

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-395
Issued: March 1997

Question: May a lawyer hold a client's file because of a fee dispute?

Answer: Qualified No.

References: KRPC 1.16(d); KBA E-280 (1984) and E-235 (1980); ABA Annotated Model Rules of Professional Conduct (3d Ed. 1995) pp. 257-58.

OPINION

KRPC 1.16(d) provides that "upon termination of representation" a lawyer shall "take steps to the extent reasonably practicable to protect a client's singular interest ... surrendering papers and property to which the client is entitled..." Comment (10) to KRPC 1.16(d) states that "[t]he lawyer may retain papers as security for a fee only to the extent permitted by law." Whether a lien is permitted by law is a question of law. In Kentucky, a charging lien on the funds or property recovered in a lawsuit is authorized by statute law, but the Committee is not aware of any statute or case that provides a Kentucky lawyer with a retaining lien.

A number of newer state bar opinions state that even if the assertion of a retaining lien is legal, there may be ethical limits on its exercise. See ABA Annotated Model Rules, pp. 257-58. See also Fortune, Underwood & Imwinkelried, Modern Litigation and Professional Responsibility Handbook (1996).

In KBA E-235 the Committee answered with a qualified "yes" to the question, "[when] a lawyer has been discharged by a client may he refuse to deliver certain items in the file to the client?" The Committee cited with approval ABA Formal Opinion 1376, which set forth specific materials that had to be returned to the client in a trademark case:

- A. Notes and memos to the file prepared by the attorney containing recitals of facts, conclusions, recommendations;
- B. Correspondence between attorney and client;
- C. Correspondence between attorney and third party;
- D. Material furnished by the client ... ;
- E. Application, receipts, affidavits filed, in respect to use, etc.;
- F. Searches made at the expense of the client;
- G. Copies of the pleadings and the like filed in an administrative or court proceeding; and
- H. Legal research embodied in the memos or briefs.

However, the above opinion was predicated on the assumption that the lawyer's fee had been paid.

KBA E-280 extended the above opinion by answering a "qualified yes" to the questions, "[may] a lawyer charge a fee for duplication of the client's file after the lawyer has been discharged?" The Committee determined "that a discharged lawyer may charge his former client for the actual costs involved in the duplication of a file, provided the lawyer does not charge a fee disproportionate to the actual costs of such duplication." The Committee added, however, that the lawyer may withhold materials within the lawyer's "work product privilege" from the client in the event of discharge.

Together these opinions, along with KRPC 1.16(d), make it clear that the lawyer must turn over the file to the client or the client's attorney except for "work product." Documents or other relevant evidence, the original of which may be required for trial preparation or as evidence for trial, must be surrendered in the original form.

The lawyer does not have a statutory lien for the costs of duplication, but the lawyer is permitted to charge for the reasonable costs of duplication. Under no circumstances may the lawyer hold hostage the file. While the lawyer is entitled to reimbursement for costs incurred "including filing fees, service fees and costs for obtaining medical records," the lawyer should "surrender" the file even if reimbursement is not forthcoming.

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."