

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-233
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: May an attorney offset, against some judgment due his/her client from one cause of action, an amount due the lawyer on a previous unrelated case?

Answer: Qualified yes.

References: DR 9-102(A)(B); *In re Geraldts*, 263 N.W. 2d 241 (Mich. 1978); *Florida Bar v. Sawyer*, 334 So.2d 259 (Fla. 1976); *Greenbaum v. State Bar*, 15 Cal.3d 893 (Cal.1976); *In re Marine*, 264 N.W.2d 285 (Wisc. 1978); ABA Informal Opinion 1375, 1376

OPINION

DR 9-102(A)(2) of the Code of Professional Responsibility permits an attorney to withdraw from the client's funds any sum owing to the lawyer or the law firm when it is due unless there is a dispute over the amount due. The Ethics Committee is not authorized to answer questions of law. Therefore, we cannot consider whether an attorney may have a lien on these funds.

A number of jurisdictions have considered this question from a legal as well as an ethical viewpoint. Most states will say that the lawyer must at least give some notice to the client as to the imminent withdrawal of funds *See In re Geraldts*, 263 N.W.2d 241 (Mich. 1978); *Florida Bar v. Sawyer*, 334 So.2d 259 (Fla. 1976); *Greenbaum v. State Bar*, 15 Cal.3d 893 (Cal. 1976).

One court has found that the attorney and the client must reach an explicit agreement about the attorney's right to withdraw clients' funds "when due." For the attorney to withdraw funds from the client's trust account, even "when due" the attorney and client must at least agree on three points:

- (1) the right of the attorney to expect the client to pay a specific claimed fee,
- (2) the amount to which the attorney is entitled,
- (3) the time at which payment is expected.

The court further held in absence of an agreement with the client on these matters, a reasonably prudent attorney should not assume that he may withdraw funds pursuant to DR 9-102(A)(2). *In re Marine*, 264 N.W. 2d 285 (Wisc 1978).

DR 9-102(B)(4) requires that the attorney promptly pay or deliver to the client upon request any funds, securities or other properties which the client is entitled to receive (emphasis added). In ABA Informal Opinion 1375 and 1376 the American Bar Association Ethics Committee suggested that when there is a conflict between an attorney and client about who is entitled to funds in an attorney's possession and when this conflict is not quickly and amicably resolved, an attorney may properly file an action for the adjudication of the rights of all claimants. The respective interests of the lawyer and client can be protected by court order in an adversary proceeding or by private agreement of the parties.

The Committee feels that an attorney may very well enter into a *written* contract with the client at the time of employment allowing the lawyer to offset all lawyer's fees on any judgment(s) or (settlement(s)) in the future (assuming full disclosure). However, in absence of a written contract of employment it is our opinion that the lawyer may not withdraw amounts due the lawyer for an unrelated cause of action. We feel any fee not paid promptly by the client is in dispute within the meaning of DR 9-102(A)(2).

A lawyer should be zealous at the time of closing out the one case not to withdraw the funds at that time. Although, with a contract executed at that time and after full disclosure the lawyer could issue another check to the lawyer in payment of these fees.

In the absence of the above the lawyer must remit to the client the funds the client is entitled to or resort to a legal remedy 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.