

Utah Ethics Opinions

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44. USB EAOOC Opinion No. 44

Utah State Bar

Ethics Advisory Opinion No. 44

Approved March 10, 1978

Summary: Attorneys may not enter into a settlement agreement without client authorization.

Facts: You have inquired as to whether or not an attorney can enter into a settlement agreement without the approval of his client when the client cannot be located after diligent efforts. In this situation, the attorney has advanced considerable costs in the case, which would probably consume most of the offered settlement.

Opinion: It is mandatory that an attorney inform his client of any settlement offers proffered by the other side. Formal Opinion 325 of the ABA Ethics Committee states that "[a] lawyer should inform his client of all settlement offers made by the opposing party." In the facts presented herein, the attorney has been unable, after diligent efforts, to locate his client to communicate what, in the attorney's opinion, is a reasonable offer of settlement. However, the inability to contact the client does not give the attorney the right to accept the settlement offer. The attorney acts only as an agent for his client and lacks authority to enter into the settlement agreement proposed. Canon 7, EC 7-7 of the Revised Rules of Professional Conduct of the Utah State Bar states as follows:

"In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of the client, the lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and, if made in the framework of the law, such decisions are binding on his lawyer. As typical examples in civil cases, it is for the client to decide whether he will accept a settlement offer or whether he will waive his right to plead an affirmative defense."

Attorneys are counseled further in EC 7-8 of Canon 7:

"A lawyer should exert his best efforts to assure that the decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. Advice of the lawyer to his client need not be confined to purely legal considerations. A lawyer should

advise his client of the possible effect of each legal alternative. A lawyer I should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint. In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision which is morally just as well as legally permissible. He may emphasize the possibility of harsh consequences that might result from assertion to legally permissible positions. In the final analysis, however, the lawyer should always remember that the decision to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself. In the event that the client in a non-adjudicatory matter insists upon a course of conduct that is contrary to the judgment and advise of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment."

Informal Opinion C-455 of the ABA Ethics Committee, rendered July 25, 1961, addressed itself to the question of whether or not an attorney for a plaintiff could withdraw as counsel and enforce a lien for services in a contingency case where a fair settlement offer was made and refused by his client and demand made by the client for a totally unrealistic sum. The committee stated:

"In the situation presented, it seems clear that the plaintiff has the right to determine whether settlement shall be accepted or not. The mere fact that the plaintiff's attorney fees that the settlement proposal should be accepted, in our opinion does not justify his withdrawal."

The Committee so held because the offer of settlement was made in court at the time of trial, and the client would not have adequate time to secure other counsel.

Therefore, it is our opinion that the attorney may not accept the offer of settlement without express authorization from his client. Reimbursement for advanced costs and fees will have to be sought by other permissible means.

Rule Cited:

Canon 7