

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-134
Issued: January 1976

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: Counsel for a defendant in a criminal case has advised the court that he represents the defendant, has undertaken specific acts of representation in the case, and knows the case has been set for trial. May he properly fail to prepare for trial and seek leave to withdraw for the first time on the day of trial because his fee has not been paid?

Answer: No.

References: Am Jur 2d, Attorneys at Law, § 91; DR 2-110(A)(C), 6-101(A)(3); EC 2-31, 6-4

OPINION

The defendant was indicted in May 1973. The Commonwealth could not find him. In April 1975 Lawyer A represented him in some kind of unspecified procedure on the indictment. Subsequently the defendant was found and returned to Kentucky. He was arraigned in September 1975. Lawyers A and B appeared for him at arraignment and advised the Court that they had been employed to represent him. The case was set for trial on a day certain in October 1975. On the day of trial for the first time, the lawyers filed a motion for leave to withdraw because they had not been paid a fee. It then appeared that they had made no preparation for trial. Trial was continued to January 1976. The defendant was in jail unable to give bond.

Ambiguities about the existence of an attorney-client relationship are always undesirable. In a matter pending before a tribunal, they are intolerable.

The existence of an attorney-client relationship is not dependent on prepayment of a fee. "The employment is sufficiently established when it is shown that the advice and assistance of the attorney are sought and received in matters pertinent to his profession." Am Jur 2d, Attorneys at Law, § 91.

When a client has consulted a lawyer about a matter pending before a tribunal, it is essential that the client, the opposing party, the lawyer, and the tribunal know whether the lawyer does or does not represent the client in the matter. The lawyer has an affirmative duty to make this clear to everyone concerned. In particular, if he does not intend to render services in the matter until he has

first been paid, he has not been employed. He must make this clear to the client and he must not advise the tribunal that he has been employed or proceed to render services in the matter until he has in fact been paid.

We do not know what agreement about their fee these lawyers had with their client. The most charitable assumption we can make is that they told him at the beginning that they would do nothing unless they were paid first. But it does not matter what agreement they had with client, because they advised the court that they represented him and rendered services to him in the matter. From defendant's arraignment in September 1975 at the latest there was an attorney-client relationship between him and the lawyers.

The Code of Professional Responsibility sets forth rules for termination of the attorney-client relationship which, in the context of this matter, could not be clearer. A lawyer may request leave to withdraw in a matter pending before a tribunal if his client deliberately disregards an agreement or obligation to the lawyer concerning expenses or fees, DR 2-110(C) But he may not withdraw until he has taken reasonable steps to avoid foreseeable prejudice to his client's rights, DR 2-110(A). The lawyers made no attempt to comply with this rule until the day of the trial, if then.

In the meantime, an attorney-client relationship existed between them and the defendant and it was their duty to prepare for trial, DR 6-101(A)(3); EC 2-31, 6-4. They did not do so and made no attempt to do so.

These lawyers also breached their duty to the court and opposing counsel. We do not believe any discussion of this point is necessary.

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.