

Committee Opinion
July 12, 1994

LEGAL ETHICS OPINION 1571

FEES - MISCONDUCT: ATTORNEY
LIEN IN PERSONAL INJURY
SETTLEMENT WHEN CLIENTS
CHOOSE DEPARTING ASSOCIATE.

You have presented a hypothetical situation in which a client hires Attorney A, an independent contractor/associate of the Law Firm of Attorney B, to handle a personal injury case. One year later, Attorney A leaves the Law Firm of Attorney B and opens his own law practice. While Attorney A was an independent contractor/associate with Attorney B, all lawyer work performed on client's case was performed by Attorney A. The office staff (i.e., personal injury legal secretaries) working on the case at the direction of Attorney A were paid by Attorney B.

You indicate that the contract for representation on the personal injury case was in writing between the client and the law firm of Attorney B. The written contract had the following provision:

"Further, I agree that, in the event I am dissatisfied with his services, I will have the right to secure the services of another attorney, after reimbursing the law firm ... upon a quantum meruit basis; however, if he has begun negotiations with the defendant or the insurance company, I will be obligated to pay him 33-1/3% of the amount offered in settlement of my case, whether or not the same meets with my approval or acceptance. And I hereby authorize new counsel to honor a lien for his said fee."

You further indicate that, after Attorney A left the law firm of Attorney B, the client chose to have Attorney A continue as counsel.

At the time the client made the decision to continue with Attorney A, an offer for settlement had not been made by the defendant's insurance carrier.

Attorney B then wrote a letter to the claims representative for the defendant and asserted an attorney's lien pursuant to § 54.1-3932 of the Code of Virginia. Attorney B wrote a letter to the client which stated as follows: "In the event there is a settlement on your case, my law firm holds a lien against same on account of attorney's fees."

You advise that, by subsequent letter, Attorney A, on behalf of client, requested that Attorney B provide an itemization of services rendered on client's case to determine the attorney's fees pursuant to the attorney's lien claimed by Attorney B. Attorney B did not respond to the request for itemization of services rendered. Attorney A again wrote Attorney B, requesting that he provide an itemization of services rendered, but Attorney B did not respond to the second request either.

Finally, you indicate that the client's personal injury claim was settled. As a result of Attorney B's refusal to provide an itemization of services rendered, the attorney's lien issue has been left unresolved. In addition, there are unresolved financial matters between Attorney A and Attorney B as to Attorney A's termination of their professional

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relationship. Attorney B has demanded that Attorney A pay him 70% of all attorney's fees paid on all cases that were opened by Attorney A while associated with the law firm of Attorney B, including the personal injury case in question.

You have asked the Committee to opine under the facts of the inquiry: (1) whether Attorney B has committed unethical conduct in violation of DR:1-102(A)(4) and DRs 2-105(A), (B) and (C) [DR:2-105] by refusing to provide Attorney with an itemization of services rendered, in an effort to coerce Attorney A to pay Attorney B 70% of all attorney's fees pursuant to the employment arrangement between Attorney A and Attorney B; (2) whether Attorney A has an obligation, under DR:1-103(A), to report Attorney B's conduct to the Virginia State Bar; and (3) whether Attorney B may ethically refuse to provide Attorney A with an itemization of services rendered in a contingent fee case.

The appropriate and controlling Disciplinary Rules related to your inquiry are DR:1-102(A)(4) which states that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation which reflects adversely on a lawyer's fitness to practice law; DR:1-103(A) which 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 honesty, trustworthiness, or fitness to practice law in other respects, shall report such information to the appropriate professional authority; and DR:2-105(A), (B), and (C) which sets forth the ethical requirements as to fees.

The committee opines relative to your inquiries as follows:

1. You ask whether Attorney's B conduct is in violation of DRs 1-102(A)(4), and 2-105(A), (B) and (C). Disciplinary Rule 2-105(A) requires that fees be adequately explained to the client. The plain language of DR:2-105(B) indicates that the basis or rate of a lawyer's fee shall be furnished on request of the lawyer's client. In addition, DR:2-105(C) indicates the requirement for a closing statement in contingent fee matters. Attorney has requested an itemization of services rendered on behalf of the client. Thus, the committee is of the opinion that it is improper, under the provisions of DR:2-105, for Attorney B to refuse to supply such itemization.

The committee is not empowered to make the factual determination necessary to decide whether or not Attorney B's refusal to provide an itemization is an attempt to coerce Attorney A into paying Attorney B in excess of the contractual arrangement. The committee, however, cautions that the recited facts indicate a demand by Attorney B of 70% of the attorney's fees, not 70% of the settlement funds.

If it is factually determined that Attorney B's refusal to provide the itemization was an attempt at coercion, such refusal may also be violative of DR:1-102(A)(4).

2. Your second inquiry concerns the obligation to report Attorney B's conduct to the Virginia State Bar. Disciplinary Rule 1-103(A) [DR:1-1-3] contains a two-prong test for determination of obligatory reporting of another lawyer's misconduct. See LE Op. 1004,

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LE Op. 1528. First, the reporting lawyer must have information which establishes to a reasonable degree of certainty that another lawyer has committed a violation of the Disciplinary Rules. Second, the reporting lawyer must reasonably determine that the violation raises a substantial question about the other lawyer's honesty, trustworthiness or fitness to practice law in other respects. Certain violations of the Disciplinary Rules may be so egregious that reasonable lawyers could not differ as to whether those violations should be reported. See LE Op. 977.

The Committee cautions that in every case the reporting lawyer must be vigilant in observing DR:7-104's prohibition against threatening to present or presenting a disciplinary charge solely to gain an advantage in a civil matter.

On the facts presented, Attorney B's refusal to provide an itemization of services is a violation of DR:2-105(A), (B), and (C), which, coupled with the assertion of an attorney's lien on the settlement proceeds and a demand for 70% of the attorney's fee in all similar cases, raises a substantial question about Attorney B's fitness to practice law in other respects.

3. Finally, the committee reiterates its position, stated in issue #1, that Attorney B may not ethically refuse to provide Attorney A with an itemization as to services rendered to the client.

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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.