

FREQUENTLY ASKED QUESTIONS: PUBLIC DEFENDER STRIKE

Minnesota's public defenders and their support staff recently voted to authorize a strike. The potential strike has raised many questions from various parties affected by it.

Even in the case of a strike, the Minnesota Rules of Professional Conduct (MRPC) continue to apply and attorneys are expected to comply. The following are some frequently asked ethics-related questions concerning how the strike may impact your legal practice. **This list is not exhaustive, so you are encouraged to contact the Advisory Opinion line by calling 651-296-3952 with any questions you may have about your ethical responsibilities in a particular matter.** In addition, there may be other legal issues that might apply, which are beyond the scope of these FAQs.

Question: I am an assistant public defender with a full caseload at various stages of litigation. If I elect to go on strike, I feel I no longer represent these clients because, in effect, striking requires me to stop working on my cases. Do my ethical obligations also end because I am on strike?

Answer: We cannot answer the legal implications surrounding a strike on the employer/employee relationship. However, the attorney-client relationship and obligations to a client under the ethics rules are separate and apart from your employment status. Therefore, no matter your employment status, you still have obligations under the MRPC to protect your clients' interests. Those obligations include: communication, diligence, competence, confidentiality, avoiding conflicts and complying with the rules of the tribunal, to name a few. Fulfilling these obligations can look different depending on the circumstances and status of the case. Some questions you should be asking yourself and have a plan to answer are:

- Who is going to explain to the client what is going on and how this affects them? (Rule 1.4(a)(3) and (b), MRPC);
- The client gets to decide their legal goals, for example to avoid delays. How should you advise them about how the strike may affect their

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goals and the means (or limitations) to achieve them? (Rules 1.2, 1.4, MRPC);

- Who can you get to assist you with this if you cannot do it? (Rules 1.6, 1.7, 1.9, MRPC);
- What do you need to do to ensure the client is not prejudiced by what is going on? (Rule 1.16(d), MRPC); and
- Are there any obligations with the court that you must first fulfill? (Rules 1.16(c), 3.4(c), MRPC).

Just as in any law firm situation, when there is a planned interruption in legal representation, the employer is often willing and able to take on some of those responsibilities—such as finding replacement counsel, filing a substitution of counsel and communicating with the client—and the attorney is obligated to make sure that happens.

In the case of a strike, this may not be an option for the employer in all cases and the attorney of record—who has formed an attorney-client relationship with the client—will have to ensure that the client is protected and that the above issues are addressed. In short, an attorney cannot ethically abandon a case just because they are on strike; the obligations under the rules attach to the individual attorney handling the case, regardless of their employment status.

Question: I am an assistant public defender and with the potential strike, must I move and receive permission to withdraw from a case before striking? The Chief Public Defender was the person appointed and I am just the attorney the Chief Public Defender assigned to the case. Shouldn't the Chief Public Defender take over the case now that I cannot work on the matter due to the strike?

Answer: The Office of Lawyers Professional Responsibility (OLPR) takes no position on statutorily who was legally appointed or how and whether a case should be reassigned. From an ethical standpoint, however, the attorney of record, regardless of whether the agency or head of the agency was appointed, has ethical obligations to the client. The attorney of record is the one with the client relationship and appears on behalf of the client, files motions on behalf of the client, directly communicates with the client and decides the legal strategy in

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consultation with the client. Therefore, even assuming that the Chief Public Defender is the rightful appointee, you, as the attorney of record, would still need to obtain approval to withdraw before ethically being able to stop work on a matter, or must ensure that the matter is covered by another in the PD's office during any period of time you are unavailable to represent your client including a planned work stoppage. Associated with that, you are obligated to affirmatively communicate with the client, ensure the client's case has successor counsel (either within the PD's office or otherwise), and take steps to protect the client's interest such as requesting and obtaining continuances where available and providing a copy of the client's file to the client to obtain alternative representation, if available. Ethically, you cannot stop work on the case and assume that someone else will take care of the client. You have an affirmative duty once you have undertaken a specific representation, under the rules, to ethically protect the client's interest until you are ethically relieved of that obligation.

Question: As an assistant public defender, I voted to strike because my workload was overwhelming and I could not fulfill my obligations of competence, diligence, communication, etc., under the ethics rules with that kind of caseload. I am striking for the best interests of my clients. Now you are saying I really cannot strike unless someone replaces me?

Answer: The OLPR does not take a position on the strike nor can we provide any legal advice or opinions related to the strike. This FAQ is limited to the ethical implications for attorneys. That being said, there are ethical issues when a criminal defense attorney is overworked. The ABA issued a formal opinion, ABA Opinion 6-441, on this topic. In general, all lawyers have obligations of competence, diligence, and communication, among others, to their clients. If a lawyer cannot fulfill those obligations, then under Rule 1.16(a), MRPC, they may ethically need to withdraw or decline to take on new cases. The formal opinion places the responsibility on both lawyers and their supervisors to ensure a workload that allows for ethical representation.

