling (or unable) to negotiate a settlement in good faith, so that the attempt could end up just wasting time and money.

Settlement negotiations can be attempted at any stage of the litigation. On one hand, sooner is often less costly than later. On the other, settlement discussions often cannot be meaningfully held until sufficient discovery has been done to determine the validity of an offer. Both sides have to be comfortable with their knowledge of what is at stake, or it becomes a matter of a “pig in a poke” – settlement reached without full knowledge of the costs and benefits, which we rarely advise.

Settlement can be attempted through correspondence, or meetings with the other side, or with the assistance of a mediator. If both sides are willing (or the Court orders the attempt), the Court may use a Senior Judge to sit as a Settlement Judge and set a time and date for a Settlement Conference. There are also private mediators available for a flat or hourly fee.

#### IV. UNBUNDLED SERVICES

Another possible way that the firm could help is by withdrawing from the case as counsel of record, but continuing to help you with some tasks, paid task by task as the need arises. You could hire us unbundled for specific tasks, and/or pay us an hourly fee for just advice (much in the way we handle our consult fees). For example:

- A. You receive a *Motion* from the opposing party.
  - 1. We could advise you on how to respond, and when your deadlines are.
  - 2. You could pay our Document Preparation Service (“DPS”) to put your response in proper format (note: you would be required to write the response, we would only format it correctly).
  - 3. You could hire us “unbundled” to respond to the *Motion* and/or to appear at the hearing.
  
- B. You need information from the opposing side.
  - 1. We could suggest in consultation ways to obtain information (such as documents) from the other side through discovery requests or the drafting of Subpoena Duces Tecum to specific entities from which you need information (such as credit card agencies or banks).
  - 2. You could pay DPS to format discovery requests for you (note: you would be responsible for determining what to request).
  - 3. You could hire us “unbundled” to execute your discovery requests for you.
  
- C. You are served with discovery requests or a Notice of Deposition.
  - 1. We could suggest ways to answer the requests or how to prepare for a deposition.
  - 2. You could pay DPS to format discovery responses for you (note: you would be required to determine what those answers will be).
  - 3. You could hire us “unbundled” to execute your discovery responses for you or to attend your deposition and help you defend.

Requests for any such unbundled services go through our Firm Administrator.

#### V. WITHDRAWAL OR SUBSTITUTION

If you just cannot raise the money to replenish your retainer, or choose not to do so, you can ask our office to cease working on your case. Depending on the status of your case, withdrawal could be easy or complicated. If there is nothing pending before the Court, we could simply file a Notice of Withdrawal as Attorney of Record. If however, litigation has begun, we would need to file a *Motion* requesting the Court to allow us to withdraw. If it is too close to trial, the Court might not even allow our firm to withdraw, even if that is what you and we wish to have happen.

Assuming that it is permissible for us to withdraw, you have the options of having another attorney substitute into the litigation in our place, or choose to represent yourself in proper person (otherwise known as “*pro per*” or “*pro se*”).

There are pros and cons to each choice. Hiring new counsel may cost even more money, since new counsel will probably require a new retainer, and substitute counsel always has to review the case history (on your dime) to get “up to speed” on your case.

On the other hand, litigating in proper person can be a very unpleasant experience, especially if you have skilled counsel on the other side. Judges are not permitted to assist you, even when you have no attorney. A *pro se* litigant is treated the same as one with an attorney – you are required to know, understand, and follow the same rules, prepare the same documents, and obey the same time constraints.

## **VI. CONCLUSION**

In a perfect world, we would not have to be concerned about money while addressing our clients’ concerns. But in the real world, we have a mortgage, payroll, etc. – just like everyone else. And it takes cash – not promises of someday being paid for work desired today – to keep this firm a viable, going concern. We hope the above is helpful in explaining how and why. Of course, if you have any questions on any aspect of our financial policies, please ask them of our Firm Administrator.