

STATE OF NEW YORK
SUPREME COURT COUNTY OF ESSEX

LEWIS FAMILY FARM, INC.,

Petitioner,

-against-

ADIRONDACK PARK AGENCY,

Respondent.

AFFIRMATION

Index No. 315-08

Hon. Richard B. Meyer

ADIRONDACK PARK AGENCY,

Plaintiff,

-against-

LEWIS FAMILY FARM, INC., SALIM B. LEWIS
and BARBARA LEWIS,

Defendants.

COUNTERCLAIM

Index No.: 332-08

Hon. Richard B. Meyer

REPLY AFFIRMATION OF JOHN J. PRIVITERA
IN FURTHER SUPPORT OF MOTION TO REARGUE

JOHN J. PRIVITERA, under penalty of perjury, hereby affirms as follows:

1. I am counsel to Petitioner Lewis Family Farm, Inc., as well as Sandy Lewis and Barbara Lewis, defendants in the counterclaim that was filed against them individually by Respondent Adirondack Park Agency.
2. I make this Reply Affirmation in further support of the motion for leave to reargue Petitioner's motion for attorneys' fees pursuant to Article 86 of the CPLR.
3. Contrary to Respondent's contentions otherwise, Petitioner has met the standard for a motion to reargue, which requires the motion to "be based upon matters of fact or law

allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include matters of fact not offered on the prior motion." CPLR § 2221(d)(2).

4. This Court overlooked the Code of Professional Responsibility when it denied an award of fees for all conferences between counsel and Petitioner's principals. Specifically, this Court held that "[c]ompensation is denied for 'strategy' discussions and conferences with LFF's corporate principals, there being no justification provided." (See Decision and Order, dated November 17, 2010, pg. 8). Indeed, we believe the burden to be quite the opposite of this Court's approach. *Failure* to communicate with a client and answer reasonable inquiries is unjustifiable and unprofessional; thus, communications with a client need no justification at all. Petitioner's counsel cannot be required to share the privileged details of its communications with a client in order to recover a fee award for those communications. See 22 NYCRR Part 1200; Rule 1.6.

5. This Court should have acknowledged and embraced counsel's obligations—and the client's rights—under the Code of Professional Responsibility. See 22 NYCRR Part 1200; Rule 1.4 (requiring counsel to "promptly" inform a client of material developments in a case).

6. Respondent incorrectly advises the Court that Petitioner made this argument for the first time on this motion to reargue. (See Affirmation of Loretta Simon, dated January 20, 2011 ¶ 15) ("Now, counsel for the first time cites the Code of Professional Responsibility as justification"). In fact, Petitioner first advised the Court of this ethical provision on reply to the original motion, when Respondent challenged counsel's time entries for communicating with Petitioner. (See Petitioner's Reply Memorandum of Law, Point III, pp. 17-18, dated September 22, 2009) (Ex. K in the Record in Support of the Motion to Reargue).

7. Petitioner need not respond to the remaining immaterial, incorrect and prejudicial statements set forth by Respondent. (See e.g., Simon Aff., ¶ 15) ("While the record in the underlying case on the merits shows that petitioner here is not impoverished, that is not the issue.").

8. While it is true that the evidentiary hearing was cancelled following the conference call on February 22, 2010 (see Ex. C to Simon Aff.), our understanding was such that the Court would reschedule the hearing if the Court had any questions or doubts concerning the documents presented on submission. Our position is clearly set forth in the correspondence following the cancellation of the hearing. (See Affirmation of John J. Privitera, dated December 16, 2010, ¶¶ 9-14, and Exhibits F and G).

9. Petitioner respectfully asks this Court to recognize counsel's professional obligation to communicate with clients and reconsider the amount of the fee award to account for the substantial communications that my law firm had with Petitioner concerning the material developments of this case.

10. If the Court desires further information concerning counsel's communications with Petitioner, a hearing should be scheduled.

I hereby swear and affirm the above under penalty of perjury this 25th day of January, 2011.

McNAMEE, LOCHNER, TITUS & WILLIAMS, P.C.



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