Firing a Non-Paying Client Results in Public Reprimand

An Ohio lawyer learned the hard way that lawyers get few breaks if they abandon a client rather than protecting the client’s interest when withdrawing. Equally problematic is the malpractice risk in these circumstances when a lawyer still has a client and does not know it. Typically what happens is that a statute of limitations or other time limitation is missed and the ‘abandoned client’ claims malpractice. If the client successfully established that the representation was not properly terminated, often all there is left to do is figure out where to send the check.

The Ohio lawyer agreed to represent a client facing eviction from his leased house. The agreement was that the lawyer would help the client avoid eviction and purchase the house. The lawyer requested a $1,500 retainer that was never paid. The effort to purchase the house failed because of the client’s questionable financing. At this point the lawyer told the client that he was terminating the representation for failure to pay the retainer and that he would not appear in court at the eviction proceeding. He also orally informed the landowner’s lawyer that he was withdrawing. Neither the lawyer nor the client appeared at the eviction hearing that resulted in the landowner regaining possession of the house and the client’s possessions being removed from the house.

The Ohio Supreme Court ordered a public reprimand for the lawyer focusing on the facts that showed the lawyer had accepted late payment from the client in a questionable financing. At this point the lawyer told the client successfully establishes that the representation was not properly terminated, often all there is left to do is figure out where to send the check.

Malpractice Avoidance Update

The act of withdrawal is that a statute of limitations or other time limitation is missed and the ‘abandoned client’ claims malpractice. If the client successfully established that the representation was not properly terminated, often all there is left to do is figure out where to send the check.

1. Know the Rules.
   - Paragraph (b) (4) of Kentucky Rule of Professional Conduct 1.16 (SCR 3.130) provides that withdrawal is permissible for cause if 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.
   - Paragraph (d) of Rule 1.16 provides that a lawyer withdrawing must take steps to protect the client’s interest. These steps include:
     - giving reasonable notice of withdrawal,
     - allowing time for retention of another lawyer,
     - promptly returning papers and property to which the client is entitled,
     - refunding any advance payment of fees that have not been earned.

2. Understand the Malpractice Exposure When Withdrawing.
   - Act of Withdrawal: The risk of an unjustified act of withdrawal is that the client will be considered abandoned by the lawyer. The lawyer is then exposed to liability for a claim for all damages proximately caused by the unjustified withdrawal as well as bar discipline. A Kentucky lawyer was disciplined for an unjustified withdrawal when he abruptly
closed an Eastern Kentucky office without even notifying a client.

**Manner of Withdrawal:** There is a risk even when a lawyer has justified grounds for withdrawal, if the withdrawal is done in a manner that does not adequately protect the interests of the client. An Ohio lawyer was disciplined for failing to arrange for another lawyer to represent one of her clients. The lawyer received court permission to withdraw, citing deterioration of the attorney-client relationship, the client’s failure to communicate with her, and the client’s failure to pay her fees as grounds for termination. She, however, never specifically told her client she was withdrawing. The unrepresented client then received an unfavorable judgment based on a divorce decree that contained an error.

3. Risk Manage Withdrawal Carefully.

- Always do a complete file review just before filing a suit. This is often the last clear chance to terminate a non-paying client without complications. Once a matter is before a court withdrawal becomes much more problematic.

- Whenever possible withdrawal should be a clean break – a clear-cut decision with the client’s agreement in writing. Use a disengagement letter that:
  - Confirms that the relationship is ending with a brief description of the reasons for withdrawal.
  - Provides reasonable notice before withdrawal is final.
  - Avoids imprudent comment on the merits of the case.
  - Indicates whether payment is due for fees or expenses.
  - Recommends seeking other counsel.
  - Explains under what conditions the lawyer will consult with a successor counsel.
  - Identifies important deadlines.
  - Includes arrangements to transfer client files.
  - If appropriate, includes a closing status report.
  - After sending the disengagement letter, carefully follow through on the duty to take necessary steps to protect the client’s interest and comply with all representations in the disengagement letter. This avoids a malpractice claim over the manner of withdrawal.

