

Committee Opinion
June 14, 1988

LEGAL ETHICS OPINION 1095

ATTORNEY CLIENT PRIVILEGE/
COLLECTION OF UNPAID FEES –
REVEALING CONFIDENCES AND SECRETS
TO ESTABLISH REASONABLENESS OF FEES.

The facts of your letter are incorporated in this letter for the sake of brevity:

1. The undersigned was retained by a Virginia corporation to perform, on an as-requested basis, various legal services in or about November, 1986.
2. During the period November, 1986 through January, 1987, legal services were provided the client corporation as and when requested; and, until in or about August, 1987, bills for these services were honored in full or, as otherwise agreed upon, in part.
3. In or about June, 1987, the client corporation directed the undersigned to handle a complex major matter involving real property (valued at some \$16 million) held by a partnership in which the client corporation was a partner. The matter pertained to an effort by the managing partner to “strip” the client corporation of its partnership interest pursuant to the terms of a supplementary agreement executed in or about January, 1987 by all partners.
4. Because of the time-essence of the matter and its complexity, the undersigned, with the knowledge and consent of the client, obtained qualified co-counsel to work with him in assessing the overall situation, developing strategy for its resolution and conducting the requisite investigative and legal research for the assessment and strategy development. Over a period of weeks the undersigned and co-counsel worked with the officers of the client corporation and reviewed documents and prevailing law to determine the facts of the matter. During the course of this effort it was determined that the situation was such that the client corporation and its officers and directors could be construed under prevailing federal and State laws as having engaged, as co-conspirators, in a defrauding of investors in the subject real property. Moreover, as these investors were foreign, the client and its officers and directors could be construed to be in violation of foreign law, to which the officers and directors, holding dual citizenship, could be subjected. After so determining, the client was informed of these conclusions and the undersigned and his co-counsel were instructed to proceed further.
5. Thereupon, because of the location of the subject real property and the adversarial parties (out-of-state), with the approval of the client, local counsel was identified by the undersigned and his co-counsel and, upon our recommendation, retained by the client to assist, first, in obtaining a satisfactory settlement of the matter and, failing that, to litigate the matter in association with the undersigned and his co-counsel. The out-of-state (local) counsel was retained by the client in July, 1987.
6. In mid-August, 1987, following completion of the aforesaid activities (assessment, strategy development and investigation and legal research), a complete briefing of local counsel, and an initial meeting with counsel for the adversarial parties *in re*. possible settlement of the client's claim, the undersigned and his co-counsel were informed by the client that they would no longer

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be lead counsel in the matter. As the reason therefor, the client cited alleged financial difficulties, adding that its President, who stated he knew everything about the matter, in conjunction with the aforesaid local counsel, would handle the matter. The undersigned and his co-counsel were relegated to the role of “monitors,” to respond solely to requests for assistance, if any, initiated by the client.

7. Thereafter, the major request for assistance made, in September, 1987, was for a review and assessment of draft pleadings prepared by local counsel, founded upon the earlier work performed by the undersigned and his co-counsel. This assistance was provided, per request. After September, 1987, other than for a perfunctory item, no further work was requested of or performed in this or any other matter for the client by the undersigned and/or his co-counsel.

8. In October, 1987, the undersigned's co-counsel terminated his representation of the client because of his dissatisfaction with the manner in which the client was now handling the matter and the client's failure to pursue the strategy which had earlier been developed and (seemingly) agreed upon. Co-counsel was also perturbed by the non-communication between him and the undersigned and the client. Co-counsel submitted his final bill together with his notice of termination of representation.

9. The undersigned continued his representation of the client until mid-January, 1988, at which time he terminated his representation of the client and submitted with it his final bill (which was a repetition of his October, 1987, billing). Between October, 1987, and January, 1988, the undersigned had, on a number of occasions, communicated with an officer of the client corporation regarding the non-payment of his October bill and the final bill of his co-counsel, being put off on each occasion because of the alleged continuing financial difficulties of the client. On these occasions numerous proposals were made to the client regarding a method for payment of these bills, e.g., partial payments over an extended period of months or execution of promissory notes due months after their execution; these proposals were summarily rejected.

10. After mid-January, 1988, the undersigned continued his dialogue with the said officer of the now-former client in an effort to obtain payment of the aforesaid bills. In mid-February, 1988, the undersigned met with the aforesaid officer of his former client and, *inter alia*, was informed that the matter had been “settled” by written agreement in November, 1987, but that payment of the settlement proceeds had been delayed, and that once this payment was received the bills would be paid. The undersigned further learned of dissension between the said officer and the other key officer of the former client regarding the November, 1987, settlement agreement and the former's unhappiness with the role of local counsel in the settlement process and his plans to take action to modify the settlement agreement which he contended remained subject to modification. There was no indication when the said officer might take the action he described or when the payment might be received; whereupon, the undersigned once again asked that the said bills be honored by execution of promissory notes by the client due some months later. This request was put into writing shortly thereafter; no response was received.

11. In March, 1988, the undersigned initiated action in the appropriate circuit court seeking judgment against his former client in the amount of his final bill.

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12. The defendant corporation (former client) filed responsive pleadings avoiding identification of any matter in which the undersigned had performed services for it and as its grounds of defense and in a counter-claim alleged that the undersigned had billed it for services either not rendered or not authorized, extending the scope of its allegations to prior bills already reviewed by it and paid in full. Defendant corporation also filed discovery that would require a "complete description" of each item of service provided it by the undersigned.

13. Following receipt of defendant corporation's discovery, the undersigned, through counsel, made timely written request of said defendant corporation, through its counsel, for an express waiver of the attorney-client privilege. Receipt of this request was acknowledged by counsel for defendant corporation, and a prompt response was indicated. To date no response has been received.

Basically, you advise that you have sued a former client for monies owed. Your former client has subsequently filed discovery requiring a "complete description" of each item of service provided by you. You have requested an express waiver of the attorney-client privilege from your former client; however, to date no response has been received from your former client.

You wish to know whether or not it is proper for you to reply with the discovery requests absent an express waiver of the attorney-client privilege by your former client.

Disciplinary Rule 4-101(C)(4) states that an attorney may reveal confidences or secrets necessary to establish the reasonableness of his fee or to defend himself or his employees or associates against an accusation of wrongful conduct. Disciplinary Rule 4-101(C)(2) states that a lawyer may reveal confidences or secrets when required by law or court order.

The Committee opines that it would not be improper for you to comply with the discovery requests pursuant to [DR:4-101\(C\)\(4\)](#) since you are attempting to establish the reasonableness of your fee. The Committee also believes that you are required by law to comply with the discovery request and that, therefore, [DR:4-101\(C\)\(2\)](#) also applies in this situation.

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