

ADVISORY ETHICS OPINION 84-06

SYNOPSIS:

A lawyer may not keep a discovery sanction award when the lawyer's right to the money is disputed by the client. The money must be placed in the client trust fund and can be distributed only when the dispute is resolved.

OPINION:

A law firm has asked our opinion on the ethical propriety of keeping money awarded as sanctions because of failure to respond to discovery. The sanctions award was made against the defendant in a personal injury case in which plaintiffs attorney's have a standard 33% contingent fee contract. Plaintiffs attorneys claim that the sanctions award belongs to the lawyers. The plaintiff claims that part of the award belongs to the plaintiff.

The request involves a mixed question of ethics and procedural law. Although this committee does not give opinions on law, a brief review of the applicable provision of the Vermont Rules of Civil Procedure is helpful. Rule 37(b) provides that for failure to respond to an order compelling discovery, the court may require the disobedient party to pay the "reasonable expenses, including attorney's fees, caused by the failure." The rule is silent on who is to receive the sanction award. Apparently, the order involved in this request is also silent. The facts supplied to us are that the disobedient party was ordered to pay a daily amount as long as certain interrogatories were not answered. The order did not indicate whether the payment was for attorney's fees or other expenses.

DR 9-102(A)(2) of the Code of Professional Responsibility provides that where a lawyer receives funds belonging in part to the lawyer and part to the client, the funds must be placed in a separate client trust account. The lawyer may withdraw the part of the funds belonging to the lawyer but not if the right to receive it is "disputed by the client." The disputed amounts may be withdrawn only after the dispute is finally resolved." Although DR 9-10:2(A) does not literally apply here because the lawyer claims that no part of the funds belong to the client, we believe that the literal reading is inappropriate in this case. Certainly the same policies that underline the rule are present here. Thus, we believe that DR 9-102(A)(2) expresses the proper rule for this case.

The right to the funds is "disputed by the client" as that term is used in the rule. Without stating an opinion on whether the client's dispute is correct, we think it is at least reasonable. Both the court order that generated the funds and the rule under which they were awarded are silent on who is the recipient of the funds. Money paid in litigation normally goes to the client or jointly to the lawyer and the client. The fee contract between the lawyer and the client is apparently silent on the question.

Since the ownership of the funds is in dispute, the rule requires the lawyer to hold the money in the separate fund until the dispute is resolved. There are a number of ways that the dispute could be resolved. For example, the lawyer could go back to the court for an amended order specifying who is the recipient of the funds.

This request does raise a serious question that could arise in any case despite attempts by the lawyer to settle with the client. The best solution would be for lawyers to include specific provisions on the problem in their contingent fee contracts.