

Committee Opinion
October 19, 1990

LEGAL ETHICS OPINION 1309

ATTORNEYS' FEES – SETTLEMENT
NEGOTIATIONS – FEDERAL CIVIL
RIGHTS ACTION – THREATENING
DISCIPLINARY CHARGES: FILING
MOTION FOR AWARD OF PLAINTIFF'S
ATTORNEYS' FEES AND OPPOSING
COUNSEL REQUESTING ADVISORY
OPINION ON PROPRIETY OF ACTION.

You have advised that you represent the plaintiff in an action filed pursuant to 42 U.S.C. § 1983 in the United States District Court for the Eastern District of Virginia. While the case was on appeal to the United States Court of Appeals for the Fourth Circuit, the parties entered into and executed a written settlement agreement and a stipulation of dismissal. You indicate that your position vis-a-vis the agreement is that it did not, and was not intended to, address defendants' liability for attorneys' fees since you state that there was no negotiation or discussion of such liability during extensive negotiations over a forty-three day period related to the terms of the agreement. You inform the Committee that you have now moved the court to award attorneys' fees pursuant to the Civil Rights Attorneys' Fees Award Act of 1976, 42 U.S.C. § 1988. In opposing this motion, defendants' counsel relies on language in the stipulation of dismissal that provides for "each party to bear its own costs" and further argues that the filing of your motion violates the Virginia Code of Professional Responsibility based on this Committee's previously rendered LE Op. 536.

You further indicate that, in addition to briefing its opposition to the motion for attorneys' fees, defendants' counsel has also written to counsel for plaintiff outlining steps defendants intend to take in response to the filing of the motion. You have provided the Committee with a retyped, redacted copy of defendants' counsel's letter. Those steps include seeking an informal ethics advisory Committee opinion as to whether you have violated your ethical responsibilities in light of LE Op. 536 and whether defendants' counsel have an obligation pursuant to DR:1-103 to report plaintiff's counsel's actions. You allege that defendants' counsel's letter "makes clear that defendants and their counsel will take no action regarding the ethical issue and will honor the settlement agreement if counsel for plaintiff withdraw the attorneys' fees motion."

You have provided extensive legal support for several issues on which you have asked the Committee to render an informal advisory opinion.

The first issue upon which you wish the Committee to opine is whether LE Op. 536 applies to the facts presented to render inappropriate the filing of a motion for attorney's fees where, you allege: (a) the issue of plaintiff's right to seek such fees pursuant to § 1988 was never raised or discussed in the parties' settlement negotiations; (b) plaintiff's counsel never intended to waive that right; and (c) plaintiff's counsel's use of the phrase "each party to bear its own costs" was intended by counsel to refer only to "traditional court costs" such as recited in F.R.C.P. 59(d) and F.R.A.P. 39, and plaintiff's

Committee Opinion
October 19, 1990

counsel believes that the law in the Fourth Circuit does not uphold the exclusion of attorneys' fees from the term "costs."

As you have indicated by your extensive legal argument and supporting case law, the questions you have raised revolve around factual and legal determinations and disputes and are thus not issues which are disposed of by the Code of Professional Responsibility and its ethical requirements. In contrast, 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 attorney []s 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. This Committee is not constituted to resolve factual disputes since those are legal issues beyond the purview of the Code of Professional Responsibility. Since, in your facts, there appears to be a material difference and a legal dispute 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, the Committee declines to render an opinion on the legal matter. 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.

The second issue on which you request the Committee's opinion is whether defendants' counsel's letter to plaintiff threatens disciplinary proceedings to gain an advantage in civil litigation and is thus in violation of DR:7-104. Disciplinary Rule 7-104(A) precludes a lawyer from presenting, participating in presenting, or threatening to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.

Assuming that the original letter from defendants' counsel to plaintiff's counsel exactly parallels the retyped, redacted version, it is apparent to the Committee that the plain language of the letter indicates an intent only to proceed immediately to bring the facts of this situation to the attention of the Legal Ethics Committee of the Virginia State Bar ... and ask for an informal advisory opinion regarding whether the facts support a finding of unprofessional conduct ... and whether [they] have an ethical duty under DR:1-103 ... to report your firm's conduct to the Virginia State Bar for appropriate disciplinary action.

This Committee is of the opinion that an indication of an intention to request an informal advisory opinion, with the subsequent intent of acting upon that opinion should the obligatory reporting of misconduct be indicated, is not violative of DR:7-104 since the rule does not presume that the request for an advisory opinion is part of the disciplinary process. As provided in Part I, § IV, 610(b) (i) of the Rules of the Virginia Supreme Court, "[a]n advisory legal ethics opinion of the Bar concerning contemplated or actual professional conduct of any member may be requested by any member." A distinctly different, elaborate procedure is provided in Part I, § IV, 613 for the

Committee Opinion
October 19, 1990

disciplining, suspending, and disbaring of attorneys. Thus, the Committee opines that defendants' counsel's request for an informal advisory legal ethics opinion is not violative of DR:7-104 since it does not threaten disciplinary proceedings. Having determined that the letter is not such a threat, the Committee need not reach the question of whether it was made solely to gain an advantage in civil litigation.

Committee Opinion
October 19, 1990