

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-292
Issued: September 1985

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: May an attorney withdraw from funds received from third parties an amount due the lawyer for fees and expenses, when such fees are in dispute, and the client does not agree to such withdrawals?

Answer: No.

References: DR 9-102(A)(2); KBA E-233; Legal Background to the ABA Model Rules of Professional Conduct; Comment (2) to Model Rule 1.15.

OPINION

A complex factual situation should be summarized briefly before we address the ethical considerations involved.

A client retained a firm under an oral agreement providing for a flat fee for up to six hours time expended on her behalf, and then at a certain hourly rate after the first six hours. The client sought a dissolution of her marriage from her husband, whom she had previously divorced and remarried. She also sought custody of her minor child. The client also sought the firm's services in obtaining property left to her minor child (the natural child of her current husband) from an Indiana testator. During the course of representation of the client on these matters, the firm also represented her in a criminal case.

After much effort, it was determined that an HHH Savings Bond of \$5000 was available for the minor child from the above mentioned estate. This bond had been mistakenly delivered to the client's husband. Necessary steps to recover the bond and have the client named as guardian for the purposes of handling the funds generated from the bond were made.

Finally, a separation agreement was affected which contained provisions relating to a garnishment in favor of the wife as well a trust agreement relating to the proceeds of the bond.

During the course of the representation, the firm provided the client with detailed statements of charges for services rendered. Her account is now substantially in arrears. It has been learned that the attorneys in her original divorce action have never been paid.

The client demanded that all funds including the proceeds of the bond recovered for the benefit of her minor child be turned over to her, and that she be permitted to make monthly payments toward the fee. Sometime thereafter, the firm was discharged by the client.

When potential problems arose, all funds associated with this client were placed in a special escrow account. The question is if the funds in the special escrow account may be used to set off the entire fee as follows:

- (1) Since one-half the efforts were expended on behalf of the minor child, then a proportionate amount to be withdrawn from escrowed funds obtained on her behalf; and that
- (2) any escrow funds from the garnishment to be applied to the balance of the fee.

The ethical propriety of setting off sums owed for fees from client funds was addressed in KBA E-233 (1980). In that opinion, we referred to DR 9-102(2) which provides:

- (A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:
 - (2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

We also noted that “any fee not paid promptly by the client is in dispute within the meaning of DR 9-102(A)(2).” Because the Committee is not authorized to answer questions of law, we did not consider whether an attorney has a lien on such funds.

After reviewing pertinent authorities, we concluded that:

in the absence of an agreement with the client on these matters (the right of the attorney to a specific claimed fee, the amount to which the attorney is entitled, and the time at which payment is expected) a reasonably prudent attorney should not assume that he may withdraw funds pursuant to DR 9-102(A)(2).

We note that this position is reinforced by the following persuasive authorities: Proposed Final Draft, ABA Model Rules of Professional Conduct, Legal Background to MR 1.15(a) and (b); Legal Background to the ABA Model Rules of Professional Conduct, Tentative Draft (1984) (“Under both the Rules and the Code, disputed funds may not be withdrawn by the lawyer until the dispute is resolved. ABA Model Code DR 9-102(A)(2).”)

On the other hand, it is clear that it is proper to keep the disputed portion of the funds in a trust account until the dispute is settled. In that regard, Comment (2) to Model Rule 1.15, which is fully consistent with the Code and supporting caselaw, provides:

Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is a risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid... . The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds should be promptly distributed.

See also, ABA/BNA Lawyer's Manual on Professional Conduct 45:1104 ("...the attorney may keep a portion of the funds in a trust account until the dispute is settled").

We also noted in KBA E-233 that counsel may resort to a legal remedy such as an action for the adjudication of the rights of all claimants, of which this Committee has no jurisdiction.

Finally, we also note that the propriety of any disbursements from the trust established in the separation agreement would present questions of law, of which this Committee has no jurisdiction.

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.