

**THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS**

Opinion No. 580

March 2008

QUESTION PRESENTED

Is a lawyer's refusal to comply with an arbitration decision in a fee dispute with a client a violation of the Texas Disciplinary Rules of Professional Conduct?

STATEMENT OF FACTS

A lawyer and his client agreed in writing to submit a fee dispute to binding arbitration. The arbitration was conducted by the fee disputes committee of the local bar association. The arbitration award favored the client, either finding that the lawyer was required to repay to the client an amount received from the client that the lawyer was not entitled to retain or finding that the lawyer was not entitled to collect certain unpaid fees from the client. The lawyer refused to abide by the arbitrator's award. Under the arbitration agreement, the arbitration decision was final and no legal grounds existed for the lawyer's failure to comply with the arbitration award.

DISCUSSION

Rule 1.14 of the Texas Disciplinary Rules of Professional Conduct requires that a lawyer hold client funds and disputed funds in separate accounts and promptly deliver to the client any funds the client is entitled to receive. It would be a violation of Rule 1.14 for a lawyer to refuse to comply with an arbitration order to release funds that have been held in the lawyer's trust account and have not been earned. Similarly, it would be a violation of Rule 1.14 for a lawyer to transfer an amount involved in a fee dispute from the lawyer's trust account to the lawyer's unrestricted account while the amount remained in dispute.

Rule 1.15(d) provides that "[u]pon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . refunding any advance payments of fee that has not been earned." If the arbitration determined that a lawyer continued to hold an advance payment of unearned fees after termination of the representation, those fees would be required to be refunded to the client. Failure to do so would be a violation of Rule 1.15(d).

In a case involving disputed fees claimed by a lawyer rather than disputed fees held by a lawyer, the discussion above of Rules 1.14 and 1.15(d) would not apply (because no client property held by the lawyer would be involved). However, Rule 8.04(a)(3), which generally prohibits a lawyer from engaging in dishonest or fraudulent conduct, could apply both in the case of monies held by the lawyer and claimed by the client and in the case of unpaid amounts that the lawyer claimed were due from the client. Rule 8.04(a)(3) provides that a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation". In the circumstances considered, the agreement to arbitrate the fee dispute is an agreement to accept the arbitration award as the resolution of the dispute, subject only to any legal grounds available for challenging the award (no such grounds were available in this case). A lawyer's entering into an agreement to resolve a fee dispute by arbitration with the undisclosed intention of refusing to accept an

unfavorable arbitration award would, in the opinion of the Committee, constitute conduct involving dishonesty, fraud, deceit and misrepresentation in violation of Rule 8.04(a)(3). This conclusion is consistent with the law of fraud in Texas. See *Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432 (Tex. 1986):

“A promise to do an act in the future is actionable fraud when made with the intention, design and purpose of deceiving, and with no intention of performing the act. . . . While a party’s intent is determined at the time the party made the representation, it may be inferred from the party’s subsequent acts after the representation is made. . . . Intent is a fact question uniquely within the realm of the trier of fact because it so depends upon the credibility of the witnesses and the weight to be given to their testimony. . . .

Failure to perform, standing alone, is no evidence of the promisor’s intent not to perform when the promise was made. However, that fact is a circumstance to be considered with other facts to establish intent.” 708 S.W.2d at 434-35.

When a lawyer does not abide by an award from an agreed fee dispute arbitration, whether the lawyer entered into the arbitration agreement with an intent to refuse to accept an award unfavorable to him would be a question of fact in the particular case.

CONCLUSION

A lawyer who agrees in writing with a client or former client to submit a fee dispute to binding arbitration and then refuses to comply with the award violates the Texas Disciplinary Rules of Professional Conduct if the lawyer continues to hold property of the client or former client contrary to the arbitration award or if the lawyer in the particular case entered into the agreement to arbitrate with the intention of not complying with an award that was unfavorable to the lawyer.