

But I Haven't Been Paid!

By Sara Rittman

Non-paying clients create perennial problems for attorneys. In these times when clients may believe they have more important priorities for their funds, the problem is likely to grow. In addition to economic problems, non-paying clients present several ethical issues for attorneys.

1. SHOULD I CONTINUE REPRESENTING THE CLIENT?

Start asking this question soon after your client gets behind in payments. Don't procrastinate. Often, attorneys continue with the representation, hoping that the client will eventually pay. While some latitude for late payments may make good sense, when late payments turn into non-payment, you really must reassess the representation.

You should make sure the client understands that withdrawal is an option you have. Ideally, the fee agreement covers this fact. Regardless, late payments present a situation in which you should advise or remind the client that you may withdraw if the client does not live up to the client's obligations.

Once you have advised or reminded the client, you should begin considering withdrawal. Although an attorney may withdraw due to the client's failure to meet the client's obligations, under Rule 4-1.16(d) the attorney "shall take steps to the extent reasonably practicable to protect a client's interests." As a result, you may not allow a late payment or non-payment situation to continue and then withdraw at a critical point in the representation.

For example, you take a case on an hourly basis and expect payment on a monthly basis. The client pays promptly

the first few months but, after a while, the payments start coming in later and later. Eventually, after nine months, the client does not make any payments. You should have cautioned the client about the possibility of withdrawal when payments started coming late. By the time the payments stopped, if not earlier, you should consider withdrawal. You may withdraw at this point if no deadlines or significant events are imminent. However, the longer you wait, the greater the likelihood that deadlines or events will be too imminent for you to withdraw ethically. If you wait, based on the client's continued promises and pleas, you may suddenly realize that trial is imminent and withdrawal may no longer be permissible.

If you seek leave to withdraw when payment problems begin to develop and that action prompts the client to pay, you can always choose not to proceed with withdrawal. You can always withdraw the motion seeking leave to withdraw. If a motion to withdraw doesn't prompt payment, you have probably just cut your losses.

You may be tempted to simply stop working on the case, if the client stops paying. Don't do it. That approach may seem fair, but you still have a duty of diligence under Rule 4-1.3. The duty of diligence continues even if the client is not paying. Your choices are to continue diligent representation or withdraw.

2. DO I HAVE TO GIVE THE CLIENT THE FILE?

Once you withdraw, you will need to provide the client with the file. You may not withhold the file in order to force payment. The original file belongs to the client, cover to cover. *In the matter of Cupples*, 952 S.W.2d 226, 234 (Mo

banc 1997). *See also*, Formal Opinion 115, as amended. Formal Opinion 115, as amended, can be found in an article at www.mo-legal-ethics.org > Articles > File Retention and Relinquishing to Client.

You must give the original file without charge within a reasonable period of time after request. However, you are not required to provide the client with items in the file for which you have paid out of pocket, until you are reimbursed. Common examples include copies of medical records and transcripts. You may make a copy of the file for your own records at your own expense. The Rules of Professional Conduct do not require you to keep a copy of the file. However, it may be advisable to maintain a copy for various reasons.

3. WHAT ABOUT SUING THE CLIENT?

The Rules of Professional Conduct do not prohibit you from suing a client for fees once you have stopped representing the client. However, Rule 4-1.5(f) provides: "When a fee dispute arises between a lawyer and a client, the lawyer shall conscientiously consider participating in the appropriate fee dispute resolution program. This does not apply if a fee is set by statute or by a court or administrative agency with authority to determine the fee." As alternate dispute resolution programs, fee dispute resolution programs have some advantages over litigation.

If you are in the Kansas City area, you can find information about the KCMBA fee dispute program at www.kcmba.org. In the St. Louis area, information about BAMSL's program can be found at www.bamsl.org. For the remainder of the state, information about The

Missouri Bar's program can be found at www.mobar.org.

You may disclose information, to the reasonable extent necessary, to support your position in a fee dispute or lawsuit related to fees. Rule 4-1.6(b)(3) allows for such disclosure of confidential information "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client."

Although lawsuits over fees are permitted, they frequently spawn counterclaims, disciplinary complaints, or both. You should consider these factors into consideration when deciding whether to sue.

4. SHOULD I HAVE TAKEN THE CLIENT IN THE FIRST PLACE?

Sometimes it is obvious, at the outset of the representation, that the client will be unable to afford all of the attorney fees necessary to complete the matter. If the client comes up with an inadequate amount but tells you that's all there is, you have several choices: (1) You may decline the representation. (2) You may agree to limited representation, based on

the amount the client can pay, if some portion of the client's goals can be accomplished through limited representation. Rule 4-1.2 governs limited scope representation. (3) You may accept the case for a reduced fee or no fee. If you are going to do *pro bono* work, it should be a conscious choice. (4) You may accept the case and hope that the client will somehow come into money during the representation and will choose to pay you with that money. Of course, this seldom occurs, leading to the question of whether to continue representing the client.

5. HOW CAN I AVOID THESE PROBLEMS?

The best way to avoid non-payment problems is to require pre-payment. You may require the full fee in advance or, more likely, require payments before you earn the fee, as the case progresses. In other words, you should always keep the client's payments at a level that you will owe the client some level of refund when the representation ends. If the client is unable to obtain the funds to pay

you in advance, is there a rational basis for believing the client will be able to pay you later? In some situations, there may be a rational basis to believe that the client will have more funds in the future. Even then, you must decide whether you want to be the one to finance the client or whether you should insist that the client obtain financing from other sources.

CONCLUSION

It may be difficult to turn away a client who has some money or to withdraw from representing a client with whom you have been working. The choice is yours. The choice should be made early and with thoughtful consideration. Waiting until too late may result in work for no fee and loss of the option to withdraw.



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