

STATE BAR ASSOCIATION OF NORTH DAKOTA

ETHICS COMMITTEE

OPINION NO. 93-09

June 28, 1993

The Ethics Committee received a request for an opinion from [REDACTED] of [REDACTED]. The request raises two unrelated questions arising from a civil rights lawsuit filed by the attorney on behalf of inmates at the North Dakota State Penitentiary. The first question relates to solicitation of potential clients and the second to settlement offers conditioned upon waiver of attorney's fees and costs.

Solicitation

The lawsuit was filed on behalf of several named male and female inmates. The attorney sought certification of the lawsuit as a class action; this was denied, but the attorney has been permitted to amend the complaint to include additional named plaintiffs. Because the female inmate named as a plaintiff in the original complaint has been released from prison (and, presumably, this was the only female inmate named as a plaintiff, although this fact is not stated in the request), the attorney wants to know if he may solicit other female inmates for inclusion in the amended complaint.

The attorney does not indicate whether he plans to contact the potential clients in-person, by mail, or by some other means. Rule 7.1 of the North Dakota Rules of Professional Conduct deals generally with communications with potential clients and more specifically with in-person contact. The comment to Rule 7.1 indicates that direct mail communications, and especially "targeted" ones, "can pose problems similar to those created by in-person contact."

The United States Supreme Court has interpreted the United States Constitution to provide greater free speech protection for targeted direct mail communications than for in-person contact. Shapiro v. Kentucky State Bar, 486 U.S. 466 (1988). The Supreme Court has also held that the First Amendment provides greater protection to a lawyer who contacts a client in connection with a lawsuit that involves significant political issues, at least where the lawyer is not motivated by a desire for pecuniary gain. In re Primus, 436 U.S. 412 (1978). Although these Supreme Court rulings may permit conduct not permitted by Rule 7.1, this opinion is based on the "worst case scenario" of communication that is not afforded special protection by Shapiro or Primus.

Rule 7.1(b) prohibits, in certain circumstances, in-person contact by a lawyer or representative of the lawyer for the purpose of suggesting or requesting that a

nonlawyer employ the lawyer if the nonlawyer has not sought advice from the lawyer . The circumstances in which this contact is prohibited are:

- (1) The suggestion or request involves use of a statement or claim that is false or misleading ...; or
- (2) The suggestion or request involves the use of undue influence, coercion, duress, compulsion, intimidation, threat, or vexatious or harassing conduct; or
- (3) The lawyer or representative knows or reasonably should know that the potential client's physical or mental condition makes it unlikely that the potential client can exercise reasonable, considered judgment as to the potential employment; or
- (4) The suggestion or request involves use of a representative and the lawyer knows or reasonably should know that such conduct violates the representative's contractual or other legal obligations.

In addition, the lawyer or representative may not contact a potential client "if the lawyer or representative knows or reasonably should know that the potential client does not wish to be contacted for this purpose." Rule 7.1(c).

If the in-person contact does not involve any of these circumstances, it is not prohibited. The attorney should carefully consider, however, whether the inmates' incarceration per se implicates any of these circumstances. The Ethics Committee offers no opinion, for example, about whether or not an incarcerated inmate is more likely to be unduly influenced by a lawyer's contact than someone who is not incarcerated or is less likely to be able to exercise reasonable, considered judgment as to the potential employment. The attorney should consider these possibilities, along with the other provisions of Rule 7.1, in deciding whether and how to communicate with inmates about potential employment.

Settlement offer

The second question involves a settlement offer from defendants which includes the condition that the plaintiffs waive their right to ask for attorney's fees and costs under 42 U.S.C. § 1988. The attorney reports that he has contracts with some of the plaintiffs in which they agree not to accept an offer that is conditioned on waiver of attorney's fees.

The attorney asks whether this settlement offer creates a conflict of interest for him and whether he is foreclosed from rejecting the offer. The attorney also questions the ethical propriety of the defendants' offer, suggesting that it is an attempt to sever the relationship between the attorney who requested the opinion and his clients.

Several provisions of the North Dakota Rules of Professional Conduct are relevant to the issue of whether or not the attorney may reject the settlement offer conditioned upon waiver of attorney's fees and costs. Rule 1.2 makes it clear that a lawyer must abide by the client's decision whether to accept a settlement offer. Rule 1.4 requires a lawyer to keep the client reasonably informed about the status of the representation and to explain matters to the extent reasonably necessary for the client to make informed decisions. Rule 2.1 requires a lawyer to give the client candid advice. These rules, taken together, leave no doubt that the attorney must report the settlement offer to the clients, explain it, and abide by the clients' decision to accept it or not.

