

Utah Ethics Opinions

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98. USB EAOC Opinion No. 98

Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 98

Approved October 27, 1989

Issue: Is an attorney's refusal to pay for services rendered by a third party at the attorney's request contrary to the attorney's obligation to act in an ethical manner, and does it warrant disciplinary action.

Opinion: Absent dishonesty, fraud, deceit or misrepresentation, disputes resulting from the failure of an attorney to make payment for services rendered by third parties should be treated as questions of substantive law, which should be examined under traditional contract and agency doctrines, rather than questions of the ethical propriety of the attorney's actions.

Analysis: The failure of an attorney to pay for services rendered by third parties at his request does not appear to have been addressed specifically by either the ABA in a formal or informal opinion or by a published state advisory opinion. However, several opinions discussing related issues suggest that, while an attorney may be held financially liable for obligations incurred by the attorney on behalf of his client, a breach of an attorney's ethical obligation would arise only if the specific nature of the attorney's failure to pay for such services amounted to dishonesty, fraud, deceit or misrepresentation.

On at least two occasions, ABA and state committees discussing other issues have referred to this question and noted the possibility that by requesting services on behalf of a client, an attorney may have obligated himself to pay for those services unless the attorney clearly indicated to the third party that the client alone would be responsible for payment. (fn1) For example, one informal opinion issued by the ABA Committee on Ethics reviewed the obligation of an attorney to pay medical fees incurred by a client. Although the bulk of the opinion discusses the propriety of an attorney paying medical fees on behalf of his client, the Committee did note that, where an attorney contacted a doctor and requested the performance of diagnostic work, an implied agreement existed that the attorney would pay for the work. (fn2)

A similar approach is suggested by a Delaware Bar Association opinion in which the Delaware Committee determined that, when an attorney requests the performance of medical services by a physician, the lawyer impliedly guarantees the payment of reasonable fees unless it is made clear to the doctor that only the client will be responsible for payment. (fn3)

The most significant aspect of both opinions with respect to the question presented here is the lack of reference to the ethical obligation of an attorney involved in such a dispute. Both committees noted the attorney's responsibility to pay for services rendered at his request, but their determination was based upon the prior determination that an implied contract resulted from the attorney's request for services. Under such an analysis, the failure of an attorney to pay for such services would most properly be dealt with as a contract or agency dispute, rather than through the Bar's disciplinary process. To impute an ethical obligation to such a failure suggests the possibility that the Bar could initiate disciplinary action against its members for the mere failure to pay creditors. Such a possibility seems beyond the scope of the Bar's role in maintaining ethical standards among its members.

The view that disputes of this nature are best resolved by courts of law rather than through the disciplinary process is supported by two other opinions related to this question. Both opinions discuss the failure of one attorney to make payment for services requested of a second attorney on behalf of a client. In both instances, the ABA Committee on Ethics determined that disputes of this nature involve questions of contract construction, and that such disputes should be resolved by the courts rather than the Ethics Committee. (fn4)

In the latter of the two opinions, the Committee stated:

Whether or not the local attorney would be liable to the Swedish attorney under the circumstances involves a question of law, upon which this Committee does not pass. However, it is the opinion of this Committee that there is nothing unethical in the local attorney taking the position that liability for a fee and expenses incurred by the Swedish attorney is a matter for Mrs. _____ and that he (the local attorney) is not liable therefor. (fn5)

Although it is possible that the ABA Committee's determinations are based upon the belief that attorneys bear a greater duty to foresee the possibility of such a dispute and prevent its occurrence, the approach taken by the Committee appears to be the most common and most logical procedure for resolving disputes of this nature. Such an approach appears appropriate in light of the express

exclusion made in the Preliminary Statement to the Model Code: "the Code . . . [does not] undertake to define standards for civil liability of lawyers for professional conduct." (fn6)

An obvious exception to such an approach would be in those instances where the failure of an attorney to make payment for services rendered by third parties was not the result of a good-faith dispute over the obligation of one party to make payment to another, but amounted to dishonesty, fraud, deceit, or misrepresentation by the attorney. None of the opinions outlined here discuss the possibility that the failure to make payment may have been fraudulent or deceitful. In such instances, there is little doubt that the attorney's conduct would constitute a violation of Rule 8.4(c) and should subject the attorney to discipline. (fn7)

However, where neither fraud, deceit nor misrepresentation are alleged, there is little precedent for applying principles of professional responsibility to the failure of an attorney to make payment for services requested on behalf of clients. It is the opinion of the Ethics Advisory Opinion Committee that controversies concerning such matters are matters of law to be determined by the courts and that ordinarily such controversies do not involve ethical questions.

Footnotes

1. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 664 (1963), Del. Bar Ass'n Op. 1981-2 (April 21, 1981).

2. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 664 (1963).

3. Del. Bar Ass'n Op. 1981-2 (April 21, 1981).

4. ABA Comm. on Professional Ethics and Grievances, Formal Op. 63 (1932); ABA Comm. on Ethics and Professional Responsibility, Informal Op. C-482 (1961).

5. ABA Comm. on Ethics and Professional Responsibility, Informal Op. C-482 (1961).

6. Model Code of Professional Responsibility, Preliminary Statement (1981).

7. Rule 8.4(c) of the Utah Rules of Professional Conduct reads: "It is professional misconduct for a lawyer to: . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . ."

Rule Cited:

8.4