MANY ETHICS COMPLAINTS ARE COMPLETELY AVOIDABLE

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As any member of the district ethics committees can affirm, many of the ethics complaints filed against Minnesota lawyers by clients have as an underlying element a fee dispute. Those complaints which are received and which allege only a fee dispute are usually summarily dismissed and referred to fee arbitration. A substantial number of the complaints, however, allege both an ethics violation and a fee dispute. Such complaints result in a full investigation by the District Ethics Committee or the Director. In such cases, however, it is undoubtedly the fee dispute rather than the alleged unethical conduct which spurs the filing of the ethics complaint.

At the risk of sounding like a broken record, I again repeat the theory I have espoused for several years: many complaints of unethical conduct are completely avoidable. We neither want nor need the extra "business" generated by the complaints that are tied to fee disputes. I strongly suggest that all private practitioners read this article carefully and examine their own office practices to ensure that they are in accord with both ethical requirements and common sense.

EC 2-19 of the Code encourages a clear agreement with the client as to the basis of the fee "as soon as feasible after a lawyer has been employed." Many problems arise because of the lawyer's reluctance to raise the issue of fees at the beginning of the representation. Others raise the issue but unfortunately leave unresolved or ambiguous important terms and conditions which would be part of any clear fee agreement.

EC 2-19 advises lawyers that it is usually "beneficial" to have written fee agreements. The Lawyers Professional Responsibility Board has long encouraged written fee agreements and in some circumstances requires them. *See* Opinion 4 prohibiting withdrawal in some circumstances unless a written fee agreement gives the lawyer such a right. Written fee agreements many soon be mandatory. *See* Rule 1.5. Model Rules of Professional Conduct (May, 1981).

Fees must be reasonable. *See* EC 2-18 and DR 2-106(B) for a discussion of the factors which determine the reasonableness of a fee. I must emphasize that while a component of a fee may not itself be clearly excessive, there may still be a problem with the total fee. Thus, for example, a modest hourly rate not in and of itself clearly excessive could result in an excessive fee if that modest rate is applied against an unreasonable number of hours for the particular work performed.

Retainers are a source of confusion in many cases. Retainers which are charged to ensure the

lawyer's availability for the case may, if reasonable, be non-refundable and earned at the time they are collected. Other retainers may be advances by the client to be applied to future costs and services. Such retainers are not earned at the time they are collected and should be placed in the trust account. Withdrawals should be made only as services are performed and costs are incurred in behalf of the client. In all events, the exact nature of the retainer should be made clear to the client at the time the retainer is paid.

Withdrawal from a case may require the refund of unearned fees. *See* DR 2-110(A)(3). Where there is a dispute over the fee, a lawyer may be required to maintain the disputed portion of the fee in the trust account. *See* DR 9-102(A)(2).

Liens on client papers to secure the payment of an unearned fee are impermissible. *See* Opinion 11. Liens on the homestead of the client are questionable even where the homestead itself is the subject of representation. *See Northwestern National Bank v. Kroll*, 306 N.W.2d 104 (Minn. 1981). We will have more to say about this in the near future.

Time records, periodic billings, and accountings to clients for fee advances are common sense ways to avoid fee disputes with clients. It is surprising how many lawyers have yet to adopt these sound law office management principles.

Even the most careful lawyer will occasionally be unable to avoid a fee dispute. In such circumstances, EC 2-23 provides:

> "A lawyer should be zealous in his efforts to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject. He should not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client."

We have had cases where lawyers have quickly sued clients for very small sums. While such conduct may technically be within the letter of the law, it certainly violates the spirit of EC 2-23 and reflects badly on the profession. Discretion should be exercised before suing a client for a fee. If the matter cannot be resolved between the attorney and the client, lawyers would do well to suggest fee arbitration. The fee arbitration process is usually quicker, cheaper and less acrimonious than a lawsuit. The district bar associations and the Minnesota State Bar Association have information about fee arbitration availability and procedures.