

Committee Opinion  
August 24, 1992

LEGAL ETHICS OPINION 1470

ZEALOUS REPRESENTATION –  
SETTLEMENT - NEGOTIATION  
TACTICS: DISCLOSURE OF CLIENT'S  
POSITION.

You have presented a hypothetical situation in which an attorney represents a bank. A customer of the bank has alleged certain facts which, if true, will make the bank liable to the customer for a given sum. However, if true, the bank will also then have a claim against a company for that money under the UCC. The bank's attorney feels that the customer will likely prove the facts if the matter goes to court and that, therefore, the bank has a strong probability of liability. No facts, however, have been proven and the costs of litigation would likely far exceed the dollar amount involved.

You have asked the Committee to opine whether, under the facts of the inquiry, the bank's attorney, in attempting to resolve liability issues outside of litigation, must indicate to the company that the facts are alleged and unproven. You also ask to what extent the bank's attorney must reveal the probability of the customer's success.

The Committee cautions that it is not empowered to opine as to the propriety of litigation strategy.

Disciplinary Rules pertinent to the issue you raise are DR:7-102(A)(5) which prohibits a lawyer from knowingly making a false statement of law or fact in the representation of a client; DR:4-101(A) which defines "secret" as information [other than that protected by the attorney-client privilege] which has been gained in the professional relationship and which would be likely to be detrimental to the client; DR:4-101(B) which precludes a lawyer from knowingly revealing a secret of his client, using it to the disadvantage of the client, or to the advantage of the lawyer or a third person; and DR:6-101(D) which requires that a lawyer inform his client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter. Further guidance is available through EC:7-5 which urges a lawyer to give to his client his professional opinion as to what the lawyer believes would likely be the ultimate decision of the courts on the matter at hand and the practical effect of such decision.

The Committee believes that it is axiomatic that facts are considered to be alleged and unproven until trial, at which time the fact-finder, judge or jury, weighs the evidence supporting or attacking the alleged facts. Therefore, the Committee is of the opinion that the bank's attorney is not obligated to indicate to the company's attorney that the customer's facts are alleged and unproven. The Committee is of the opinion, however, that since such facts have not been proven, the bank's attorney should not posit them with certainty to the company's attorney, since to do so might rise to the level of a violation of DR:7-102(A)(5).