

REPORT . . . LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

By

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We continue to receive frequent complaints about the refusal of lawyers to complete matters they have undertaken until all remaining fees are paid by the clients. Such complaints often include the allegation that attorneys have demanded, on the day of a scheduled hearing, full payment of remaining fees as a condition of appearing at the hearing.

Such complaints, the responses of attorneys to them, and the inquiries of other attorneys seeking ethical advice, make clear that many lawyers erroneously believe that they have the right to condition completion of their representation of a client upon receipt of full payment of the fee. Both the Code of Professional Responsibility and its interpretation by the Lawyers Professional Responsibility Board limit carefully the circumstances in which a “no fee — no services” withdrawal is permissible.

Disciplinary Rule 7-101(A)(2), Code of Professional Responsibility, provides:

“A lawyer shall not intentionally

- (2) Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR 2-110”

Disciplinary Rule 2-110(C)(1)(f) does permit an attorney to withdraw or to seek the permission of a court to withdraw if a client “deliberately disregards an agreement or obligation to the lawyer as to expenses or fees”. Even if DR 2-110(C)(1)(f) is applicable, the lawyer is still required under DR 2-110(A)(2) to take:

“ . . . reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.”

Problems frequently arise when the lawyer has accepted an initial retainer from the client, performed substantial services, and then seeks to obtain payment of the remaining fee prior to completion of his representation. For example, an attorney may accept an initial retainer in a marriage dissolution case, commence the action, represent the client in the settlement negotiations, prepare the final papers, and then,

as a condition of appearing at the final hearing, demand full payment of the remaining fee. Opinion No. 4, Lawyers Professional Responsibility Board (October 12, 1973), held:

“It is professional misconduct for a lawyer, having accepted a fee to represent the client, to refuse to proceed with the client’s matter until any remaining fee is paid in full unless the client has failed to honor an agreement or obligation to the lawyer as to expenses or fees. If the attorney raises the client’s failure to honor a fee agreement as a defense for his failure to proceed, the agreement must be established by clear and convincing evidence or be in writing, signed by the attorney and the client.”

Where the attorney believes that payment of the fee may be a problem, there is nothing to prohibit him from requiring that it be paid in advance of representation. If, however, continued representation of the client is to be conditioned upon periodic payment during the course of representation, such a condition should be in a written fee agreement, signed by the attorney and the client. If such agreement is not in writing, the attorney will have the burden of demonstrating its existence by clear and convincing evidence. Finally, even if withdrawal is permitted under Opinion 4 and DR 2-110(C)(1)(f), the attorney is still required to comply with the DR 2-110(A)(2) requirement that he take reasonable steps to avoid foreseeable prejudice to the rights of his client. Attorneys who make threats of withdrawal and demands for full payment on the court house steps on the day of a scheduled hearing, or at other times when the absence of counsel may prejudice the client, will be expected to demonstrate their compliance with the foregoing provisions of the Code and Opinion No. 4 of the Board.