- A complete copy of the file should be retained. A fixed client or one that fixed you has a high potential to be a malpractice claimant. The first line of defense is a complete file with a comprehensive disengagement letter. This is the best evidence for showing competent and ethical practice in terminating a client.

For information on risk managing withdrawal in other situations read the KBA Bench & Bar article “How To Fire A Client” available on our web site at www.lmick.com – go to the Risk Management/Bench & Bar Articles page.

**What We Have Here Is A Failure to Communicate**

Editor’s Note: This article is one of a series that LawReader.com has agreed to provide for Lawyers Mutual’s newsletter as a bar service. LawReader.com provides Internet legal research service specializing in Kentucky law. For more about LawReader go to www.LawReader.com.

I have seen several recent cases concerning communications with a client or opposing party that highlight the potential bar complaints, malpractice claims, and litigation expenses that are easily avoided if only the lawyer will communicate with the right person.

In one case a lawyer prepared a lawsuit and was prepared to file it because he couldn’t get the opposing party, a state agency, to respond to his requests for assistance. The lawyer wrote, phoned, e-mailed and the state agency head in an attempt to remedy the issue for his client. The state agency head refused to respond to the letter, phone call, or the accompanying e-mail. After the lawyer concluded he wasn’t going to get a response from the state agency head, in a last ditch effort to avoid litigation he e-mailed a copy of the complaint to the general counsel for the agency informing him that the suit would be filed in three days. Within hours he received a response from the agency’s general counsel and a remedy for his client. The lawsuit was avoided – the general counsel saved his client (and Kentucky taxpayers) costly and embarrassing litigation simply by returning a phone call his client recklessly ignored.

I wonder how many times lawyers, state agency personnel, and clients refuse to answer their mail or return phone calls thereby forcing the filing of lawsuits or complaints that easily could have been avoided by a timely response. Develop some “bedside manner,” always return calls, respond to mail promptly, and be sure to communicate with the right person.

Another recent case involves a lawyer who failed to communicate an offer of settlement to her clients. It is claimed that a new offer of settlement from one party to another, and the receiving attorney rejects it without passing it on to the client. While it is possible that the client has specifically instructed the lawyer to reject any new offers, unless this has been done, the lawyer who rejects a new offer without consulting with his client is at risk for a bar complaint and a malpractice claim.

By the way, don’t forget that in Kentucky a lawyer must have actual authority to agree to a settlement for a client – another reason why all settlement offers must be communicated to a client unless the lawyer has specific client instructions covering the offer. See Clark v. Barden, Ky., 917 S.W.2d 574 (1996) that held that Kentucky lawyers do not have apparent authority to settle client suits. They must have actual authority.

**How to Avoid Complaints and Claims in Divorce Representation by Using a Comprehensive Client Communication Plan**

In their June 19, 2006 National Law Journal article "Enlightening Clients" Mary Kay Kisthardt and Barbara Handschu outline a comprehensive approach for keeping divorce clients well informed. The authors advocate demystifying the process with the following advice:

- Be sure the client understands what retainers are and what they cover. Explain in the letter of engagement as appropriate:
  - when replenishment of a retainer is required;
  - whether an additional retainer is required for a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

**Committee Note**

**Subdivision (f) Subdivision (f) is new. It focuses on a distinctive feature of computer operations, the routine alteration and deletion of information that attends ordinary use. Many steps essential to computer operation may alter or destroy information, for reasons that have nothing to do with how that information might relate to litigation. As a result, the ordinary operation of computer systems creates a risk that a party may lose potentially discoverable information without culpable conduct on its part. Under Rule 37(f), absent exceptional circumstances, sanctions cannot be imposed for loss of electronically stored information resulting from the routine, good-faith operation of an electronic information system.

The amended rules go into effect in December under the Congressionally mandated deadline which is not considered likely. The approved rules are available on the Internet at http://www.uscourts.gov/rules/Reports/STIP-2005.pdf. For more information on document retention and destruction programs read the KBA Bench & Bar article "Shredded Any Good Documents Lately?" available on our web site at www.lmick.com – go to the Risk Management/Bench & Bar Articles page.

