

INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS SUBCOMMITTEE

OPINION NO. 1 of 1977

We have been asked our opinion on whether deputy prosecuting attorneys appointed to enforce child support obligations in cooperation with the Indiana State Department of Public Welfare may also represent criminal defendants in their private practice. We have been asked further whether such part-time deputies may represent individual clients in claims against the State of Indiana.

A part-time deputy prosecuting attorney may not engage in the criminal defense practice. Indiana Opinions, 1963-12, 1964-2, 1972-2, and 1973-3. In Opinion 1972-2, it was stated: ". . . that both the prosecuting attorney and his deputies are members of the State Constitutional Judicial System, are representatives of the State of Indiana, and therefore, cannot ethically defend a person accused of a crime anywhere in this state or in an adjoining state."

In addition, in criminal prosecutions, the State of Indiana is the party. In similar situations, the American Bar Association Committee on Ethics and Professional Responsibility has pointed out the problems that may arise when a part-time deputy prosecutor or deputy attorney general undertakes to represent clients in claims against the State. In American Bar Association Informal Opinion 674, the Committee ruled that a firm having as one of its members a deputy attorney general could not represent a client before the State Tax Commission without a full disclosure and express consent from all concerned. Pursuant to DR 5-105(C) even when it is obvious that the lawyer may adequately represent multiple clients, the possibility of an effect upon the independent professional judgment on behalf of each must be fully disclosed and each client must consent to the multiple representation. In Formal Opinion 186, the Committee ruled that a county attorney who represents the county in civil matters only, would not be allowed to defend a criminal case brought by the prosecutor of the district. Finally, in Formal Opinion 262, the Committee asserted that a part-time state prosecuting attorney could represent private persons before federal government agencies only if the representation would not interfere with cooperative relationships between the state and federal prosecutors.

In Indiana, the conflicts and the potential appearances of impropriety are intensified by the fact that the party in criminal prosecutions is the State of Indiana. The deputy prosecuting attorney is an appointed official of the State of Indiana. Canon 9 of the Code of Professional Responsibility requires that a lawyer avoid the appearance of impropriety. The lawyer should conduct himself or herself in a manner that best promotes public confidence in the integrity of the legal system and the Bar.

For the foregoing reasons, it is our opinion that a part-time deputy prosecuting attorney should neither represent criminal defendants in their private practice nor private clients in claims against the State of Indiana.

INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS SUBCOMMITTEE

OPINION NO. 2 of 1977

The Legal Ethics Subcommittee has been requested to render its opinion as to the propriety of requiring a defense attorney to execute the following certification in connection with a plea bargain agreement, with specific emphasis directed to the underlined portion of the certification:

"I, _____, attorney for _____, hereby certify that I have read and explained to the Defendant all of the foregoing questions and the legal significance of his answers to these questions. I have advised him that, in my opinion, all of the elements of the crime are represented by the facts that he recites here. Further, that I believe he is guilty of the crime confessed to if the facts here recited are true.

There are no other promises resulting from plea agreements other than those contained in the attached agreements.

I have spent at least _____ hours of my time discussing this plea agreement with the defendant.

Attorney

DR 7-106(C)(3) and (4) of the Code of Professional Responsibility are applicable and read in relevant part as follows:

"Appearing in his professional capacity before a tribunal, a lawyer shall not . . .

(3) assert his personal knowledge of the facts in issue, except when testifying as a witness.

(4) assert his personal opinion as to the justness of a cause, as to the credibility of the witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused . . ."

Testing the underlined language in the certification against DR 7-106(C)(3), there is an implication that the lawyer is asserting his personal knowledge of the facts in issue in the sentence which provides in part: ". . . all of the elements of the crime are represented by the facts that he recites here."

However, when considering the application of DR 7-106(C)(4), to both of the underlined sentences, there is a direct and clear assertion by the lawyer as to his opinion of the guilt or innocence of the accused. The lawyer is certifying upon execution of the certification that he believes all of the elements of the crime are present and that he believes that the defendant is guilty of the crime. This should be strictly a judicial responsibility based upon the facts set out in the plea bargain agreement and the lawyer should not add his personal opinion to the plea bargain agreement, which is the result of the certification as presented.

The plea bargain agreement is an essential part of the criminal trial process and in the form submitted to the Subcommittee, will become a part of the Court's record. Accordingly, it is the opinion of the Subcommittee that the certification of the attorney constitutes "Appearing in his professional capacity before a tribunal . . ." as is contemplated by the introductory language to DR 7-106(C).

