Committee Opinion
September 17, 1991

LEGAL ETHICS OPINION 1432

FEES - CORPORATE PRACTICE – CONTRACT OF EMPLOYMENT - TERMINATION OF REPRESENTATION.

You have presented a hypothetical situation in which an attorney agreed to substitute as counsel of record and assume all responsibility for representation of a client in two pending cases which had been consolidated for trial. In the first case, Client was defending against an action filed in the name of a closely-held corporation, and in the second Client was suing the corporation and its principals for damages for, among other things, failure to provide any financial information to the shareholder regarding the value of his equity for nearly eight years. You advise that Client had been an organizer of the corporation, had served as a director and president, and was still a shareholder. Furthermore, you indicate that the first of the two suits had been filed one-and-a-half years prior to the substitution of counsel.

You have informed the Committee that Client told Attorney that obtaining the books and records of the corporation was the top priority in resolving these cases and that Client felt that the corporation would rather settle than produce such records. Client further stated that motions for productions of the records, as well as extensive interrogatories, had been served four months earlier, but that no order had been obtained by prior counsel to compel their production. Client also indicated that prior counsel had agreed to minimal billed hours at an hourly rate with client's attorney-wife providing assistance; whereas other attorneys had requested a $15,000 retainer which was not affordable.

Following substitution of counsel, Attorney conferred with Client several times; reviewed the cases and files; explored various fee arrangements in extensive discussions; and ultimately proposed a contingency fee arrangement whereby Client was to pay all expenses in advance. The fee proposal letter indicated that Attorney had already filed a motion to compel, a praecipe to set a trial date, and was scheduling depositions of adverse parties. You indicate that Client accepted the agreement by return mail and, at docket call, a trial date was set.

Attorney later wrote client that the judge overruled the motion to compel. In a subsequent letter, Attorney wrote that he had scheduled another motion to produce and, in advance, a hearing to compel, in case of non-compliance with the request. Client was informed that he had to appear for depositions by the adverse party, but that he could review the financial records at the time. At the time of the depositions, however, the records were not made available. Meanwhile, the trial was continued because Attorney had a federal court appearance on the same date.

Attorney subsequently informed Client that he had obtained a court order compelling the corporation to produce its financial records, but the corporation filed objections and a hearing was set on the objections and for a request for another continuance. Although the Attorney stated that he believed that adverse counsel would agree to a continuance, and that Client would not have to appear for the scheduled trial date, Attorney informed Client, at the hearing, that the judge had refused to grant another continuance. Attorney

advised and asked permission from Client to nonsuit the case, which Attorney said he would re-file in a few weeks. Client agreed to the nonsuit of the case in which he was plaintiff, but opposing counsel refused to nonsuit his case. You indicate that, with four days notice, Client made arrangements to appear from out-of-state to testify in the trial against him.

You indicate that Client called and wrote Attorney several times for information on the status of the case to be re-filed was subsequently told by Attorney that he could no longer work on a straight contingent fee basis but would need a retainer of $15,000 to represent Client in the re-filed action. Client wrote Attorney that he could not afford such fees and that he expected Attorney to re-file his lawsuit before the limitations period expired and to get the corporate books and records.

You advise that, to date, Client has received no word from Attorney as to the letter refusing the $15,000 retainer agreement or the re-filing and, finally, you indicate that the statute of limitations is rapidly approaching.

You have asked the Committee to opine whether, under the facts of the inquiry, Attorney has failed to complete a contract of employment for the Client; whether the non-suit has terminated the attorney's obligations to the client; and whether the attorney's re-filing constitutes a new suit for which he can charge new and different fees.

The appropriate and controlling disciplinary rules related to you inquiry are DR:2-108(D), which mandates that upon termination of employment, a lawyer shall take reasonable steps for the continued protection of a client's interests; and DR:7-101(A)(2), which states that a lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services.

The Committee has previously opined that an attorney is expected to attend to all matters incident to divorce proceedings unless the client consents to limitations on the representation after full and adequate disclosure has been made to the client. (See LE Op. 1193.) Since, as the facts you present allege, Attorney was hired by Client specifically to obtain the books and records of the defendant corporation; was informed that motions for production of documents had been served several months prior to his employment; and Attorney ultimately obtained an order to compel production but subsequently took a non-suit, the order to compel production was not enforced, and the client's objective not achieved. The Committee opines, therefore, that Attorney has intentionally failed to carry out a contract of employment with the client, in violation of DR:7-101(A)(2).

As to the question of whether the non-suit has terminated the attorney- client relationship, the Committee directs your attention to DR:2-108(D). Since the attorney is no longer counsel of record, by virtue of the non-suit, the committee believes that DR:2-108(C), requiring leave of court for withdrawal by counsel of record, is inapplicable. Thus, although Attorney may withdraw without leave of court, the Committee opines, however, that the attorney still has an obligation to protect the client's interests, under DR:2-108(D). Furthermore, the Committee is of the opinion that the attorney's obligation

also includes the duty to re-file the suit to prevent the statute of limitations from running and from prejudice against his client. (See LE Op. 841, LE Op. 872, LE Op. 1088.)

Finally, the Committee opines that as to whether the fee agreement is nullified and may be unilaterally changed upon the taking of the non-suit raises a legal question as to contract law which is beyond the purview of the Committee.