

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-235
Issued: May 1980

This opinion was decided under the Code of Professional Responsibility, which was in effect from 1971 to 1990. Lawyers should consult the current version of the Rules of Professional Conduct and Comments, SCR 3.130 (available at <http://www.kybar.org>), before relying on this opinion.

Question: When a lawyer has been discharged by a client may he refuse to deliver certain items in the file to the client?

Answer: Qualified yes.

References: DR 2-110, 6-102(A), 9-102(B)(4); ABA Informal Opinion 1376; CR 26.02(3); EC 6-6; Mervin v. F.T.C., 591 F.2d 821 (1978)

OPINION

This question differs from when an attorney withdraws from a case under DR 2-110. In answering this question, we assume that the lawyer's fee has been paid (since there may be a question of an attorney's lien which is a question of law of which this Committee is not authorized to answer).

In a related opinion, ABA Informal Opinion 1376, the American Bar Association stated that the following specific materials must be given to the client in a Trademark case:

- A. Notes and memos to the file prepared by the attorney containing recitals of facts, conclusions, recommendation);
- B. Correspondence between attorney and client;
- C. Correspondence between attorney and third party;
- D. Material furnished by the client (for example, labels applying the trademark);
- E. Application, receipts, affidavits filed, in respect to use, etc. All pertaining to registration of trademarks for the client
- F. Searches made at the expense of the client;
- G. Copy of the pleadings and the like file in an administrative or court proceedings;
- H. Legal research embodied in the memos or briefs.

It seems to the Committee that the ethical principles involved are simple. The client is entitled to receive what he has paid for and the return of what he has delivered to the lawyer. Beyond that, the conscientious lawyer should not withhold from the client any item which could reasonably be anticipated to be useful to the client. DR 9-102(B)(4) provides that the lawyer shall

deliver to the client other properties in the possession of the lawyer which the client is entitled to receive.

Kentucky Rules of Civil Procedure 26.02(3) in essence provides that a lawyer need not deliver to the other side part of the discovery of the “work product.” The Committee feels that the attorney’s work product privilege protects a lawyer and need not be given to the client in the event of discharge. The “work product” would include disclosures of mental impressions, conclusions, opinions, or legal theories which have been generally generated primarily for his own purposes in working on the client’s problem. See Mervin v. F.T.C., 591 F.2d 821 (1978).

It seems to the Ethics Committee that the lawyer may very well want to duplicate copies of things within the file of the client; however, only in rare instances should any thing be retained by the lawyer without giving a copy of that document to the client.

A lawyer, upon releasing the file to a client, should be conscious of EC 6-6 and DR 6-102(A). The latter reads as follows:

A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice.

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.