Accordingly, it is the opinion of the Subcommittee that the underlined portions of the certification set forth above are inappropriate under the provisions of DR 7-106(C) and a lawyer cannot ethically execute such a certification for the reasons set forth above.

INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS SUBCOMMITTEE

OPINION NO. 3 of 1977

Ethical Considerations Regarding Lawyer List Distributed
by a Nationwide Law Firm to its Clients Who Further Dis-
tribute Said List to Their Individual Members and Em-
ployees Pursuant to Their Group Legal Services Plans

The Legal Ethics Subcommittee of the Indiana State Bar Association has been presented with the question:

"What are the ethical considerations regarding an attorney who associates himself or his law firm with a nationwide law firm which provides legal services to individual members of non-profit groups and to employees of employers by allowing the attorney's name or the name of his law firm to be placed on a recommended lawyer list distributed to such members and employees."

The applicable portions of the Indiana Code of Professional Responsibility are DR 2-103(C) and (D), which provide:

- (C) A lawyer shall not request a person or organization to recommend employment, as a private practitioner, of himself, his partner, or associate, except that he may request referrals from a lawyer referral service operated, sponsored, or approved by a bar association representative of the general bar of the geographical area in which the association exists and may pay its fees incident thereto.
- (D) A lawyer shall not knowingly assist a person or organization that recommends, furnishes, or pays for legal services to promote the use of his services or those of his partners or associates. However, he may cooperate in a dignified manner with the legal service activities of any of the following, provided that his independent professional judgment is exercised in behalf of his client without interference or control by any organization or other person:
 - (1) A legal aid office or public defender office:
 - (a) Operated or sponsored by a duly accredited law school.
 - (b) Operated or sponsored by a bona fide non-profit community organization.

- (c) Operated or sponsored by a governmental agency.
 - (d) Operated, sponsored, or approved by a bar association representative of the general bar of the geographical area in which the association exists.
- (2) A military legal assistance office.
 - (3) A lawyer referral service operated, sponsored, or approved by a bar association representative of the general bar of the geographical area in which the association exists.
 - (4) A bar association representative of the general bar of the geographical area in which the association exists.
 - (5) Any other non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, but only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service activities, and only if the following conditions, unless prohibited by such interpretation, are met:
 - (a) The primary purposes of such organization do not include the rendition of legal services.
 - (b) The recommending, furnishing, or paying for legal services to its members is incidental and reasonably related to the primary purposes of such organization.
 - (c) Such organization does not derive a financial benefit from the rendition of legal services by the lawyer.
 - (d) The member or beneficiary for whom the legal services are rendered, and not such organization, is recognized as the client of the lawyer in that matter.

Much has been recently written with regard to the delivery of legal services to the public. The decisions in this area are of great importance and have significant ramifications. Opinion No. 1 of 1976. However, the Legal Ethics Subcommittee must render this opinion pursuant to the Indiana Code of Professional Responsibility as it presently exists regardless of recent amendments to other jurisdictions' Codes of Professional Responsibility. See ABA Code of Professional Responsibility as amended, and Res Gestae, March, 1977, page 126.

The lawyer referral list in the present case is not distributed, sponsored or approved, in any way by local bar associations. Therefore, under DR 2-103(C), it would be unethical for an attorney, licensed to practice in the State of Indiana, to request the above-mentioned law firm to recommend employment as a private practitioner, of himself, his partner, or his associate.

The legal service activities of the above-mentioned law firm are not associated with: (1) a legal aid office or public defender office, (2) military legal assistance office, (3) a lawyer referral service operated, sponsored or approved by bar association representative of the general bar of the geographical area in which association exists, or (4) a bar association representative of the general bar of the geographical area in which the association exists. Furthermore, it appears that one of the primary purposes of the above-mentioned law firm is to render legal services through their affiliated associates. Thus, the above-mentioned law firm does not fall within the "any other non-profit organization" category of DR 2-103(D) (5) due to the fact that it does not satisfy DR 2-103(D) (5) (a). Consequently, it would be unethical for an attorney, licensed to practice in the State of Indiana, to knowingly assist the above-mentioned law firm to promote the use of his services or those of his partners or associates.

INDIANA STATE BAR ASSOCIATION
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OPINION NO. 4 of 1977

The following hypothetical fact situation has been referred to the Legal Ethics Subcommittee for formal opinion:

"Attorney A, who is a member of the law firm A, B, C & D regularly receives monetary advances from clients. Undetermined portions of the advances constitute advances against costs and expenses for filing papers, etc., in various legal matters for the clients. The remaining portions of all advances are advances against attorney A's anticipated legal fees in such matter.