**U.S. Supreme Court Approves Amended Rules on E-Discovery**

Amended Federal Rules of Civil Procedure on E-Discovery approved by the U.S. Supreme Court require discussion between the parties about electronically stored information in advance of the discovery process, allow for a claim of privilege for inadvertently disclosed electronic documents, and establish a ‘Safe Harbor’ from sanctions for routine destruction of electronic stored information. The Safe Harbor provision shown below is an important risk management consideration because many lawyers assist clients in developing document retention and destruction programs:

**Rule 37. Failure to Make Disclosures or Cooperate in Discovery; Sanctions**

(f) Electronically stored information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

It is a truism that every debt is ultimately paid, if not to the debtor then eventually by the creditor. **James Grant**
closed an Eastern Kentucky office without even notifying a client.

- **Manner of Withdrawal**: There is a risk even when a lawyer has justifiable grounds for withdrawal, if the withdrawal is done in a manner that does not adequately protect the interests of the client. An Ohio lawyer was disciplined for failing to arrange for another lawyer to represent one of her clients. The lawyer received court permission to withdraw, citing deterioration of the attorney-client relationship, the client’s failure to communicate with her, and the client’s failure to pay her fees as grounds for termination. She, however, never specifically told her client she was withdrawing. The unrepresented client then received an unfavorable judgment based on a divorce decree that contained an error.

3. **Risk Manage Withdrawal Carefully.**

- Always do a complete file review just before notifying a client.
- Whenever possible withdrawal should be a clean break – a clear-cut decision with the client’s agreement in writing. Use a ‘clear break’ – a disengagement letter that:
  - Is final.
  - Briefly describes the reasons for withdrawal.
  - Provides Internet legal research service specializing in Kentucky law. For more information on document retention and destruction programs read the KBA Bench & Bar article “Shredded Any Good Documents Lately?” available on our web site at www.lmick.com – go to the Risk Management/Bench & Bar Articles page.

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In one case a lawyer prepared a lawsuit and was prepared to file it because he couldn’t get the opposing party, a state agency, to respond to his requests for assistance. The lawyer wrote, phoned, and e-mailed the state agency head in vain for over a year. After the lawyer concluded he wasn’t going to get a response from the state agency head, in a last ditch effort to avoid litigation he e-mailed a copy of the complaint to the general counsel for the agency informing him that the suit would be filed in three days. Within hours he received a response from the agency’s general counsel and a remedy for his client. The lawsuit was avoided – the general counsel saved his client (and Kentucky taxpayers) costly and embarrassing litigation simply by returning a phone call his client recklessly ignored.

I wonder how many times lawyers, state agency personnel, and clients refuse to answer their mail or return phone calls thereby forcing the filing of lawsuits or complaints that easily could have been avoided by a timely response. Develop some “bedside manner,” always return calls, respond to mail promptly, and be sure to communicate with the right person.

Another recent case involves a lawyer who failed to communicate an offer of settlement to his client. It was claimed that a new offer of settlement of some 30 million dollars was made to a lawyer representing multiple clients numbering in the hundreds. The lawyer immediately rejected the offer without advising her clients, thus risking a malpractice claim.

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The Ohio Supreme Court ordered a public reprimand for the lawyer focusing on the facts that showed the lawyer had accepted late payment from the client in a prior representation, was a casual drinking acquaintance of the client at a local bar, and had not terminated the representation in writing. The reprimand was issued notwithstanding the fact that there was no evidence that the lawyer ever filed an appearance in the eviction proceeding and that the Ohio disciplinary rules do not require a lawyer to confirm in writing that a representation is terminated for failure to pay fees.

This is a harsh result by any measure and is a reflection of low probability events as being distant in time… Probability has nothing to do with time. The surprise that would upset the best-laid forecasts could be standing just around the corner.”

Maggie Mahe

"There is no defense to ‘I promise to pay’...”

Preston Carter

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