
**E-95-4 Lawyer self-help in enforcing fee
agreement with clients**

Question

Assuming that a lawyer and client have entered a fee agreement that complies with SCR 20:1.5 and that the client has failed to remain current in payments of the lawyer's fee, may the lawyer use the following self-help remedies to collect the fee: 1) continue the representation but withhold some or all services (e.g., postpone a final hearing on a divorce) until satisfactory payment arrangements are made; 2) withdraw from representation; and 3) if the lawyer withdraws, retain the client's file until satisfactory payment arrangements are made?

Opinion

Opinion E-80-8 addressed some of the issues presented in the question, but the Committee on Professional Ethics believes that these issues should be revisited given the subsequent adoption of the Wisconsin Rules of Professional Conduct. Opinion E-80-8 is hereby superseded.

The Rules of Professional Conduct and related law demand that lawyers provide high quality legal services consistent with the objectives of the representation. It is highly offensive to the letter and spirit of the Rules for lawyers to withhold appropriate services in a continuing lawyer-client relationship in order to pressure the client into meeting fee obligations owed to the lawyer. For example, the duties of competence, imposed by SCR 20:1.1, and diligence, imposed by SCR 20:1.3, leave no room for intentionally diminished services by the lawyer. The conflict of interest provisions in SCR 20:1.7(b) expressly require the avoidance of harm to clients caused by conflicts between the client's interests and the lawyer's interests. As long as the representation continues, the lawyer owes the client the duty to exert her best efforts in the client's interests consistent with the nature of the representation agreed upon.

Although lawyers are prohibited from withholding services from a continuing client in order to pressure the client into paying the lawyer's fee, the lawyer need not continue indefinitely in the representation if the client has breached fee

obligations. As a general matter, SCR 20:1.16(b)(4) permits a lawyer to withdraw from representation if the client “fails substantially” to fulfill a fee obligation to the lawyer and the client has been given a “reasonable warning” that the lawyer will withdraw unless the obligation is fulfilled. Two significant limitations, however, operate upon this right to withdraw. First, if a court or other tribunal orders the lawyer to continue in the representation, withdrawal is not permitted. *See* SCR 20:1.16(c). Second, upon withdrawing from representation for nonpayment of a fee, a lawyer is required by SCR 20:1.16(d) to “take steps to the extent reasonably practicable to protect the client’s interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, [and] surrendering papers and property to which the client is entitled.”

If the lawyer-client relationship is terminated, the Rules of Professional Conduct permit the lawyer to “retain papers relating to the client only to the extent permitted by other law.” SCR 20:1.16(d). The so-called “retaining lien” has not been expressly recognized in Wisconsin and, therefore, any claim by a lawyer that there is, under Wisconsin law, a general right to retain client papers to secure payment of a fee is tenuous, at best. *See generally* ABA, Annotated Model Rules of Professional Conduct at 283–84 (2d ed. 1992); 45 Wis. Bar Bull. 34 (April 1973). Even though Wisconsin law has not recognized a general retaining lien for lawyers, it may be permissible in very limited circumstances to retain some client-related papers as a matter of contract or other law. For example, if a client hires a lawyer for the sole purpose of preparing a document, such as a form contract for a business or articles of incorporation, and fails to pay the agreed upon fee for the document, it may be permissible to retain the contracted-for document until the fee is paid. This, however, would be a more limited right than the retaining lien recognized in some jurisdictions. *See also* E-82-7 relating to providing copies of files to clients.