

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 94-5

Issued April 15, 1994

[Withdrawn by Board on Aug. 11, 2000 due to amended DR 5-103(B), eff. Jun. 14, 1999]

[Not current-subsequent rule amendments to DR 5-103(B), eff. Jun. 14, 1999.]

SYLLABUS: A law firm may settle a law suit against a former client for expenses of litigation for an amount less than the expenses actually owed the law firm without violating Disciplinary Rule 5-103 (B), provided the representation of the client is concluded and there existed at the outset of representation an agreement that the client would remain liable for reimbursing the expenses of litigation advanced by the law firm.

OPINION: The question presented is whether it is proper for a law firm to settle a law suit against a former client for expenses of litigation for an amount less than the expenses actually owed the law firm.

Under Disciplinary Rule 5-103 (B) of the Ohio Code of Professional Responsibility, a lawyer may advance or guarantee the expenses of litigation provided the client remains liable for such expenses.

DR 5-103 (B) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

Implicit within the rule are corollary agreements. A law firm agrees to advance or guarantee the expenses of litigation. A client agrees to remain liable for reimbursing the expenses of litigation. Yet, whether a client upholds the agreement may be unpredictable.

When a client fails to reimburse the expenses of litigation, a law firm is faced with the dilemma of how to seek reimbursement. In Opinion 87-001 (1987), addressing the issue of advancing expenses of litigation and reimbursement following an unsuccessful outcome to a client's suit, this Board advised

that "[t]o what degree the lawyer attempts to seek reimbursement from his or her clients is a legal or business decision for the individual lawyer to make." Ohio SupCt, Bd of Comm'rs on Grievances and Discipline, Op. 87-001 (1987). Some firms may attempt collection through the firm's own efforts. Other firms may use collection agencies See e.g., Bar Ass'n of Nassau County, Op. 93-5 (1993). Other firms may file a civil suit against a former client.

As to the issue presented, a law firm's decision to settle a law suit against a former client for expenses of litigation when the settlement is for an amount less than the expenses actually owed the law firm is a legal or business decision for a law firm to make. However, such decision must be in keeping with Disciplinary Rule 5-103 (B). The rule's requirement that a client remain ultimately liable for expenses is a protection for the client. This protection is necessary at the outset of litigation, when a lawyer's professional judgment on behalf of a client may be affected by a proprietary interest in the litigation. In contrast, after the conclusion of representation, a lawyer's independent judgment has already been exercised on behalf of the client. A decision made after the conclusion of representation and litigation as to reimbursement of expenses does not result in a propriety interest affecting the lawyer's judgment on behalf of a client.

In conclusion, the Board advises that a law firm may settle a law suit against a former client for expenses of litigation for an amount less than the expenses actually owed the law firm without violating Disciplinary Rule 5-103 (B), provided the representation of the client is concluded and there existed at the outset of representation an agreement that the client would remain liable for reimbursing the expenses of litigation advanced by the law firm.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.