

The facts of your letter are incorporated in this letter for the sake of brevity:

For approximately ten years, I have been a sole practitioner in the private practice of law in Fairfax County, Virginia. In March of 1986 I was offered, and accepted, the job of general counsel with * * *, a small accounts receivable lender in Northern Virginia. Pursuant to a written employment contract, I was to work twenty hours per week for the corporation and the remaining time for my private practice. My compensation included salary, office, secretarial services, telephone and all other office overhead.

In approximately July, 1987, the corporation was unable, or unwilling, to pay my salary. It appeared at that time that the corporation was out of business or would be out of business in the very near future. The corporation had a piece of litigation which was of importance to it. The litigation was handled by an outside counsel at the trial level. The case needed to be appealed. A notice of appeal had been filed by the outside counsel; however, outside counsel notified all, that he would not represent the client any further. The president of the corporation insisted that I handle the litigation on appeal to the United States Circuit Court for the Fourth Circuit as part of my duties with * * *. Since * * * had ceased operations, and it did not appear that it was able to function in the future, I agreed to enter my appearance in the case only upon the following conditions:

1. That all salary due to me would be paid.
2. That my secretary's salary would be paid.
3. That \$5,000.00 be put into my escrow account to provide enough funds for all out of pocket costs, including transcripts, printing, etc.
4. That a financially responsible party sign a retainer agreement with me providing for the payment of my fees in the event I was required to handle the case other than as a * * * employee whether the corporation went out of business or I terminated my relationship for whatever reason.

* * * borrowed \$9,060.00 to accommodate paragraphs 1, 2, and 3 above. At the time this was accomplished, my secretary had been paid for the time she worked until she quit the corporation. I placed five thousand dollars (\$5,000.00) in trust and the remaining four thousand ninety six dollars (\$4,096.00) was, by agreement, paid to me as part of the salary owed. It did not pay all of the salary owed. No retainer agreement was provided with someone who would be financially responsible. In the absence of a retainer agreement, I orally stated to the president of the corporation that I would enter my appearance in the case (time was critical) provided that I was authorized to draw from the escrow account for monies owed to me and provided the corporation endorsed an order

authorizing me to withdraw from the case in the event I determined that I would not be paid, or there was some other conflict prohibiting me from handling the case further.

On August 5, 1987 I terminated my employment with * * *. At that time * * * owed me substantial sums of money for salary, vacation time, and other compensation (such as the cost for secretarial services from the date of my secretary's quitting to August 5, 1987).

In August of 1987, the United States Court of Appeals granted my motion to withdraw as counsel. I was advised in late September, 1987, that the corporation intended to obtain the services of other counsel. The president of the corporation requested that I forward the file to him along with the monies in the trust account. I have forwarded the file, but have refused to forward the monies in the trust account. I claim that I have a setoff in excess of the amount in the trust account for monies due to me. I am confident that, if I turn over the trust account funds to the corporation, I will never see any payment of the monies due to me. The corporation has not done any business in more than a year, has judgments against it in excess of three million dollars and has had all of its furniture, typewriters, etc., sold by sheriff's auction. The corporation exists only in its litigation files and has one employee, that is, the president of the corporation, who is nominally operating the corporation out of his home. The corporation does not transact any business.

You wish to know whether you may withhold payment of trust monies which the corporation has requested absent an agreement with the corporation or a court order.

DR:9-102(B)(4) [DR:9-102] provides that "a lawyer shall promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer *which such person is entitled to receive*" (emphasis added). Absent an agreement or a court order between you and the corporation which states that your fees may be paid from the trust, the trust monies belong to the corporation because the monies were deposited for the specific reason of paying the costs of litigation. The Committee opines that it would be improper for you to withhold the trust monies absent a prior agreement from the corporation because the corporation is entitled to receive these monies.

Committee Opinion
October 29, 1987

Editor's Note. – The asterisks in the opinion above represent deletions made to protect the confidentiality of the parties.