The Risk Manager

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Analyze this if you think you are malpractice proof:

"People tend to think 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 waiting just around the corner."

Maggie Maher

"There is no defense to 'I promise to pay...."

Preston Carter

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 establishes 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 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 how stringently disciplinary authorities are protecting clients' interests. Given the attendant malpractice exposure in abandoned client claims, it is essential that when withdrawing a lawyer connect all the dots and err on the side of doing too much rather than too little in protecting the terminated client's interest. What follows are some of the key things to know and do when firing a client for failure to pay fees:

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, and
  ✓ 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

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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 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 fired client or one that fired 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.

Sources for this article are Cuyahoga County Bar Assoc. v. Ballou, 109 Ohio St.3d 152 (2006); Kentucky Bar Ass'n v. Rankin, 999 S.W.2d 710 (Ky. 1999); Office of Disciplinary Counsel v. Butler, 706 N.E.2d 757 (Ohio 1999); and extracts from "How to Fire a Client," by Del O'Roark, KBA Bench & Bar, Vol. 65 No. 3 (May 2001).

What We Have Here Is A Failure to Communicate

By Retired Judge Stan Billingsley

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, and e-mailed 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.

> ***It is a truism that every debt is ultimately paid, if not by the debtor then eventually by the creditor."***
>
> ***James Grant***

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 of some 30 million dollars was made to a lawyer representing multiple clients numbering in the hundreds. The lawyer immediately rejected

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the offer without advising her clients, thus risking a malpractice claim.

The Commentary to SCR 3.130 (1.4 Communication) covers the duty of a lawyer to pass on offers of settlement to a client:

> "... A lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable. See Rule 1.2(a)...."

I have seen instances in mediations when the mediator relays 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.

"Now is always the hardest time to invest."

Barton Biggs

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. Burden*, 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.

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.

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 unless Congress disapproves them which is not considered likely. The approved rules are available on the Internet at http://www.uscourts.gov/rules/Reports/ST09-2005.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.

How to Avoid Complaints and Claims in Divorce Representations 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 trial preparation;
  - that an 'evergreen' retainer requires the client to pay bills as they accrue with the initial retainer covering final billing; and
  - that failure to comply with the retainer requirement during pending litigation will cause the lawyer to apply to the court for permission to withdraw.

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- Describe the divorce litigation process to the client orally and in writing. Provide the client an outline of the process if that is helpful. Give the client articles and publications on divorce litigation. The authors recommend the American Academy of Matrimonial Lawyers' *Divorce Manual: A Client Handbook.*

- Copy clients on all documents regarding their case including pleadings, court orders, and all correspondence. Send the client copies of memorandums for the file concerning any in-person, telephone, and e-mail communications with the courts, opposing counsel, and third parties. When forwarding documents be sure to include an explanatory letter or note to ensure client understanding. If the forwarded document requires input from the client, be sure to make that clear to the client in the forwarding letter or note.

- Promptly return client telephone calls. Establish an office procedure in which a paralegal or legal secretary returns the client's call when the lawyer is unavailable. That person should coordinate a time with the client and lawyer when the lawyer will return the call.

> ***"Liquidity is a coward; it disappears at the first sign of trouble."***
>
> ***Barton Biggs***

- Be cautious in forecasting how expeditiously the matter will proceed. Do not underestimate the time required thereby raising the client's expectations and corresponding anxiety when the process takes longer.

- If feasible, designate a paralegal or other member of the office to provide the client regular case status updates. Be sure to explain this arrangement to the client and the billing considerations; i.e., lawyer hourly fee or paralegal hourly fee.

- Inform the client about alternative dispute resolution procedures applicable to the matter. These procedures are often helpful in cases involving domestic violence.

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