

L.E.I. 84-4

(November 30, 1984)

**REFUSAL TO FILE FINAL DIVORCE DECREE
UNTIL PAYMENT OF FEES**

As a result of its disposition of a recent disciplinary matter, the Legal Ethics Committee deems it desirable to issue this advisory opinion on whether a lawyer representing a client in a divorce action may refuse to file the final decree until his fee is paid in full. We conclude that it is unethical for a lawyer to delay the completion of a divorce action until his fee is paid.

The American Bar Association's Committee on Ethics and Professional Responsibility addressed this question in Informal Opinion No. 1455 (June 4, 1980). The ABA Committee noted that when a divorce case reaches conclusion by the court, the judgment of divorce is not regarded as final until it is journalized, usually by entry of an order prepared by the successful party's lawyer. As the Committee recognized, the social relations changed by the final divorce decree have an effect on others in addition to the client. These are matters which should not be held in abeyance by an unentered divorce decree.

In Informal Opinion No. 1455 the ABA Committee concluded that while the lawyer may withdraw from a divorce proceeding at intermediate stages if the client defaults under a fee arrangement, assuming that appropriate steps are taken to avoid prejudice to the client, once the lawyer has moved the case to judgment he has an ethical duty to file the final divorce decree or to notify the

client that the divorce proceedings are not finalized. The lawyer should also explain the client's status and rights to him, and he should further explain that he will withdraw from the case unless his fee is paid. Under any circumstances, the lawyer must seek to minimize any harmful consequences to the client.

It is our opinion that a lawyer's refusal to proceed to final judgment in a divorce action due to nonpayment of his fee violates the proscription in DR 5-101(A) against permitting his own personal or financial interests to interfere with the exercise of his professional judgment on behalf of a client. Furthermore, refusal to complete the divorce action would constitute a failure to complete a contract of employment, which is prohibited by DR 7-101(A) (2). Moreover, refusal to file the final divorce decree would likely violate DR 7-101(A) (3), which forbids a lawyer to intentionally prejudice or damage his client in the course of representation.

A lawyer may not delay completion of the divorce action until his fee is paid. This is so notwithstanding a fee agreement or court order that another party pay the fee. In case of a deliberate disregard of a fee agreement on the part of the client, the lawyer may withdraw from representation in accordance with DR 2-110(C) (1) (f). However, under EC 32 and DR 2-110(A) (2), the lawyer may not withdraw from representing the client until he has undertaken reasonable steps to avoid foreseeable prejudice to the client's rights. This includes giving due notice to the client,

allowing time for the employment of new counsel, and delivering to the client all papers and property to which the client is entitled.

If the employment contract or a court order provides for the opposing party to pay the lawyer's fee, the lawyer should exercise due diligence in representing his client and should collect the fee from the other party. In cases where the client is financially unable to pay his lawyer's fee, the lawyer must nonetheless complete his work on the case unless the client consents to termination of his employment. Our opinion in this regard is in accord with Opinion 1-1978 of the Indiana State Bar Association.

DR 5-103(A) (1) of the Code of Professional Responsibility permits a lawyer to acquire a lien granted by law to secure his fees and expenses. However, ethical considerations may require the lawyer to forego asserting a retaining lien over his client's papers and property if such a possessory right is inconsistent with public policy, with the lawyer's responsibility to his client, or with the lawyer's duty to the court. [Special concurring opinion of Feldman, J., in National Sales & Service Co. v. Superior Court, 667 P.2d 738, 742 (Ariz. 1983).] Assertion of a retaining lien over the client's papers would be ethically justified, however, if a financially able client willfully refuses to pay an agreed-upon fee which is due, since such conduct would amount to gross imposition by the client. ABA Informal Opinion No. 1461 (November 11, 1980). While such conduct on the client's part might justify a lawyer in retaining the client's copy of a

final divorce decree until his fee is paid, it would not justify his refusal to have the final divorce decree entered by the court.

Our holding that a lawyer may not ethically delay the completion of a divorce action until his fee is paid is consistent not only with the American Bar Association's position but also with opinions issued by a number of state and local bar associations. Among bar associations adopting the same or similar opinions are those in California (Opinion 1968-16, reported at 43 J.S.B. Cal. 879); Indiana (Opinion 1-1978, reported at 22 Res Gestae 318); Arizona (Opinion 47, issued September 4, 1959, and reported at 6 Ariz. B.J. 13, December, 1970); New York City (Opinion 364, issued March 25, 1936); New York County, New York (Opinion 158, issued in 1918); New York State (Opinion 212, issued November 22, 1972, and reported at 44 N.Y.S.B.J. 126); Virginia (Informal Opinion 62); Idaho (Opinion June 26, 1973, reported at 16 Advocate 10); North Dakota (Opinion reported in Newsletter St. B.N.D., April, 1979); and San Diego County, California (Opinion 1973-3, issued February 5, 1973). Other state bar associations have issued opinions that it is unethical in general for a lawyer to refuse to further prosecute a client's case because his full fee has not been paid in advance. These jurisdictions include Minnesota (Opinion 4, October 12, 1973, reported at 30 Bench & B. Minn. 14); Oregon (Opinion 1, issued June 18, 1936); and Wisconsin (Memorandum Opinion 8-77, reported in Wis. B. Bull., June, 1979, supplement).

Our opinion on this issue is also in accord with decisions of the West Virginia Supreme Court of Appeals regarding divorce

actions. In Humphrey v. Mauzy, 155 W. Va. 89, 181 S.E.2d 329 (1971), the Court held that a clerk cannot withhold divorce orders from recordation for failure to pay the \$10.00 fee prescribed by W. Va. Code § 59-1-11. In Nagy v. Oakley, 309 S.E.2d 68 (W. Va. 1983), the Court held W. Va. Code § 59-1-8 to be unconstitutional when applied to divorce cases. That code section authorizes commissioners appointed by circuit courts to refuse to hear cases or to prepare or file reports until their fees are paid in advance. The Court held that the statute, when applied in the context of divorce actions, violated the prohibition in Article III, Section 17 of the West Virginia Constitution against the financial condition of litigants affecting the judicial process. We note that the Nagy decision bears directly upon practices by lawyers, as divorce commissioners appointed by circuit courts in West Virginia are licensed attorneys at law.