

ADVISORY ETHICS OPINION 85-03

SYNOPSIS:

Although attorneys entering into settlement agreements are expected to abide by such agreements, it would not be unethical for the requesting firm to ask the court, after the fact, to re-open the question of whether attorney's fees, allowed by statute, should be awarded.

OPINION:

A law firm has asked our opinion as to whether it would be ethically proper, or whether an ethical obligation exists, to abrogate an agreement to waive attorney's fees made in the context of settlement negotiations which concluded litigation initiated under the provisions of 42 U.S.C. §1983. The firm indicates that they brought the litigation in question on behalf of a Plaintiff inmate, seeking to establish that in transferring and reclassifying him, the Vermont Department of Corrections violated his State and Federal constitutional rights. Just prior to trial, settlement negotiations commences resulting in a settlement disposing of all claims. As a part of the settlement, the Plaintiff was obligated to waive any entitlement to attorney's fees made available to "prevailing part[ies]" under 42 U.S.C. §1988. Because the requesting firm's client strongly favored the settlement offer, the firm felt compelled to accede to the demands of Corrections Department counsel and waive their claim to attorney's fees, having in mind Ethical Consideration 7-7 of the Professional Responsibility Code, which provides that "it is for the client to decide whether he will accept a settlement offer. . . ." Because the Defendant's counsel claims that the case was settled on a basis which afforded relief to the Plaintiff of no greater measure than that which he would have received regardless of the litigation. Defense counsel was the view that they could properly insist that the settlement agreement include a provision that there was no "prevailing party" within the meaning of 42 U.S.C. §1983.

The requesting firm believes that its client was "prevailing party" in the litigation, and has asked whether it would be unethical for the firm, under these circumstances, to abrogate its agreement to waive attorney's fees and litigate the question of whether such fees should be awarded.¹ In addition, the requesting firm asks if it is under any affirmative duty to abrogate the agreement and bring the attorney fee question before the Court.

It should be noted that Defendant's counsel suggests that the facts of the case as presented may not be appropriate to resolve the ethical questions raised herein "since the settlement in the instant case was in exchange solely for dismissal of other state claims, not the §1983 action." It would appear, however, that settlement negotiations were intended to eliminate the necessity for any further hearings as to any of the matters raised by Plaintiff's §1983 action was necessarily encompassed as a part of the settlement. Accordingly, this Committee feels that it is appropriate to deal with the ethical questions raised herein.

It goes without saying that by usual custom and practice, attorneys consenting with their clients to settlement agreements are expected to abide by such agreements. It is generally recognized, however, that statutory fee awards are often made available to plaintiffs to promote the vindication of important rights. Accordingly, it would seem reasonable to conclude that it might be inappropriate to allow the function of this type of statutory provision to be negated through settlement negotiations. Moreover, since the agreement would be "abrogated," if at all, only by order of the Court entered in light of all the circumstances, we do not believe that it would be unethical for the for the requesting firm to ask the Court, after the fact, to re-open the question of whether attorney's fees should be awarded. In dealing with the ethical issues raised by this request, the Committee has in mind that the same decision to permit "the client to decide whether he [would] accept [the] settlement offer" lead to the conclusion that any attempt to secure a fee award must be made in such a way as not to jeopardize the settlement which was obtained for the client, and even then, only with the client's knowledge and consent.

The further question presented is whether the requesting firm has a "duty" to bring the circumstances surrounding negotiation of the settlement to the attention of the court. We believe that the answer to this question would depend, in large part, on specific facts of which we are not knowledgeable, relating to the nature of the fee agreement between the firm and its client. If, for example, the firm had agreed to represent the client on a contingent fee basis premised substantially or totally upon attorney's fees being awarded by the Court, the firm might not be under any obligation to present the issue to the Court, since the client's interests would presumably not be adversely affected by the firm waiving its fee.² If, on the other hand, the client was liable to the firm for a fee notwithstanding the lack of a court-awarded fee, whether such an obligation existed might well then depend upon the terms of the original undertaking of the parties.

We also wish to note our further belief that the most appropriate course of conduct for the requesting firm in this case would

¹ See *Brown v. Culpepper*, 559 F.2d 274 (5th Cir. 1977); plaintiff can be "prevailing party" despite voluntary settlement of case.

² See, e.g., *Regalado v. Johnson*, 79 F.R.D. 447, 451 (D. Ill. 1978).

have been for it to present the settlement proposal to the Court, disclosing the nature and extent of disagreement between the parties as to the propriety of the legal fee issue being considered at the same time as the substantive issues underlying the agreement. In this way, the Court could have appropriately chosen to reject or accept the proposal, or otherwise have dealt with the agreement in terms which would have permitted more timely, and less complicated, consideration of the ethical issues posed by the situation.³

³ See Lisa F. v. Snider, 561 F.Supp. 724, and 726 (N.D. Ind. 1983): “. . . it is imperative that the courts assist in the dilemma caused by defendants’ insistence on the waiver of attorney fees as a condition of settlement on the merits.”