

Committee Opinion
October 19, 1990

LEGAL ETHICS OPINION 1308

FEES – MISCONDUCT –
REPRESENTING A CLIENT WITHIN
THE BOUNDS OF THE LAW:
ATTORNEY WHO FILES A MOTION
FOR ATTORNEYS' FEES AFTER
ENTRY OF ORDER DISMISSING
MATTER SUBJECT TO JOINT
STIPULATION WHICH PRECLUDED
SEEKING ATTORNEYS' FEES.

You have advised that a member of the Virginia State Bar is a member of an out-of-state firm which filed suit in a federal district court located in Virginia, asserting against agencies and officials of the Commonwealth of Virginia two claims pursuant to 42 U.S.C. § 1983. The suit was dismissed and an appeal was filed in the United States Court of Appeals for the Fourth Circuit. Before the appeal was decided, the parties negotiated a settlement which provided that (1) the litigation, which in the prayer for relief sought attorneys' fees under § 1988, would be ended; (2) the parties would file a joint stipulation asking the court of appeals to dismiss the appeal with prejudice; (3) the district court would be asked to dismiss with prejudice whatever was left of the case if any remand occurred before the settlement had been completely approved; and (4) the parties would bear their own costs.

You have further indicated that the appellate court accepted the joint stipulation before any decision was rendered and dismissed the appeal without any remand. You relate that, thirty days after entry of the order of dismissal, the firm representing the plaintiff filed motions for attorneys' fees in both the court of appeals and the district court, "claiming to be a 'prevailing party' ' under the applicable U.S. Code section and asserting "in its pleading that an agreement waiving fees was not a 'special circumstance ' that should bar the award of fees under the statute."

Finally, you have informed the Committee that the official of the Commonwealth who approved the settlement has submitted an affidavit stating unequivocally that it was his understanding that the settlement "was intended to end the litigation in its entirety including the prayer for attorneys' fees," an understanding with which his counsel in your office agrees entirely.

You ask that the Committee opine on the propriety of the conduct of the firm, in particular the firm member who is a member of the Virginia State Bar, in moving the courts for awards of attorneys' fees following the entry of the settlement agreement and in light of the Committee's prior opinion number 536. In addition, you ask for the Committee's determination as to the obligation of involved lawyers in the Office of the Attorney General to report the matter to the appropriate disciplinary authority.

The appropriate and controlling rules relative to your inquiry are DR:7-102(A)(2), which precludes a lawyer from knowingly advancing a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it

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can be supported by good faith argument for an extension, modification, or reversal of existing law, and DR:1-103(A) which, in pertinent part, requires that a lawyer, having information indicating that another lawyer has committed a violation of the Disciplinary Rules that raises a substantial question as to that lawyer's fitness to practice law in other respects, shall report such information to the appropriate professional authority.

In rendering its prior LE Op. 536, the Committee was presented with an inquiry which recited that an agreement on attorneys' fees had in fact been reached during settlement negotiations in a federal civil rights action. The inquiry specifically requested an opinion predicated on the plaintiff's attorney having agreed to "whatever the defendant offer[ed] as to attorneys['] fees, so as not to hinder in any way the most advantageous settlement for the client." Thus, the inquiry presented hypothetical facts which demonstrated that a meeting of the minds on attorneys' fees had occurred. The Committee is not constituted to resolve factual disputes since those are legal issues beyond the purview of the Code of Professional Responsibility. Thus, LE Op. 536 is not dispositive of the question you raise since, in your facts, there appears to be a material difference between the parties as to the intent of the settlement agreement with regard to whether the term "costs" refers also to attorneys' fees and whether, therefore, an agreement was reached on that issue. Since there is a factual dispute, this Committee declines to render an opinion based on DR:7-102(A)(2) in determination of the propriety of the attorney's or firm's conduct. Such a determination must be made by a finder of fact and may apparently be made by the court of competent jurisdiction, ostensibly within its ruling on the pending motion(s) for attorneys' fees.

Since no determination has yet been made by a finder of fact as to the propriety of the attorney's conduct in filing motions for attorneys' fees, the Committee is of the opinion that any obligation to report such conduct is not yet ripe. Should a conclusion be reached by the court which finds the conduct to have been improper and violative of the Code of Professional Responsibility, and should lawyers of the Office of Attorney General who were involved in the matter also believe that such violation raises a substantial question as to that lawyer's fitness to practice law in other respects, they would then have the duty to report that information to the appropriate authority. (See LE Op. 1093) The reporting of misconduct in the absence of a factual finding, however, is based upon a subjective determination that the lawyer has "information indicating" such a violation and even then reporting is not obligatory unless the complainant is satisfied that the violation which has occurred raises a substantial question as to that lawyer's fitness to practice law in other respects. The Committee recognizes the obligation to report misconduct as an integral part of a lawyer's professional responsibility, but cautions that such reports must be made in concert with factual determinations and an analysis of the impact on the offending lawyer's fitness to practice law. (See *In re Himmel*, 125 Ill.2d 531, 533 N.E.2d 790 (1988))

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Legal Ethics Committee Notes. – If information about the ethics violation is a client confidence, a lawyer may report the other lawyer’s misconduct only if the client consents under Rule 1.6(c)(3); the lawyer considering whether to report must consult with the client under that Rule.

Editor’s Note. – Overruled in part by L. E. Op. No. 1528. See footnote 1 of the opinion for scope.