

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-282
Issued: January 1984

Question 1: May a lawyer accept a fee in excess of a statutory or court ordered fee?

Answer 1: Qualified no.

Question 2: If a lawyer may not ethically accept a fee in excess of a statutory or court ordered fee, may the lawyer suggest or accept a gift from the client which would equal the amount of the contractual fee between the two?

Answer 2: No.

Question 3: If a lawyer may not suggest such a gift, may the lawyer suggest that the client give a gift to a specific charity?

Answer 3: No.

References: KBA E-6; DR 1-102(A)(4), (5); KRS 342.320; DR 2-106; Ex Parte Auditor of Public Accounts, Ky., 604 S.W.2d 682 (1980); Kentucky Bar Association v. Kemper, 637 S.W.2d 637 (1982); KRS 403.220; EC 9-2.

OPINION

In 1962 this Committee was asked whether a lawyer could charge in excess of a state statutory fee. This request was on behalf of the Workmen's Compensation Board to the expressed statutory enactment of a fee in a workmen's compensation case pursuant to KRS 342.320. This Committee stated that the attorney is bound by the statute and it would be unethical for a lawyer to charge in excess of the statutory fee.

Lawyer's fees are generally governed by DR 2-106 which provides in essence that a lawyer shall charge a reasonable fee for services performed.

A proliferation of statutes now have been enacted in this country and state providing limits or setting of attorney fees for performance of work of lawyers. In essence the legislative body, court or administrative body sets the fee. Obviously, the lawyer may appeal that decision.

The lawyer who would seek to charge the client more than is ordered by the court or allowable by a statute may be engaging in activity involving misrepresentation, and such action most certainly would be prejudicial to the administration of justice. DR 1-102(A)(4), (5). See also KBA E-250 and Kentucky Bar Association v. Kemper, Ky., 637 S.W.2d (Ky. 1982).

This Committee views, without deciding, that the legislature has the power to determine the reasonableness of an attorney's fee. See Ex Parte Auditor of Public Accounts, Ky., 604 S.W.2d 682 (1980).

In some situations the judge may very well order a partial attorney fee against a party adverse to the attorney's client. This is particularly true in divorce cases pursuant to KRS 403.220. In that case, where the judgment is "towards" attorney fee there is nothing to preclude a lawyer charging the client a fee in excess of that ordered by the judge "toward" the total fee as long as the total fee is reasonable. DR 2-106.

Absence the above situation or one like it, an attorney is bound by the fee set by the legislature or court or administrative agency.

OPINION 2

Merely changing a "legal" obligation into a "moral" obligation does not change the character of the transaction. If we assume there was a valid purpose for the amount of a statutory or court ordered fee we also must assume that changing the enforceability of any obligation to pay the excess, if any, does not in itself satisfy the purpose.

Even if such a gift would be proper otherwise, suggesting or accepting such a gift may well violate Canon 9 which says, "A lawyer should avoid even the appearance of professional impropriety." EC 9-2 says, "Public confidence in law and lawyers may be eroded by irresponsible or improper conduct of a lawyer. On occasion, ethical conduct of a lawyer may appear to laymen to be unethical."

OPINION 3

A client in such circumstances must be permitted to decide how to spend the money without guidance from the attorney. To allow otherwise would be to permit a "moral" obligation to be imposed on the client which would frustrate the purpose of the statute or court in establishing the fee

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). Note that the Rule provides: "Both informal and formal opinions shall be advisory only; however, no attorney shall be disciplined for any professional act on his part performed in compliance with an opinion furnished to him on his petition, provided his petition clearly, fairly, accurately and completely states his contemplated professional act."