

LEGAL ETHICS OPINION 1325

WITHDRAWAL FROM
REPRESENTATION: NON-PAYMENT
OF LEGAL FEES AND DEFAMATORY
ACCUSATIONS MADE BY CLIENT.

You have advised that, although you are a member of the Virginia State Bar, you reside and practice in a South American country. You further indicate that you entered into an agreement, which was executed in Idaho, to represent a foreign corporation in the negotiation, settlement, and/or litigation against a foreign government resulting from the corporation's claim as finder of a shipwreck which contained an estimated \$3 billion in treasure. The agreement provided for an hourly fee rate, costs, and monthly detailed invoices and was affirmed by the corporation's board of directors which also named you as legal representative for the corporation. You have described for the Committee that a legal representative in the country in which you practice is distinct from an attorney at law and is the commercial representative for the company in that country with all of the corporate powers of the board of directors and all of the potential individual liability. Furthermore, such a legal representative is not required to be an attorney at law. Subsequent to those corporate actions, you were authorized to bring a legal action against the foreign government and you authorized your then-law partner, which partnership has subsequently been dissolved, to file the suit as Attorney of Record. The facts you have provided indicate that the suit was filed shortly after you authorized your partner to do so.

You indicate that, although much time has been expended on the case and the corporation repeatedly expressed satisfaction with the work being performed by your firm, the corporation has failed to comply with its contractual agreement to pay invoices after they were presented. Specifically, the corporation agreed to pay \$10,000 approximately two months after suit was filed and an additional \$50,000 within 30 days thereafter. The first payment (\$10,000) was made as scheduled, but no further payments have been made by the corporation. Subsequent to that first payment, the corporation requested a contingent fee agreement be submitted for consideration; such a contract was prepared and submitted, but the corporation has not responded.

In addition to the failure to pay fees, you indicate that the corporation, without your knowledge, sent a defamatory letter against the foreign government which then prepared an official protest to the United States embassy. You indicate that the letter accused the government and unnamed officials of criminal acts, subjecting you, as the corporation's legal representative, to civil liability and both you and your former law partner to physical danger.

As a result of both issues, failure to pay fees and costs owed and the defamatory letter, you requested that the corporation retain a new legal representative and a new attorney. You indicate that to date you have not received any response from the corporation's board of directors.

Finally, you advise that under the law and professional norms of the foreign government, your former law partner has a right to unilaterally and voluntarily withdraw

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from the litigation, without any requirement to seek permission of the trial court. You indicate that he may also file a civil suit against the corporation for monies owed during or after litigation. Your former partner has not exercised those rights pending your receipt of this informal advisory opinion.

You have asked that the Committee opine as to the propriety of your renunciation of your fiduciary appointment as Legal Representative to the corporation in view of the non-payment of costs and fees owed and of the defamatory letter sent by the corporation to the foreign government. You have further inquired as to the propriety of your instituting suit against the corporation for their non-payment of fees and costs owed.

The appropriate and controlling rules relative to your questions are DR:1-102(A)(4) which prohibits a lawyer from engaging “in conduct involving dishonesty, fraud, deceit, or misrepresentation which reflects adversely on [the] lawyer's fitness to practice law”; DR:2-108(B)(2), (3), and (4) which prescribe the conditions which permit a lawyer to withdraw from representing a client; DR:2-108(C) which directs that counsel of record in a court proceeding may not withdraw except by leave of court after notice to the client of the time and place of a motion for leave to withdraw; and DR:1-102(B) which instructs that a lawyer admitted to practice in Virginia is subject to the Virginia Code of Professional Responsibility although engaged in practice elsewhere, *unless disciplinary rules of the foreign jurisdiction permit the activity*. (emphasis added)

The Committee is of the opinion that the provisions of DR:1-102(A)(4) embrace far more than an attorney's conduct in the context of an attorney/client relationship. Thus, the Committee opines that when an attorney assumes the responsibility of acting as a fiduciary and violates his or her duty in a manner that would justify disciplinary action had the relationship been that of attorney/client, the attorney may be properly disciplined pursuant to the Code of Professional Responsibility. The Committee thus specifically adopts the conclusions reached in ABA Formal Opinion No. 336. (See also *State v. Freeman*, 229 Kan. 639, 629 P.2d 716 (1981); and *Committee on Professional Ethics v. Gross*, 322 N.W.2d 82 (Iowa 1982))

Virginia Disciplinary Rule 2-108(B), subsections (2), (3) and (4), directs that a lawyer may withdraw from representing a client if (2) the client persists in a course of conduct involving the lawyer's services that the lawyer reasonably believes is illegal or unjust; (3) the client fails to fulfill an obligation to the lawyer regarding the lawyer's services and such failure continues after reasonable notice to the client; or (4) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client. The Committee is of the opinion that, under the facts you have provided, it would not be improper to move to withdraw as legal representative for the corporation. (See also LE Op. 974) The Committee understands, however, from your recitation of the facts, that such permission of the court is not required in the foreign country in which you practice. Under those circumstances, the Committee directs your attention to DR:1-102(B) which, as noted above, would control. Therefore, if the professional norms in that country permit unilateral and voluntary withdrawal from

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representation without authorization by the court, it would not be improper for you to act accordingly.

The Committee has earlier opined that there is no disciplinary rule ethically prohibiting an attorney from bringing an action against his client for past-due attorney's fees and costs. (See LE Op. 974 and LE Op. 995) Guidance is available under Ethical Consideration 2-25 [EC:2-25] which urges that a lawyer should not sue a (current) client for a fee unless necessary to prevent fraud or gross imposition by the client. (See LE Op. 1117. But see LE Op. 1230 and LE Op. 1257)

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