"The account into which all such advances against costs, expenses and anticipated legal fees are deposited is in the firm name, "A, B, C & D". The account does not bear the words "Clients' Account", or "Trust Account for Clients" or like words. Members of the firm draw funds from the account for their personal use." (Emphasis added)

We have been asked to render an opinion with respect to the ethical propriety of attorney A's actions as described in the foregoing hypothetical fact situation.

Canon 9 of the Code of Professional Responsibility provides "A Lawyer Should Avoid Even the Appearance of Professional Impropriety." Ethical Consideration 9-5 under Canon 9 provides as follows:

"Separation of the funds of a client from those of his lawyer not only serves to protect the client but also avoids even the appearance of impropriety, and therefore commingling of such funds should be avoided."

Disciplinary Rule 9-102(A) provides as follows:

"All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

- (1) Funds reasonably sufficient to pay bank charges may be deposited therein.
- (2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited

therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved."

It is clear under Disciplinary Rule 9-102(A) that funds of a client paid to a lawyer or law firm which represent advances for "costs and expenses" are specifically excluded from the "funds of clients" which are required to be deposited in one or more identifiable bank accounts and not commingled with the funds of a lawyer or law firm.

It appears to this Subcommittee that the amounts received by lawyer A as advances against attorney A's anticipated legal fees are in the nature of a "retainer advance." While Disciplinary Rule 9-102(A) of the Code of Professional Responsibility does not make specific reference to terms, such as "retainer" or "retainer advances," such specifically referenced authority did exist under the Canons of Professional Ethics and the opinions of the American Bar Association thereunder.

Particularly, Canon 44 of the Canons of Professional Ethics provides, in relevant part, as follows:

Upon withdrawing from a case after a retainer has been paid, the attorney should refund such part of the retainer as has not been clearly earned.

Further, with respect to retainers, American Bar Association Informal Opinion No. 998 provides as follows:

"We think it is unethical to require the client to agree that the retainer paid will be kept by the lawyer under all circumstances. Undoubtedly in most instances the retainer will be earned, but the retainer should only be kept if it is earned. A retainer is an advance payment in connection with fees and not a payment unrelated to fees."

From the foregoing, it appears that retainer amounts, which are amounts advanced against anticipated legal fees, at the time of the initial advance, are "funds of clients" under Disciplinary Rule 9-102. Said funds and the handling thereof in the opinion of the Subcommittee are covered by Subsection 2 of Disciplinary Rule 9-102(A) which provides:

"Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited (in a separate identifiable bank account), the proportion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved."

Under the hypothetical situation presented to this Subcommittee, it is not possible to determine the portion of the client's advances which represented advances for

"costs and expenses" and the portion of the client's advances which represented "retainer advances" against attorney A's anticipated legal fees. Since said advances were, in effect, commingled by the client, and the cost and expense portion cannot be anticipated, it is our opinion that the advances referred to in the hypothetical fact situation must be deposited in one or more identifiable bank accounts in accordance with Disciplinary Rule 9-102(A) and Disciplinary Rule 9-102(A) (2). Said advances may not be deposited in the firm name "A, B, C & D" account or otherwise commingled with the funds of lawyer A or his law firm.

If the hypothetical fact situation had presented a situation where the advances received could be specifically identified and divided between advances for "costs and expenses" and "retainer advances" against anticipated legal fees, the all-inclusive foregoing opinion of the Committee would not apply. In such a situation where the application of the advances can be specifically identified, to the extent that an attorney received monetary advances from clients which specifically constitute advances for a reasonable and proper estimate of "costs and expenses," it is proper for said lawyer to deposit such advances in the firm name account, which account does not bear the words "Clients' Account" or "Trust Account for Clients" or like words. However, with respect to client advances which specifically represent "retainer advances" against an attorney's anticipated legal fees, said advances must be deposited in one or more identifiable bank accounts in accordance with Disciplinary Rule 9-102(A) and Disciplinary Rule 9-102(A) (2); said advances may not be deposited in a firm name account or otherwise commingled with the funds of the attorney or his law firm.

INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS SUBCOMMITTEE

OPINION NO. 5 of 1977

We have been asked to review Indiana Opinions No. 1 of 1966 and No. 2 of 1966 in light of certain American Bar Association Ethics Opinions, the Code of Professional Responsibility, and other developments.

