

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-383
Issued: July 1995

Since the adoption of the Rules of Professional Conduct in 1990, the Kentucky Supreme Court has adopted various amendments, and made substantial revisions in 2009. For example, this opinion refers to Rule 1.2(e), which was deleted and the substance was moved to amended Rule 1.4(a)(5), and to Comments 2 and 3 of Rule 1.15. Lawyers should consult the current version of the rules and comments, SCR 3.130 (available at <http://www.kybar.org>) before relying on this opinion.

Question 1: Does a lawyer have an ethical obligation to ensure payment to an individual who has provided services to, or on behalf of the lawyer's client, or in the furtherance of the client's case:

- a) if the lawyer hired the individual provider?
- b) if the lawyer did not hire the individual provider?
- c) if, under the same circumstances as 1(a) and 1(b) above, no recovery is had, or the recovery is insufficient?
- d) if the client directs the lawyer not to pay the third person, and instead directs the lawyer to deliver all funds or property to the client?

Question 2: Do the Rules of Professional Conduct require a lawyer to recognize and comply with a third person's claim of ownership to the client's property that is in the lawyer's possession?

Answers: 1(a). Yes. 1(b), 1(c), 1(d), and 2. See Opinion.

References: KBA E-297; Leon v. Martinez, 614 N.Y.S.2d 972 (N.Y. 1994); Rule(s) 1.2(d) & (e), 1.15(b) and 4.1; Unigard Ins. Co. v. Tremont, 430 A.2d 30 (Conn. 1981); KBA/KMA Interprofessional Code, Minnesota Op. 7 (1983). Dist. of Col. Op. 251 (1995).

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The inquiry presents mixed questions of law and ethics and this committee is limited to responding based upon matters of ethics. See KBA E-297.

Regarding Question 1(a):

An attorney has an ethical as well as a legal obligation to ensure payment to a third party employed by the attorney to provide services in furtherance of the client's claim where there is no valid dispute that the services were performed in accordance with the employment.

Under certain circumstances an attorney is required by the applicable law of the case to ensure payment to a third party. *See* Rule 1.15(b); Interprofessional Code, para VI and VII. Reference is also made to Minnesota Op. 7 (1983), which provides:

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An attorney may not deny responsibility for the compensation of services rendered by doctors, engineers, accountants, attorneys or other persons, when the attorney requested the services without explicitly stating that the provider should not look to the attorney for payment. Lawyers should expressly disclaim liability in writing at the time the services are requested. A lawyer ordering services is liable as a principal for those services absent an express disclaimer. A lawyer may not, by deceitful or fraudulent means, seek to avoid financial obligations. DRs 102 (A) (4) (5). 7-101(A)(1)(2)(7). (Adopted 1/26/74, amended 10/26/79, repealed 1/7/83).

In those situations where the attorney ordered the performance of services for the client, participated in obtaining services for the benefit of the client, obtained services for the benefit of the client without making it clear to the provider of such services that the provider should look solely to the client, or where the lawyer conferred with a third party, with the client's knowledge, to take no present action against the client, for example, a third person's pursuing a collection action against the client until the settlement of the client's claims which is the basis of the lawyer's representation of the client, the lawyer has an obligation under the Rules of Professional Conduct to ensure payment of those services. However, absent these circumstances, an attorney is under no ethical obligation to assume the role of an insurer of third party claims. When an attorney accepts such a role at the direction of the attorney's client or where such a role is imposed on an attorney as a result of representing the client, then the attorney is bound by the Rules of Professional Conduct to fulfill the responsibility as part of the lawyer's duty to the client.

Regarding Question 1(b):

See above.

Regarding Question 1(c):

See above.

Regarding Question 1(d):

If an attorney is under a duty imposed by law, then the attorney is required to comply with the law. Where prior actions of the client or the circumstances of the representation place the attorney in the position of a surety, then the attorney's conduct must comply with the law of surety. If a dispute should arise between the client and the third party, concerning a properly asserted claim, then the attorney should protect the funds and property until the dispute is settled or until ordered to distribute the funds or property. See *Leon v. Martinez* (citing DR 9-102, the predecessor to Rule 1.15(b); *Unigard Ins. Co. v. Tremont* (lawyer who ignored insurer's statutory lien committed conversion); Rule(s) 1.2(d) & (e) and Rule 4.1.

In this regard the following Comments to Rule 1.15 provide guidance that has applicability here.

(2) Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is 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. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. 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.

(3) Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.

Regarding Question 2:

In the circumstances stated above, an attorney may refuse to surrender the property to the client, but the attorney is not under an ethical obligation, under the Rules of Professional Conduct, to protect the interests of third parties. See comments at page 262 of the American Bar Association's text, *Annotated Model Rules of Professional Conduct*, Second Edition (1992).

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.