

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-237
Issued: July 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 1: May a lawyer sue a client in order to collect a fee?

Answer 1: Qualified yes.

Question 2: May a lawyer file criminal charges for failure to pay attorney fees under KRS 514.060?

Answer 2: Qualified yes.

References: EC 2-23, 7-21; DR 7-105, 7-102(A)(1)(2); ABA Formal Opinion 250; SCR 3.130; Bates v. Arizona, 433 U.S. 350 (1977); Kentucky Bar Assn v. Stuart, 568 S.W.2d 933 (Ky 1978); Bluestein v. State Bar of California, 529 P.2d 599 (Cal. 1974); KRS 514.060; 91 ALR3d 583

OPINION

Although recent cases have tended to erode certain time honored aspects of the profession (*see* Bates and Stuart), it is the feeling of the Ethics Committee that we still are a profession and not a business. Ours is a learned profession, not a mere money-getting trade. ABA Formal Opinion 250 (1943). Prior to the Code of Professional Responsibility the ABA Canon 14 provided in essence that a lawyer should only sue to collect a fee to prevent injustice, imposition, or fraud.

With the adoption of the Code of Professional Responsibility the applicable section is EC 2-23.

A lawyer should be zealous in his efforts to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject. He should not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client.

The Ethical Considerations (EC) are by definition in the Code, aspirations towards which every member of the profession should strive. Disciplinary Rules (DR's) are mandatory in character and state the minimum level of conduct.

EC 2-23 accordingly is one which lawyers should strive towards. There is no disciplinary rule which would prevent a lawyer from suing to collect a fee.

SCR 3.130 provides also that unprofessional or unethical conduct tending to bring the bench and bar into disrepute are standards to the legal profession.

In 91 ALR3d 583 there is an excellent discussion of the practices of which attorneys have been disciplined for fee collection practices, none of which involve a Kentucky lawyer.

It seems clear to the Ethics Committee that from time to time it may be necessary to sue a client in order to collect a fee within EC 2-23. Accordingly, the Ethics Committee considers, before a lawyer sues to collect a fee, the following things should be considered prior to suit:

1. Demand in writing should be sent by the lawyer to the client.
2. The lawyer should consider whether to advise the client of entering into an agreement to arbitrate under the Kentucky Bar Association's Fee Arbitration Panel.
3. A lawyer should consider the case on its own merits. No set time lengths or amounts of money should be used as a definite standard in filing suit. In each case a lawyer should consider whether fraud or gross imposition by the client has been met. It is the feelings of the Ethics Committee that the words "gross imposition" may be defined as when a client has the ability to pay a legal fee and does not pay a legal fee.

Assuming that all of the above are met then the lawyer may properly bring suit for collection of the legal fee. With respect to Question 2 the Committee is of the opinion that to bring criminal charges against a client for failure to pay a fee may be in direct violation of DR 7-105 which provides as follows:

- (A) A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

In Bluestein v. State Bar of California, 529 P.2d 599 (Cal. 1974), the court gave a six-months suspension to the lawyer for an improper fee collection method, where the attorney agreed to drop criminal charges he had preferred against his client's husband if the husband would pay his fee owed to the attorney for representing the wife in a divorce proceeding.

It is the feeling of the Ethics Committee that a lawyer faced with the problem of collecting a fee has two legal alternatives:

1. The lawyer may file a civil suit for the collection of the fee,
2. The lawyer may file criminal charges under KRS 514.060, Theft of Services.

A lawyer, being an officer of the court, should give considerable thought prior to bringing criminal charges against a client for failure to pay a legal fee. A lawyer would be subject to DR 7-102(A)(I) and (2) in that he would not be bringing the action merely to harass or bring an action that is unwarranted under existing law.

Thus, by filing criminal charges a lawyer impliedly certifies that the action is brought not for the purpose of collecting the fee but in the interest of justice. Accordingly, the lawyer must fully prosecute the case to its conclusion. In the event the judge orders restitution to the lawyer the lawyer may accept payment of the fee. However, the lawyer should not dismiss the case once brought upon payment of the fee by the client.

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.