In relevant part, Indiana Opinion No. 1 of 1966 held that, where an attorney is reasonably satisfied that he has a line for fees, he may ethically hold the file of a client as security for the payments of his fees. In relevant part, Indiana Opinion No. 2 of 1966 held that an attorney's right to compensation for services performed is one which ethically requires other attorneys to refrain from intervening in a cause until such time as the previous lawyer has been fully paid. This Subcommittee's review of these two existing Indiana Opinions will be dealt with separately in this Opinion.

REVIEW OF INDIANA OPINION NO. 1 of 1966

Whether or not an attorney may ethically hold the file of a client as security for the payment of his fees is a question which involves the subject of attorneys' liens. In Indiana, both the legislature and the judiciary have recognized and dealt with attorneys' liens. Under Indiana Code § 33-1-3-1, a statutory lien is provided which gives an attorney the right to file a lien if his services procure a judgment, decree or award. Although this lien exists, in proper circumstances, a client may bring a contempt action against an attorney who refuses to turn over money and papers to the person from whom or for whom the attorney has received them. (Indiana Code § 34-1-60-10).

The Indiana Supreme Court has declared that in addition to the statutory attorneys' liens on judgments, decrees and awards, attorneys have a common law equitable lien on funds generated through the attorney's actions. State v. Hendricks Circuit Court, (1962), 243 Ind. 134, 183 N.E. 2d 331. In its decision, the Indiana Supreme Court quoted with approval 7 C.J.S., Attorney and Client, § 210, p. 1141, which asserts that attorneys have a "retaining lien" on the client's documents and other properties which come into the hands of the attorney professionally, until the attorney is paid for his services. As the Subcommittee is precluded from rendering opinions on questions of law, the Subcommittee expressly refrains from any interpretation or opinion as to (1) the legal effect of the above-cited materials, (2) the existence or nonexistence of other relevant legal references, and (3) the current legal status of attorneys' liens in Indiana.

In addition to the legal considerations which are discussed above which deal with attorneys' liens, under certain circumstances, certain ethical considerations deal with the same subject. Under Canon 9 of the Code of Professional Responsibility, it is provided that "A Lawyer Should Avoid Even the Appearance of Professional Impropriety." Disciplinary Rule 9-102(B)(4) under said Canon declares that a lawyer shall "promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in possession of the lawyer which the client is entitled to receive." (Emphasis Added). The negative inference of this Disciplinary Rule is that situations will exist where a client is not entitled to receive the funds, securities or other properties in possession of the attorney. Further, Disciplinary Rule 5-103(A)(1) under Canon 5 of the Code of Professional Responsibility acknowledges the ethical propriety of a lawyer acquiring an ownership interest in a cause when he acquires a lien granted by law to secure his fee or expenses.

From the foregoing, it appears that the question of an attorney's right to hold the records and papers delivered to him by his client until he is fully compensated is usually a question of law relating to the statutory and common law attorneys' liens. As stated in American Bar Association Formal Opinion No. 209:

Any controversy arising with respect to the assertion of such lien is ruled by the statement of this Committee in (American Bar Association Formal) Opinion 63, as follows:

Any question as to the amount of an attorney's fee or method of its payment is a matter of contract, expressed or implied to be construed as other contracts are construed. Any controversy concerning such a matter is a matter of law to be determined by the courts. Ordinarily no ethical question is involved in such a controversy.

An exception is recognized in case of flagrant overcharges. See (American Bar Association Formal) Opinions 27 and 190 We conclude, therefore, that the question is one of law and without the jurisdiction of this committee.

Although the question of retaining a client's papers is ordinarily a question of law which is governed by the jurisdiction's statutory and common law relating to attorneys' liens, the Subcommittee is of the opinion that under certain circumstances the propriety of such a lien may involve ethical considerations. For example, the ethical aspects of retaining such papers must be considered in circumstances of flagrant overcharges and in circumstances where the attorney who is retaining possession of the papers deliberately failed to perform the services which he had contracted with his client to perform. Certainly, other situations exist in which an

follows:

"We held in (American Bar Association Formal) Opinion 63 that 'an attorney is under no ethical obligation to associates for payment of their fees for services rendered his client unless he has definitely agreed to be liable therefor.' That involved a situation in which the lawyer complained against had referred the client's case to the lawyers whose fees were not paid."

See also, American Bar Association Informal Opinions 243 and 1142.

