CLIENTS SUED BY ATTORNEYS OVER FEES

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Our office has received with increasing frequency complaints from clients who are sued by their attorneys over fees. In this month's column I will discuss one recurring factual situation which warranted the issuance of an admonition.

John Doe, Esq., has represented Mary Smith in a divorce action. Ms. Smith, despite numerous requests, has failed to pay her legal fee. Although attorney Doe is cognizant of EC 2-23 which provides that a lawyer should be zealous in his or her efforts to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject, he finds no recourse other than to sue this client to collect the fee. After being served with a summons and complaint, Smith writes Doe stating she cannot pay because of her dire financial circumstances. She also denies the amount of the bill and states she would be happy to present her side to the judge.

After the period for Smith's answer has elapsed, Doe files with the court his affidavit of no answer, identification, nonmilitary status, amount due, and costs and disbursements in order to obtain a default judgment. John Doe does not inform Smith of the default hearing's time and place nor does he inform the judge of Smith's letter denying liability and requesting an opportunity to present her side of the case. The court enters a default judgment against Smith.

The issue arises whether Doe has committed unprofessional conduct by failing to notify Smith of the hearing's time and place and/or the judge of Smith's letter.

John Doe states he did not consider Smith's letter a legal answer in the collection suit and acted accordingly. It is our position that Doe should have brought the letter to the court's attention so the court could have determined whether Smith's letter constituted an answer within the meaning of the Rules of Civil Procedure. The letter both denies liability and expresses Smith's desire to present her side of the case to the judge. Such language clearly indicates the letter is not irrelevant correspondence, but rather a written response to Doe's complaint. As such, it should be brought before the court for a judicial determination of whether it constitutes an answer.

Rule 55.01, Rules of Civil Procedure, provides:

> When a party against whom a judgment for affirmative relief is sought has *failed* to *plead* or *otherwise defend* within the time allowed therefor by these rules or by statute, and that fact is made to appear by affidavit, judgment by default shall be entered against him as follows . . . (emphasis added).

In this instance, it is clear that Smith, given her lack of formal legal training, believed in good faith her letter

to Doe constituted an answer in defense of Doe's suit. Moreover, Rule 8.06, Rules of Civil Procedure, provides that all pleadings shall be construed so as to do substantial justice. It has been our experience that the court would reopen the judgment should Smith bring to its attention her letter to Doe. John Doe's failure to present the letter to the court is conduct prejudicial to the administration of justice in violation of DR 1-102(A)(5). Ms. Smith's assumption that her letter would at least result in a notice of hearing is more than justified given Doe had previously represented her. Therefore, the interests of justice required Doe to notify Smith of the hearing date, thus providing her with an opportunity to present her case.

John Doe's failure to disclose to the court his receipt of Smith's letter is a misrepresentation in violation of several disciplinary rules. While it may be true Doe never received a document properly captioned and denominated as an "Answer", Doe did receive Smith's letter. Therefore, Doe made a misrepresentation in his affidavit and to the court by making only a partial disclosure of relevant facts, i.e., Doe stated in his affidavit as follows:

> John Doe, being duly sworn, on oath says; that he is the attorney for the plaintiff in the action above entitled; that the summons and complaint in said action have been duly served on the defendant, Mary Smith, therein and said summons and complaint with proof of such service thereof duly filed in the office of the clerk of said court; that the time allowed by law and specified in said summons for said defendant Mary Smith to answer the complaint in said action has elapsed, that no answer or other pleading had been received by or served upon said plaintiff or its attorney, and *defendant Mary Smith has not otherwise defended* in the action; that accordingly said defendant Mary Smith is in default herein (emphasis added).

To avoid the misrepresentation, Doe should acknowledge in his affidavit the receipt of Smith's letter and attach it as an exhibit. In this manner Doe can leave to the court the determination of whether Smith's letter constitutes an answer and, therefore, whether a default judgment may properly be entered.

In the several complaints of this nature, we have issued private admonitions. In order to avoid such consequences, the attorney should advise the court of the letter or other response, and where such communication has been received, affirmatively notify the client of the motion for default judgment.