

COLLECTING WHAT IS DUE

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Reprinted from *Minnesota Lawyer* (October 22, 2001)

Attorneys, like everyone else, deserve to be paid for their work. Some attorneys take earned-on-receipt fees prior to beginning representation. Some contract for a percentage of an eventual recovery, as in a personal injury action. Many attorneys get paid by billing their clients for services performed, eventually receiving payment by return mail or office visit. And many times attorneys don't get paid in full, due to disputes with clients over the bill, client relocation or other problems.

If the entire bill is not paid, what may an attorney do to recover fees owed? An attorney may bill the client and hope for the best. If representation has ceased, the attorney may certainly institute collection actions, through an agency or the court, to recover. An attorney may, under certain defined circumstances, file an attorney's lien against client property involved in the proceeding, including real estate. There are some things, however, that an attorney should not do to collect fees owed.

Consider the following scenario from a recent complaint. An attorney represented the husband in a dissolution of marriage action. After the judgment and decree was entered, the attorney billed the client for the remaining fees and expenses, including the fees of an expert witness who had testified at trial. The client made two substantial payments on the bill (in addition to fees paid during the representation), but then moved out of state and left a small balance unpaid. The client disputed a portion of the bill, and the attorney and client never reached agreement as to what additional amount, if any, was owed.

Four years later, opposing counsel sent the attorney a small check in the amount of \$250, payable jointly to the attorney and client, having discovered belatedly that she still had funds which belonged to the husband in an escrow account. (Which is another article in itself. Why did it take four years to "discover" these funds?)

What is the attorney's ethical obligation with regard to the check from opposing counsel? May the attorney deposit the check into his business or trust account in partial payment of the outstanding balance? After all, the attorney is unlikely to get paid otherwise, and in the attorney's view, the client certainly owes the money. This choice of conduct is not advised, however, and at the very least involves a violation of Rule 8.4(c) of the Minnesota Rules of Professional Conduct (MRPC), which prohibits conduct involving fraud, deceit or misrepresentation.

First of all, since the check is payable jointly, the client's signature should be required under the negotiable instruments section of the Uniform Commercial Code (UCC) to negotiate the check. The lawyer's status as former attorney does not give him the authority to negotiate checks for the client, and signing the client's name amounts to forgery. Negotiating the check without the client's name may be possible, as the bank may cash the check without both signatures, but it violates the UCC. In addition, attempting to negotiate the check with only the attorney's signature may fraudulently imply to the bank an authority to do so.

Secondly, the attorney may or may not have a lien on the funds, depending on whether the funds were client property involved in the proceeding, and whether a lien was ever asserted. Most likely, the funds against which a lien could have been asserted were divided up shortly after the decree was entered, and the attorney did not attempt to perfect a lien on any other property, not being aware of any.

Thirdly, the attorney may certainly negotiate with the client for payment of the outstanding bill with the funds received. It is quite possible this will not be successful, but you never know until you try. If they reach agreement, the attorney can make arrangements to exchange checks or to have the check signed first by the client.

The amount due to the attorney is in dispute and has not been finally determined by anyone. If the amount had finally been determined and the client simply refused payment, the attorney could take steps to assert a lien against the property, if the funds are subject to a lien, or if the attorney already had a judgment. Otherwise, since it is not the attorney's money the funds should be turned over to the client.

In the case described above, the client filed an ethics complaint against the attorney, which was sent to the district ethics committee (DEC) for investigation. The attorney's firm then sent a check to the client for \$250. The DEC investigator found there may have been a technical violation of Rule 1.15 of the MRPC, but because the attorney advised the client the \$250 check had been received and deposited, and paid the funds over to the client when the client complained, discipline was not warranted. The DEC committee found that the attorney's conduct was "very bad practice, but it did not rise to a level of an ethical violation." The Director adopted the recommendation of the DEC to dismiss without discipline, but cautioned the attorney that such self-help measures are not appropriate and could subject an attorney to discipline in some circumstances.