The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 88-31

Issued December 16, 1988

[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

SYLLABUS: When an attorney withdraws or is discharged from employment, has collected no fees under a retainer agreement, and has provided no services under said agreement, the attorney is not entitled to recover the fee stipulated. If no fee is merited, the question of division of fees amongst partners is moot.

OPINION: We have before us your request for our opinion on whether it is ethical to enforce a retainer agreement for payment of future fees for legal services which are no longer desired and will not be performed.

The Disciplinary Rules of the Code of Professional Responsibility are mandatory in character. They state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Using those same rules, DR 2-110(A)(3) makes it clear that a lawyer who withdraws, or is discharged from employment is to refund any part of a fee paid in advance that has not been earned.

This is further supported by both Ethical Consideration 2-31 of the Ohio Code of Professional Responsibility, and Model Rule of Professional Conduct 1.16(d). While the Ethical Considerations are not mandatory in character, "they represent the objectives toward which every member of the profession should strive." Code of Professional Responsibility, Preface. The Model Rules, although not adopted by Ohio, have been adopted by a majority of states and are persuasive. In light of the nearly identical language used in Ethical Consideration 2-31 and Model Rules 1.16(d), their combined use adds even greater weight to the mandatory Disciplinary Rules.

If, under those rules, an attorney must refund unearned fees, it is logical to assume that he also must not collect unearned fees. According to Scheinesohn v. Lemonek, 84 Ohio St. 424, 95 N.E. 913 (1911), an attorney may recover the value of services contemplated. However, if, because of termination, no work was actually performed, the attorney is not entitled to

a fee based upon whatever benefits the defendant/client might have derived if services had been rendered. This case clearly shows that an attorney is not entitled to unearned fees.

Applying all of these factors to the situation presented, it is clear that a fee of any sort, where no services have been performed is unreasonable.

Finally, your request implied a question on the division of such fees by partners in a law firm. As no work was done and no fee was or should be collected, division of fees by partners in this situation is unnecessary. However, if a fee had been both earned and collected, it would seem that the partnership agreement between the attorneys should control the division of said fees.

This opinion is advisory in nature, is based upon the facts as presented and is limited to questions, arising under the Code of Professional Responsibility.