

ADVISORY ETHICS OPINION 86-04

SYNOPSIS:

The Professional Responsibility Committee, unsuited to the task of adjudicating, cannot render opinions addressing the ethical propriety of conduct of attorneys not seeking our advice.

FACTS:

A, B and C, former associates of the Law Firm of X, have disassociated with the X Firm and formed the ABC Partnership. A, B and C have contacted their pending and active clients to advise them of this change, and to advise clients that they have the choice of continuing to be represented by the X Firm, or being represented by the ABC Partnership, or seeking any other attorney they desire. Many clients have chosen to be represented by the ABC Partnership and have advised the X Firm of their choice.

The ABC Partnership has tried to secure the release of the files from the X Firm. However, X Firm requires a fee agreement as to those files before the X Firm will release those files to the ABC Partnership.

ABC has requested this Committee's advice as to the following ethical questions:

1. In some of the hourly fee files remaining in the X Firm office, clients have paid a "retainer" which would be applied to future attorneys fees. The X Firm has been advised by the client of the client's desire to be represented now by the ABC Partnership. Does the X Firm have a duty under the Code of Professional Responsibility to return to the client any amounts of this "retainer" which are unearned?
2. Does the X Firm, once advised by the client of the client's desire to be represented by the ABC Partnership, have a duty to release those files to the hands of the ABC Partnership in active and pending files, especially where there is potential prejudice to the client's cause? In a similar vein, does the X Firm, after it has been advised by the client of the client's desire to be represented by the ABC Partnership, have a duty to release and to forward to the ABC Partnership any and all future communication and correspondence concerning the file to the ABC Partnership?
3. In contingent fee cases, after the X Firm has been advised by the client of the client's desire to be represented by the ABC Partnership, the X Firm requires a fee agreement with the ABC Partnership prior to a release of the file. The X Firm is demanding an origination fee for the file, in addition to reasonable compensation for the time and effort involved in any particular case at the X Firm. After the X Firm has been advised by the client that the X Firm is discharged, and the client has chosen to be represented by the ABC Partnership, can the X Firm charge an origination fee in addition to reasonable compensation for the time and effort which the X Firm has into the file before the X Firm agrees to a release of the file?
4. In hourly fee cases, once the X Firm has been advised by the client of the client's desire to be represented by the ABC Partnership, is the X Firm entitled to receive any compensation for time and effort rendered by the ABC Partnership in representing its client? Along the same lines, can the X Firm withhold the release of those pending files until X Firm has a fee arrangement with the ABC Partnership which entitles the X Firm to compensation in the future although the X Firm has no more responsibility for the case and renders no further services?

ANALYSIS:

The Committee respectfully declines to answer the four questions raised for our consideration.

This request presents an opportunity to delineate the scope of the Professional Responsibility Committee's role in assisting members of the Bar with ethical questions. The questions presented to us in this matter relate not to the propriety of conduct of the inquiring attorney, but to the prior conduct of another attorney who has not sought our advice. In such circumstances, we deem it inappropriate to pass upon the questions presented.

This Committee does not serve an adjudicative function. We operate on an ex parte basis, relying on the facts presented to us by attorneys requesting our advice. We engage in no fact-finding, and can only assume the accuracy of the facts with which we are presented.

These institutional constraints necessarily confine our role. While we are in a position to render advisory opinions to attorneys regarding their own contemplated conduct, this Committee is unsuited to the task of adjudicating whether the conduct of attorneys not requesting our advice has been ethical. By Administrative Order No. 9 of the Vermont Supreme Court, such adjudicative determination is the responsibility of the Vermont Professional Conduct Board; this Committee will not intrude into that area.

Were this Committee to render opinions addressing the ethical propriety of conduct of attorneys not seeking our advice, we would run a consistent risk of factually inaccurate decision-making. This also would create the further risk that we would become a tool in controversies between opposing counsel.

For these reasons, we join the ABA Standing Committee on Professional Ethics and the Maine Professional Ethics Commission in limiting our advice to requests involving the conduct of the inquiring attorney. Because the advice requested in this matter relates predominantly to the propriety of conduct of an attorney who has not sought our advice, we offer no opinion thereon.