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THE UNPLEASANT REALITY OF MONEY AND TRUST ACCOUNT BALANCES

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 an 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 that 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, 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 that you have funds with which to keep counsel employed on your behalf. Consider using credit cards, lines of credit, signature loans from banks, or borrowing money from family members, friends, or acquaintances who might help out. But your 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 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 any 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. If you are unable to maintain the required retainer account balance. 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 an impasse. If so, moving to settlement may well 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, 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. 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 upon the status of your case, we may be able to file a Notice of Withdrawal, we may have to file a Motion requesting the Court to allow us to withdraw, or we may file a Substitution of Attorney should you decide to retain other legal counsel.

Q & A

WHAT IS A RETAINER?

A retainer is money you give to an attorney that is placed in a client trust fund. The attorney only earns the money after they perform work on your behalf.

AFTER THE RETAINER, WHEN DO I PAY MORE?

Each month you will receive a billing statement for the amount billed on your account that month. You will be responsible for "replenishing" your retainer in the amount billed, which will bring your retainer back to the required level.

EXAMPLE:

1. Client pays initial $8,500 retainer

2. Client's bill the first month is $2,400.00

(all accounts are reviewed regularly)

3. Attorney draws $2,400.00 from client's trust as compensation for work performed

4. Client replenishes by the end of the month

WHAT HAPPENSTO THE RETAINER AT THE END OF MY MATTER?

At the conclusion of your matter, your retainer is refunded to you. This is true if your matter concludes by trial, settlement, you choose to find another attorney, or you choose to abandon your case. The money is held in trust and is yours until earned.

WHAT IF MY MATTER IS ALMOST OVER, WILL I STILL NEED TO REPLENISH?

In certain cases, where a matter is nearly concluded and the attorney determines the money in retainer is sufficient to finish the matter, the attorney may inform the client there is no longer a need to replenish the retainer. This is subject to the attorney's discretion and may be revoked if circumstances change requiring additional unexpected legal work (such as a settlement falling through).

CAN'T YOU JUST CHARGE ME A FLAT FEE?

Generally no. Family law matters are impossible to determine the exact scope of work. Every case is different and you cannot account for the scope of work for a case that often spans 6 - 18 months. There are also factors completely out of our control, such as:

1) The Judge: a Judge can drag proceedings out by setting numerous return hearings, not setting trial efficiently, or setting additional procedures.

2) The Other Party: The other party can be unreasonable, file frivolous motions, and otherwise be a nuisance.

3) The Other Attorney: Same as other party.