The attorney who requested this opinion has volunteered the information that he has contracts with some clients which provide that the clients will not accept settlement offers conditioned on waiver of attorney's fees. These contracts, rather than the settlement offer, create a conflict of interest between the attorney and the clients.

This conflict would make the representation by the attorney improper under Rule 1.7, unless the attorney can satisfy the requirements of Rule 1.7(c). Rule 1.7(a) and (b) prohibit representation if a lawyer's own interests "will" or are even "likely to adversely affect the representation." Rule 1.7(c) is more lenient if the representation "might be adversely affected," but the lawyer must reasonably believe there will be no adverse effect and must obtain client consent after consultation. Before obtaining a client's agreement to forego an offered settlement, the attorney would have to inform the client of the advantages of the potential settlement offer. The attorney should refrain from use of this type of agreement, in light of the serious questions that could be raised about the adequacy of the consultation and the voluntariness of the client's consent.

The client who accepts a settlement offer conditioned upon waiver of court-awarded attorney's fees and costs does not avoid the obligation to pay for the attorney's services. The attorney should have a fee agreement that makes clear the client's responsibility for attorney's fees and costs, but that agreement may not restrict the client's right to receive and accept settlement offers.

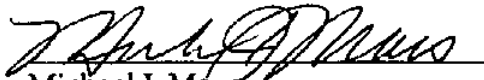
The attorney's question about the propriety of the settlement offer invites the Committee to render an opinion on the conduct of another lawyer, which the Committee does not do. The Committee notes that the United States Supreme Court approved this type of settlement offer in Evans v. Jeff D., 475 U.S. 717 (1986). This definitive interpretation of 42 U.S.C. § 1988, though not binding on this Committee's interpretation of the ethical requirements for North Dakota lawyers, is highly persuasive. Dictum in Evans deals extensively with the relevant ethical issues, which exist only because of the federal statute the Court interprets. The attorney who requested this opinion would be well-advised to read that opinion.

Ethics committees in other jurisdictions have issued opinions consistent with Evans. The District of Columbia withdrew its pre-Evans opinion finding these settlement offers unethical in order to conform to Evans. 6 Laws. Man. on Prof. Conduct (ABA/BNA) 11 (Feb. 14, 1990). California has gone even farther, opining that lawyers have a duty to inform clients of the merits of accepting a settlement offer conditioned upon a fee waiver. 7 Laws. Man. on Prof. Conduct (ABA/BNA) 124 (May 8, 1991).

This information is provided pursuant to Rule 1.2(B), North Dakota Rules for Lawyer Disability and Discipline. This rule states:

A lawyer who acts with good faith and reasonable reliance on a written opinion or advisory letter of the Ethics Committee of the State Bar Association of North Dakota shall not be subject to sanction for violation of the North Dakota Rules of Professional Conduct as to the conduct which is the subject of the opinion or advisory letter.

This opinion was drafted by Barry R. Vickrey and unanimously approved by the Ethics Committee on June 28, 1993.


Michael J. Maus
Chairperson

38-5200-10000

This lawsuit is a civil rights action pertaining to access to the courts issues. I took the case on because I knew that if we were successful, I could collect attorney's fees and costs under 42 USC 1988. 42 USC 1988 was enacted to allow private attorneys to collect reasonable attorney's fees and costs for successfully prevailing in civil rights cases for clients who are unable to retain counsel.

However, there is a trend developing that defendants in cases such as this are intentionally trying to avoid payment of attorney's fees and costs by putting the attorney in an untenable position.

Additionally, some of the plaintiffs have signed contracts with me that state that plaintiffs will not settle the lawsuit whereby attorney's fees are waived.

My question is this: Am I, attorney for the plaintiffs, foreclosed from rejecting any offer of settlement whereby plaintiffs must waive their rights to collect attorney's fees and costs? Is it unethical to attempt to sever the attorney-client relationship by making an offer of settlement whereby attorney's fees and costs must be waived in order to settle an action.

Time is of the essence in this matter. I would appreciate your help in clarifying what my ethical duties are. Thank you.

Sincerely,
