

FORMAL OPINION NO. 95

The question submitted by a District Court Magistrate is as follows:

Recently there have been several cases where attorneys are suing clients for past due attorney's fees, and at the same time, requesting additional attorney's fees under the new Idaho costs statutes.

When an attorney or another member of his firm pursues this course of action, I seriously question, (1) the applicability of attorney's fees at all (he is, in effect representing himself vis-a-vis sending the case over to another law firm where attorney's fees would actually be incurred), and (2) most importantly, the ethics of such a practice.

The statute authorizing the Court to allow attorney's fees is applicable to "all civil actions" and a suit for attorney's fees would clearly seem to qualify under the statute. Whether an attorney would represent himself or be represented by another attorney would not appear to bear upon what is permitted under the existing statute.

The fact that the statute is new and that the present Code of Professional Responsibility makes no reference to the question of suing a client for a fee gives cause to consider the propriety of what is taking place in Idaho as reported by the magistrate.

Canon 14 of our prior Ethics Code reads as follows:

"14, Suing a Client for a Fee--Controversies with clients concerning compensation are to be avoided by the lawyer so far as shall be compatible with his self-respect and with his right to receive reasonable recompense for his services;

and lawsuits with clients should be resorted to only to prevent injustice, imposition or fraud."

Drinker in his work on Legal Ethics states:

"He should sue for fees only when the circumstances imperatively demand it. He will find it wise, it is believed, in the long run, not to accept any fee from an honest client greater than the client thinks he should pay."

In Opinion 250, the ABA Committee said:

"Ours is a learned profession, not a mere money-getting trade. (See Canon 12.) Suits to collect fees should be avoided. Only where the circumstances imperatively require, should resort be had to a suit to compel payment. . . ."

Even though the specific reference to such actions is no longer present in our code of ethics, the committee is of the opinion that every attorney should be guided by the same principles as have served in the past.

Continued as "Ethical Consideration 2-23" as a part of the Code of Professional Responsibility as adopted by the American Bar Association, we find the following:

"EC 2-23. A lawyer should be zealous in his efforts to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject. He should not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client."

By whatever unfavorable shade of suit for attorney's fees might be graded, a suit for such fees plus attorney's fees would seem to be greater. Nevertheless, our code does permit such suits if necessary to prevent fraud or gross imposition and we cannot avoid the conclusion that what is clearly authorized by statute is beyond the reach of our Code of Professional Responsibility.

DATED this 17th day of September, 1976.