But, ABA Op. 6-441 also specifies, "If permission of a court is required to withdraw from representation and permission is refused, the lawyer's

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obligations under the Rules remain: the lawyer must continue with the representation while taking whatever steps are feasible to ensure that she will be able to provide competent and diligent representation to the defendant.” This does make it difficult to stop work completely to strike, particularly on short notice, but under the ethical rules, a client’s interests are paramount, and consistent with that, an attorney cannot place their personal interest above the client’s. Therefore, a strike, in and of itself, may not be a basis for withdrawal, but some of the client-based reasons supporting the strike might support your reasons for withdrawal in a specific case. There are ways to work to protect the client’s interest, fulfill your ethical obligations, and strike. But they will require looking at each case, discussing options with your client, working with your supervisors, and potentially working with opposing counsel and the court. Every case will be different, and it will depend on the facts and circumstances of each case.

Question: Once I am on strike, what happens if my employer locks me out of my files and I cannot continue to work on my case and protect my client’s interest? What are my obligations when that happens?

Answer: This question comes up in many attorney termination cases. Law firms and departing lawyers have long fought over this issue. The client file belongs to the client and therefore the client always gets a copy of the file. The Director’s Office cannot answer the legal question of who controls the file when there is a dispute between the lawyer and the lawyer’s employer. But, with regard to the ethical question, the client should not suffer because of an employment dispute. As mentioned above, the individual attorney of record still has responsibilities to the client. This may include asking for the file, making sure if you don’t get the file that someone else is handling the client matter, making sure that someone is communicating with the client, and making sure that there is a substitution of counsel filed. Again, communication and doing what is reasonably practicable to protect the client’s interest are key. Both the employer and the employee have obligations to protect the client’s interest. For more information on how to best transition when there is an attorney departure in the analogous law firm situation, *see* ABA Opinion 489.

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Question: What happens if the motion to withdraw is denied, and no one is assigned to handle my case(s)? Must I still continue to represent the client even through a strike?

Answer: Under Rule 1.16(c), MRPC, “A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.” Therefore, if the court orders an attorney to continue representation, the attorney must do so. The question of *whether* the court should allow you to withdraw due to the strike would necessarily involve weighing the interest of justice. Are you seeking withdrawal because your caseload is such that you cannot diligently, competently, continue the representation? Or is it merely a personal interest to withdraw? Is your client’s case such that further delays will cause harm or infringe on their constitutional rights? Would the interest of justice weigh in favor of proceeding with the case? These factors will likely be considered on a case-by-case basis. Ultimately, an attorney should not place their personal interest above the client’s.

Question: I am not a criminal defense attorney, but I have been asked by the court to be appointed as counsel for indigent clients to assist during the planned public defender strike. Must I accept the appointment?

Answer: Rule 6.2, MRPC, provides, “A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as: (a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law; (b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or (c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer’s ability to represent the client.”

While you cannot ethically seek to avoid the appointment, you should raise issues if you believe you cannot ethically undertake the representation, such as you are not competent to undertake the representation, or such other good cause exists under Rule 6.2, MRPC.

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Question: As an assistant county attorney, I have concerns about the strike. If we do not move these cases along, the backlog will get worse. I know that the strike may cause further delays. Am I required to slow down and not push a case forward because I know the defendant may not have counsel to represent them? Or can I just keep moving forward?

Answer: Many of an attorney's obligations under the rules focus on the attorney's obligations to the client, and the defendant is not the county attorney's client. But every lawyer, especially a prosecutor, has an obligation to act justly and fairly.

Rule 3.8, MRPC, provides some specific requirements for prosecutors to ensure a just and fair result. For example, Rule 3.8(b), MRPC, requires a prosecutor to "make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel." Rule 3.8(c), MRPC, prohibits a prosecutor from seeking "to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing." But Rule 3.8, MRPC, does not cover all scenarios that may come up with the strike, and there is no specific rule that requires a prosecutor to take into consideration the effects of a strike on the opposing party. But, depending on the totality of facts, the interest of justice may require a prosecutor to take into consideration whether their actions would be fair or just. This can only be done by looking at each case and consulting with your office and others on how to best keep the cases moving while not infringing on a defendant's rights. In short, this is not a good time to "take advantage" of the other side in order to "win," but you can still take actions to protect and serve the state's interest if it will not be prejudicial to the other side.

In addition to revisiting your obligations under Rule 3.8, MRPC, you may also find ABA Formal Opinion 486 helpful. ABA Op. 486 covers a prosecutor's obligations when negotiating plea bargains with unrepresented individuals who are or may be entitled to counsel at the time the prosecutor initiates the plea bargaining process for a misdemeanor charge.