

## Can a Lawyer Go on Strike?

If a client doesn't pay fees, it's better to continue working or step away completely.

It is a well-recognized point of legal ethics that a client's failure to pay agreed-upon fees can provide a permissible basis for a lawyer to withdraw from a case, or to move to withdraw when a case is pending in court. Does it follow that a client's nonpayment of fees can justify a lawyer's taking the seemingly less drastic step of ceasing work on the matter until the client becomes current in his or her fee obligations?

According to a recent opinion of the Rhode Island Supreme Court's Ethics Advisory Panel, citing a similar ruling in Missouri, the answer, somewhat surprisingly, is no. (*See* R.I. Opinion 2003-8 and Mo. Informal Opinion 2000172.)

The issue in the Rhode Island opinion was whether a temporary

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Ethics

work stoppage can be included in a retainer agreement as an option an attorney may pursue. Thus, the opinion means such a procedure may

be impermissible, even with a client's express agreement.

This rather counterintuitive conclusion may surprise many lawyers who would assume that a client's failure to meet its obligation to pay should relieve them of any obligation to work on a case until the arrearage is satisfied. In fact, many lawyers view such a work stoppage as an act of forbearance, in lieu of the draconian step of outright withdrawal, that gives the client a chance to make up the arrearage.

While there is no definitive ruling on this issue in D.C., Rhode Island and Missouri make a good point: The Rules of Professional Conduct require that lawyers be diligent in matters they undertake (Rule 1.3). The rules include a procedure for withdrawal under specified circumstances (Rule 1.16), but they have no provision for, in effect, "going on strike."

The Rhode Island ethics panel stated that a lawyer must either remain in the case and work with the required diligence, or withdraw. It found that a provision in a retainer agreement allowing the half-in-half-out approach is impermissible, stating: "Unless the relationship is terminated, a lawyer should carry through to conclusion all matters undertaken for a client."

This all-or-nothing approach is also consistent with good risk management. What may seem to a lawyer to be a bit of basic rough justice, or a more lenient approach than outright withdrawal, may make the lawyer vulnerable to a more costly problem.

If something goes wrong in the case, a lawyer who stays involved but takes a de facto "inactive" status has no legal basis for pleading the client's nonpayment as a justification for failing to act within the standard of care.

It is problematic for a professional in any field of endeavor to be only tangentially or partially involved in any undertaking.

Therefore, the best course of action is to make a decision to withdraw or not withdraw. Like a lifeguard at the beach, you are either on duty and fully vigilant, or you are off duty.

Mark Foster, a legal ethics expert at Zuckerman Spaeder, says: "A client is entitled to know whether he has a 100 percent lawyer or no lawyer at all. It's very dangerous to try to be some percentage of a lawyer. In cases that turn out badly, clients don't think that they agreed to less than a 100 percent lawyer."

A clear distinction should be drawn for measures in a case, such as the retention of an expert, that require the expenditure of funds a client has agreed to lay out. A lawyer's obligation to act with diligence does not require him or her to buy things for a client, absent an agreement to do so. Of course, the lawyer should anticipate such expenditures and discuss them with clients, so they are not surprised to learn that significant sums will be required to bring a case to conclusion.

In addition, distinct issues may be implicated with respect to discrete types of representations, such as court-appointed cases, or attorneys who are employed by a legal services organization. In *Federal Trade Commission v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990), the Supreme Court reversed a D.C. Circuit decision and held that a strike by lawyers who regularly handled appointments of indigents under the Criminal Justice Act constituted an illegal restraint of trade.

In that case, the CJA lawyers merely declined to take new appointments rather than ceasing work on pending cases. Special issues may also arise in connection with lawyer-employees and their rights as "employees."

Finally, a one-size-fits-all approach may not be appropriate. Some representations, such as litigation, are time-sensitive and are more clearly affected by a lawyer spending time on the sidelines. Some transactional work may suffer no harm by a break in the action. An argument could be made for such a distinction.

As a general proposition—particularly in litigation and other time-sensitive matters, as a matter of "best practices"—lawyers should not use the "temporarily on strike" method. In the event of sustained arrearage, the lawyer should continue to be active in the matter until the precise point a withdrawal is ethically carried out.

I also believe, however, that there is enough doubt on the question that lawyers who do in some fashion cease efforts until the client makes up an arrearage should not be disciplined or otherwise sanctioned, until there is definitive authority on the point—especially when there is no urgency in the work being performed and no material harm to the client.

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