Advisory Opinion 1986-7

Assumed Facts:

The attorney was retained by the client for representation in a divorce. In a written fee agreement, the parties agreed upon an hourly rate, a retainer of $400 and a method of payment by which the client would pay additional retainers as deemed necessary by the attorney.

The client was unable to comply with the payment provisions. The attorney and client therefore agreed orally that the client could pay at a later date.

Five months after the attorney had been retained, the unpaid balance was approximately $3,400. The parties agreed that the attorney would begin monthly billing. The client would pay as much as he could each month on the outstanding balance as soon as he could. The client assigned to the attorney the proceeds of any judgment in the divorce case to the extent of the balance owed, particularly the client's proceeds from the sale of the family residence. The client gave the attorney a lien to the same extent. The attorney continued to work on the case.

The client eventually discharged the attorney from the case. The client owed approximately $7,500 at that time.

The attorney later learned that the former client, in reaching a divorce settlement agreement, assigned the client's interest in the house proceeds to the other spouse and creditors. The attorney filed a notice of claim, moved to intervene and requested injunctive relief which was denied.

Questions:

       1. Has the attorney engaged in unethical conduct?

       2. would continued prosecution of his claim be unethical?

       3. Would a suit *in rem* or for declaratory judgment be unethical?

Analysis:

1. Has the attorney engaged in unethical conduct?

No canon or disciplinary rule in the New Mexico Code of Professional Responsibility proscribes the taking of an assignment of or a lien on the client's property to secure attorney's fees. Nor is there any prohibition against enforcing such assignment or lien. Canons 1, 2, 3, 4, 6, 7, 8 and 9 and the companion disciplinary rules do not apply to the questioned conduct.

Under Canon 5, Disciplinary Rule 5-103 prevents an attorney from acquiring a proprietary interest in the cause of action or subject matter of litigation, except that he may acquire a lien granted by law to secure his fees and expenses. DR 5-103(A)(1). If the proceeds of the sale of the client's house are not considered the "subject matter of litigation," then the DR 5-103 general rule does not prevent the attorney from acquiring an assignment of or lien on these proceeds. If the proceeds are considered the "subject matter of litigation," then the DR 5-103 exception allows an attorney to acquire a lien granted by law. In New Mexico, two sorts of liens are granted by law specifically to attorneys: a common law "retaining lien" and a "charging lien." *Prichard v. Fulmer,* 22 N.M. 134, 139, 159 P. 39 (1916). The retaining lien allows the attorney to keep papers and property in his possession until his fees and costs are paid. *Id.* The charging lien is the right of the attorney to recover his fees and costs from a fund recovered by his efforts and to have the court prevent payment or set aside payments or assignments to others in fraud of the attorney's rights. *Id.* at p. 140. *Hanna Paint Mfg. Co. v. Rodey, Dickason, Sloan, Akin & Robb, P.A.,* 298 F.2d 371, 373 (1962). It seems that the lien acquired by the attorney in this case provides him rights he already properly had pursuant to his attorney's charging lien. Therefore, it appears that the attorney committed no ethical violation by taking an assignment of the proceeds to secure his fees. *See* ABA Informal opinion No. 569. Also, disputes as to attorney's fees and collection of those fees do not ordinarily raise ethical questions. ABA Informal opinion No. 1461.

Canon 5, Disciplinary Rule 5-105, directs that a lawyer shall not allow his independent professional judgment on the client's behalf to be impaired by the attorney's representation of conflicting interests. This Disciplinary Rule was the subject of New Mexico Advisory opinion 85-1, an opinion incorrectly cited to the attorney in this case as forbidding the enforcement of the attorney's claim. DR 5-105 has nothing to do with the securing or enforcement of attorney's fees. The rule treats the problem of conflict of interest in the context of accepting proffered employment; i.e., it is concerned with the relationships of past, present and potential clients to each other. The present case is not such a multiple-client scenario.

Canon 5, Disciplinary Rule 5-101, also deals with the effect of an attorney's financial, business, property or personal interests on his professional judgment. Again, this regulation is set in the context of accepting proffered employment. It is irrelevant to the situation wherein an attorney acquires a financial interest to secure his fees after employment and seeks to enforce the interest after employment has ended.

2. Would continued prosecution of the attorney's claim violate any ethical standards?

It is illogical that an attorney would be granted lien rights by law but be ethically constrained from enforcing those rights. The Model Code states that a lawyer should avoid suing a client for his fee unless there is no other way to prevent injustice or fraud by the client. Canon 14. *See* ABA Formal Opinion 250 and ABA Formal Opinion 165. The attorney in this case has already tried to resolve the problem of non-payment by negotiation and contract. If the attorney does not pursue his claim, the proceeds of his former client's only asset will disappear. There is no other action the attorney could take which would reasonably insure the payment of his fee. Therefore, the attorney's enforcement of his claim does not appear to violate any ethical standard.

3. Would a suit in rem or for declaratory judgment be unethical?

See above paragraph.

Conclusion:

The attorney's past and contemplated conduct does not violate any ethical prohibition. As a practical matter, the taking of a security interest in the client's property seems to be a fairly common procedure.