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Committee on Professional Ethics



Opinion # 567 - 11/21/84 (14-84)

Overrules in part
N.Y. State 224 (1972)

Topic: Lien, lawyers' retaining;
Fee for legal services,
dispute over.

Digest: A lawyer holding funds
under retaining lien is not
required to sue client to
resolve a fee dispute pro-
vided lawyer has been zealous
in efforts to settle dispute
without litigation and believes
in good faith that failure
of client to pay claimed fee
would result in fraud or gross
imposition by client.

Code: DR 5-103(A)(1), DR 9-102(A)(2)
and (B)(4); EC 2-17, EC 2-23,
EC 5-7.

QUESTION

Where a lawyer is holding funds under a retaining lien to secure a disputed fee and has exhausted good faith efforts short of litigation to resolve such dispute, must the lawyer bring a suit against the client to resolve the fee dispute?

OPINION

The facts as submitted by the inquirer may be summarized as follows: The lawyer holds funds previously deposited by a client to secure payment of the lawyer's fee, and believes that there is a valid retaining lien on those funds. The client disputes the lawyer's right to what the lawyer considers a proper fee in the circumstances. The lawyer has sought to resolve the matter with the client through negotiation and has offered to arbitrate the dispute, but such negotiations have been unsuccessful and the client has declined to arbitrate. The lawyer asks whether, in such circumstances, he is ethically required to commence suit against the client to resolve the fee dispute or whether he may simply continue to hold the funds, thus leaving to the client the decision of whether to litigate over the amount of the fee.

Because this Committee does not determine questions of law, this Committee offers no opinion as to the legal permissibility of the inquirer's retaining lien. The Committee does, however,

note that the Code permits a lawyer to protect his right to collect a fee by asserting legally permissible liens. DR 5-103(A)(1) and EC 5-7. Therefore, for the purposes of this opinion, the Committee will assume, without deciding, that the inquirer's retaining lien is a legally permissible lien.

EC 2-23 provides that a lawyer should attempt to resolve a fee dispute amicably and that a lawyer should not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client. However, a lawyer may assert a legally permissible lien in order to protect his right to collect a fee. DR 5-103(A)(1) and EC 5-7. Therefore, if a lawyer has possession of funds that belong to a client, the lawyer may assert a retaining lien on those funds pending resolution of a fee dispute. However, if the amount of the funds belonging to the client exceed the fee reasonably claimed by the lawyer, the lawyer must promptly pay the excess to the client. DR 9-102(B)(4); see N. Y. City 82-22 (1983). Cf. EC 2-17

After the retaining lien has attached, the lawyer should continue attempts to settle the fee dispute amicably. EC 2-23. If the lawyer and the client are unable to settle the fee dispute by negotiation, the lawyer should conscientiously consider mediation or arbitration to the extent any such procedures have been established by the bar.

Where, however, all reasonable efforts to resolve the dispute short of litigation have been exhausted, the lawyer must decide whether litigation is appropriate. If the lawyer were not holding funds of the client, the lawyer's decision as to whether or not to sue the client for the fee should be governed by EC 2-23, i.e., whether suit is necessary to prevent fraud or gross imposition by the client. The Committee is of the opinion that the same standard should be applied in assessing the lawyer's duties when the lawyer is already holding funds under a retaining lien sufficient to pay the claimed fee. If the lawyer believes in good faith that the failure of the client to pay a fee in the amount of the claimed fee would result in fraud or gross imposition by the client, then, in the opinion of the Committee, the lawyer may continue to hold the funds and is not ethically required to institute suit against the client to settle the dispute, thus leaving the decision to the client as to whether or not there will be litigation to resolve the dispute. In such circumstances the lawyer may, if he chooses, institute the suit, but he need not do so.

Whether the lawyer institutes the suit or places that burden on the client, the ultimate burden on the client is

not substantially different. The Committee sees no virtue in requiring the lawyer to be the one to make the decision to impose that burden provided the same standard is employed in either case, i.e., that for the lawyer to accede to the client's position without suit would, in the lawyer's good faith judgment, result in fraud or gross imposition by the client. The lawyer, however, must continue to hold the funds in a separate account and may not use the funds as his own. N.Y. City 82-22 (1983). This will supply a substantial incentive for the lawyer to take the initiative to get the dispute settled.

In N.Y. State 224 (1972) it was stated that, once a lawyer's retaining lien has attached, the lawyer should "take prompt steps to secure a judicial determination" of a fee dispute. Such statement in New York State 224 is overruled.

For the foregoing reasons the question posed is answered in the negative provided the lawyer believes in good faith that the failure of the client to pay the claimed fee would result in fraud or gross imposition.
