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PROFESSIONAL CONDUCT

A Column for Tough Economic Times: What the Rules Say About Getting Paid

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Special to the Legal

The economy is getting worse by the day, but you don't need us to tell you that. Your growing list of receivables tells you more than enough. Your good payers are becoming slow payers, your slow payers are becoming no payers. What's a lawyer to do?

First, can you withdraw from a representation where the client fails to make payment for services rendered? According to Pennsylvania Rule of Professional Conduct 1.16(b), a petition to withdraw can apply when "the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled"; where "the representation will result in an unreasonable financial burden on the lawyer"; or where "other good cause for withdrawal exists." One caveat though: If the court denies your petition to withdraw, under Pa. R.P.C. 1.16(c) you are required to continue the representation despite the lack of payment.

Assuming the court grants your petition to withdraw, the rule asserts that you must, to the extent reasonably possible, protect the client's interests by, for example, "giving reasonable notice to the client"; "allowing time for employment of other counsel"; "surrendering papers and property to which the client is entitled"; and "refunding any advance payment or fee or expense that has not been earned or incurred."

Can you ask the client for security for your fee? Obtaining a judgment note from a client in favor of a firm constitutes a business transaction, and, therefore, the requirements of Pa. R.P.C.



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1.8(a) must be met before such a transaction is permissible. Pa. R.P.C. 1.8(a) states that a lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless: the transaction and terms on which the lawyer acquires the interest are fair and fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client; the client is advised and is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and the client gives informed, written consent. These requirements must also be met if you wish to include a provision of

your fee agreement, which provides that you may ask your client to execute a judgment note for unpaid fees. (See *Phila. Bar Ass'n Op. No. 91-5* (1991).)

Another route is suggested in Comment 5 to Pa. R.P.C. 1.5. The comment advises that "[i]f a procedure has been established for resolution of fee disputes, such as arbitration or mediation procedures established by the bar, the lawyer should conscientiously consider submitting to it." Of course, a lawyer and client may always choose arbitration or mediation by mutual agreement when a fee dispute arises.

In Pennsylvania, fee disputes are generally handled at the county bar level. The Philadelphia Bar Association has a fee disputes committee that was created to resolve, out of court, disagreements about fees between clients and lawyers. There are two methods of resolution available through the committee: mediation, in which a mediator facilitates airing out the issues and fosters an atmosphere conducive to amicable resolution of the fee dispute; and arbitration, where each side is heard and a binding decision is rendered by either a sole arbitrator or a panel of arbitrators. You can find the forms for initiating a fee dispute on the Web site of the Philadelphia Bar Association.

While the fee disputes committee has no legal authority to require a responding party to participate in the program, an arbitration or other ADR provision may be included as part of a fee agreement. These clauses give rise to pecuniary interests adverse to the client and, therefore, trigger the disclosure and consent requirements of Pa. R.P.C. 1.8(a). According to Pa. Bar Ass'n Comm. on Legal Ethics and Prof. Resp. Op. No. 97-140 (1997), the inclusion of an arbitration or other ADR provision

is permissible as to both sophisticated and unsophisticated clients, so long as the advantages and disadvantages of the provision are fully disclosed in the attorney's engagement letter. Unlike many jurisdictions, Pennsylvania does not require independent counsel for the client to assist them in understanding the terms of an arbitration or ADR provision in a fee agreement, so long as Pa. R.P.C. 1.8(a) has been complied with. (See Phila. Bar Ass'n Op. No. 91-5 (1991).)

In New Jersey, there are 17 district fee arbitration committees, but they are more geared toward clients than lawyers. If a client files for fee arbitration, an attorney is required to submit to it. However, if the fee committee determines that the client owes you money, you will be able to enter judgment in court if the client fails to pay within 30 days.

How about an old-fashioned retaining lien? Pa. R.P.C. 1.8(i) states that a lawyer shall not acquire a proprietary interest in a cause of action that the lawyer is conducting for a client, except that the lawyer may acquire a lien granted by law to secure the lawyer's fee or expenses." Pennsylvania recognizes two kinds of attorneys' liens: a retaining lien and a charging lien.

A retaining lien permits a lawyer to retain money, papers or other property in the lawyer's possession to secure payment of costs and fees from the client. Before asserting this lien, the attorney should consider whether withholding such property would cause substantial prejudice to the client. If the answer is yes, the lawyer should return the client's papers and property and commence a suit for the recovery of fees instead. Lawyers should also remember that a retaining lien is passive and does not grant them any right to sell or otherwise dispose of the property in their possession. In addition, once a client has

paid for the creation of a legal document, like a will, and it is placed in the client's file, it is the client, rather than the attorney, who holds a proprietary interest in the document. (See Pa. Bar Ass'n Comm. on Legal Ethics and Prof. Resp. Op. No. 94-35 (1994).) Also, in a contingency matter, the lien may not be asserted until after the happening of the contingency.

Charging liens are divided into two sub-categories: equitable charging liens and legal charging liens. Equitable charging liens give the lawyer a right to be paid out of a fund in the control or possession of the court, when the fund resulted from the skill and labor of the lawyer; such payment may be applied only to a particular case. Legal charging liens apply to funds of a client in the lawyer's possession and may be applied to all outstanding debts of the client owed to the lawyer. A careful examination of Pa. R.P.C. 1.15(f) is required here. The rule permits an attorney to withhold monies that are equal to the fee claimed until resolution of any dispute with the client over the fees. However, the attorney should not assert a lien against more assets of the client than the amount to which they believe they are entitled, and, if there are additional amounts in the attorney's possession, it should be disbursed to the client immediately. Furthermore, because the assertion of a charging lien presents a conflict of interest, the lawyer should only seek to enforce his lien in court after advising the client that he should seek other counsel and allowing the client a reasonable opportunity to find such counsel. (See Pa. Bar Ass'n Comm. on Legal Ethics and Prof. Resp. Op. No. 94-35 (1994).)

Finally, there is no rule against an attorney suing their client for unpaid fees and expenses. New Jersey Rule of Court 1:20A-6, however,

does require that an attorney give pre-action notice to a client at least 21 days before filing a lawsuit to recover fees. The pre-action notice must be given in writing and contain the address and telephone number of the secretary of the fee committee in the district where the lawyer practices and must inform the client of the right to request fee arbitration.

We suggest that you think carefully before suing a client for unpaid fees. If the client isn't paying the bill because you didn't serve him well, then taking him to court might make him more likely to turn litigious himself and sue for malpractice. Although Pennsylvania hasn't said so explicitly, several other jurisdictions have told their attorneys to save the lawsuits until after they have either successfully concluded the representation or been allowed to withdraw.

The difficult truth is that more of us are going to be writing off receivables this year, straining our client relationships, our wallets and our psyches. We expect a corresponding uptick in petitions to withdraw, fee disputes and lawsuits to recover unpaid fees. If you find yourself in the unenviable position of having to select one of these remedies in the coming year, remember to first consult the rules and your fee agreement and carefully consider the potential ramifications of your election.

This may be a bit off topic, but recently we've been consulted by several lawyers who are in trouble professionally, financially or emotionally. In these tough economic times, your friends and colleagues need your support more than ever. Our last piece of advice for this month is: Take a lawyer to lunch, and ask what you can do to help.

Litigation associate Renada Rutmanis assisted with the research and drafting of this article. •