

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CENDANT CORPORATION, :
 :
 Plaintiff, :
 :
 v. : CASE NO. 3:99CV996 (RNC)
 :
 STUART L. BELL, :
 :
 Defendant. :

RULING AND ORDER

Plaintiff Cendant Corporation has moved to strike the affidavit of Robert Tucker, which defendant Stuart L. Bell has submitted in support of his Motion for Relief Arising Out Of The Jury's Verdicts In His Favor. The motion to strike is granted.

Tucker is an attorney admitted to practice in New York who represented Cendant's predecessor, CUC International, Inc., in connection with the negotiation and preparation of an employment agreement for Bell. The agreement contains a fee-shifting provision, the meaning of which is disputed by the parties. Bell contends that the provision entitles him to recover all fees he has actually incurred in connection with this litigation without having to justify the amount. Cendant contends the provision permits Bell to recover reasonable fees only.

In his affidavit, Tucker sides with Bell on this issue. He states that Bell's position accurately reflects the contractual intent and understanding of his former client CUC. He further states that, in his opinion as the drafter of the agreement, Bell is entitled to recover the full amount of his costs and fees.

Cendant contends that Tucker's affidavit should be stricken because it stems from a breach of duties of confidentiality and loyalty he owes to Cendant as the successor to CUC, duties that prohibit him from revealing information relating to his representation of CUC or using such information to the disadvantage of Cendant. Bell contends the information contained in the affidavit is not protected by the attorney-client privilege and that exclusion of evidence is not a proper remedy for an attorney's breach of fiduciary duty.

The record is insufficient to permit a determination of whether the information in Tucker's affidavit is privileged, but Cendant's privilege claim finds support in Connecticut case law. See Gebbie v. Cadle Co., 49 Conn. App. 265, 273-74 (1998) (in an action to enforce a letter agreement, question posed to attorney who negotiated the terms of the letter concerning his client's knowledge of a certain provision

invaded attorney-client privilege because "question posed went to the heart of the communication between the client and attorney."). Even assuming Tucker's affidavit does not reveal privileged communications, it certainly reveals "information relating to [his] representation of [the] client," within the meaning of Rule of Professional Conduct 1.6(a); and uses it to the disadvantage of a former client within the meaning of Rule 1.9(2). In fact, Cendant's

claim that the affidavit stems from Tucker's violation of these rules is not seriously disputed by Bell.

On the present record, then, the motion to strike turns on whether Tucker's affidavit may be excluded at Cendant's request as a remedy for his apparent violation of the duties he owes Cendant under the Rules of Professional Conduct.

"Exclusionary remedies are strong medicine, normally reserved for constitutional violations and challenged even there" United States v. White, 879 F.2d 1509, 1513 (7th Cir. 1989). Nevertheless, a court has discretion to exclude evidence as a remedy for ethical violations when exclusion is justified. See United States v. Hammad, 858 F.2d 840-42 (2d Cir. 1988). This discretion has been employed to seal an attorney's affidavit and strike it from the record in order to "minimize any effect" of unauthorized disclosures. See Morin v. Trupin, 728 F. Supp. 952, 958 (S.D.N.Y. 1989).

Weighing the interests served by striking Tucker's affidavit against any potential adverse impact on the fact-finding process, I agree with Cendant that the affidavit should be stricken. Striking the affidavit avoids creating an incentive for others to reveal former clients' secrets, maintains the integrity of the fact-finding process by removing tainted evidence, and promotes confidence in the

integrity of the judicial process. See Hammad, 858 F.2d at 841. These considerations clearly outweigh the need

for the affidavit as evidence of the parties' contractual intent because no such need has been demonstrated. Magistrate Judge Martinez, to whom Bell's application for attorney's fees has been referred, may find that she can rule on the application without considering extrinsic evidence of contractual intent. If she finds that extrinsic evidence is needed, Bell may offer his own testimony and the testimony of other witnesses besides Tucker. Until these (and perhaps other) sources of evidence are exhausted, the interests of justice preclude consideration of Tucker's affidavit.

Accordingly, the motion to strike is hereby granted. Tucker's affidavit will be sealed and stricken from the record. So ordered.

Dated at Hartford, Connecticut this 31st day of March 2003.

Robert N. Chatigny
United States District Judge