INDIANA STATE BAR ASSOCIATION

Opinions Of Legal Ethics Committee, 1966

Opinion No. 1 of 1966 Lawyers May Retain File As Security

The Legal Ethics Committee was asked whether an attorney may ethically hold a file as security for payment of the fee, where such payment is contingent upon recovery, and there has been no recovery due to either withdrawal or dismissal of the attorney.

The Committee is of the opinion that if withdrawal as attorney is consistent with Canon 114, i.e., withdrawal for good cause, regardless of client consent, and Canon 42 applies:

"Expenses of Litigation--A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience, but subject to reimbursement."

then an attorney must be reimbursed for such expenses advanced. This conclusion is entirely consistent with the American Bar Association's Committee on Professional Ethics Opinion No. 246 which held:

"A contract for a reasonable contingent fee where sanctioned by law is permitted by Canon 13, but the client must remain responsible to the lawyer for expenses advanced by the latter. There is to be no barter of the privilege of prosecuting a cause for gain in exchange for the promise of the attorney to prosecute at his own expense." (Cardozo, Ch. J. in Matter of Gilman, 251 N.Y. 265, 270-271.)

Upon withdrawal prior to recovery, the contingent fee contract ends, and the attorney is entitled only on the basis of quantum meruit. Such was the opinion of the New York City Committee on Ethics in Opinion No. 394 with which we concur. See also Drinker, Henry S., Legal Ethics, New York: Columbia University Press, 1953, pp. 176-178.

On the question of holding the file as security for payment of expenses and quantum meruit compensation, the committee adopts as its opinion the comment of Henry S. Drinker in Legal Ethics, supra at page 177:

"Where he is reasonably satisfied that he has a lien for fees, a lawyer may retain the papers until compensated or retain a check, to the client's order, received by him, but must keep the funds separate and subject to accounting."

Opinion No. 2 of 1966 Non-Intervention By Attorneys

Consistent with the views in Opinion No. 1 of 1966, the Legal Ethics Committee affirms the right of an attorney to be secure in his contractual relationship with the client.

The attorney's right to compensation for services performed is one which ethically requires other attorneys to refrain from intervening in the cause until such time as the previous lawyer has been fully paid.

The American Bar Association's Committee on Professional Ethics held in Opinion No. 17, in further clarification of Canon 22:

"Compensation for his services is an attorney's professional right and, in matters affecting a professional right, candor and fairness require that other attorneys grant him more than the mere compliance with rules of court or with his statutory rights. They require that he be given a reasonable opportunity to assert and protect any such right which he may claim or possess, whether it be based on a lien or not."

The Indiana State Bar Association's Legal Ethics Committee concurs with and adopts this opinion.

Opinion No. 3 of 1966

Attorneys May Not Lend Name To Collection Agencies

It has been brought to the attention of the Committee that a common practice may exist among attorneys wherein a collection agency, having acquired the services of an attorney, sends to debtors certain forms or form letters prepared by the attorney, at the discretion of the collection agency's employees. Whether such a practice is common is not of any great importance; the fact that it exists at all makes it worthy of an opinion by this Committee.

Canon 47 states:

"No lawyer shall permit his professional services, or his name, to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate."

Although the unauthorized practice of law is for the courts to determine, and not a proper subject for the Legal Ethics Committee of the Indiana State Bar Association, we do not deem it necessary to fully determine the extent of the unauthorized practice prior to condemning the actions of attorneys as unethical, where such attorneys' actions may lead to the unauthorized practice of law. For in the words of the Canon itself, what is condemned is the ability to ". . . make possible . . . " the unauthorized practice of law. Where an attorney lends his name to a communication to a member of the public, it is incumbent upon such attorney to know of the circumstances whereby the prestige of his name and profession is lent to such correspondence. The general public deservedly expects the requests and demands contained in a letter from an attorney to be the work product of the attorney signing the letter. Such work product includes not only the initial writing of the letter, but the determination that such letter should be sent to a specific party to gain a given legal result.

It therefore is the opinion of this committee that an attorney preparing form letters, or in any other way lending his name to any writing, the disposition of which shall be determined by a layman, is guilty of unethical conduct.

Opinion No. 4 of 1966 Group Practice

The Legal Ethics Committee has been asked to comment on the ethical considerations of group legal practice in light of the U.S. Supreme Court opinion in Brotherhood of Railroad Trainmen v. Virginia, 84 S. Ct. 1113 (1964). The Supreme Court held that union members who upon the recommendation of their union leadership obtain legal advice from attorneys employed by the union organization would be denied their constitutional rights under the First and Fourteenth Amendments should advice from such counsel be denied. However, the Court in rendering its legal judgment did not rule on the ethical questions as they pertain to attorneys involved in such practice and limited its holding only to the effect upon those who had banded together to seek legal advice. The Court further modified its finding to allow such recommendation only to those who required legal aid pursuant to settling a claim resulting from injury or death while engaged in employment in which the union has an interest. In obvious concert with the opinion of the Supreme Court, the Chancery Court of Richmond, Virginia upon remand held:

"that the Brotherhood of Railroad Trainmen, its officers, agents, servants, employees, members and anyone acting in its behalf, be, and they now are, permanently restrained and enjoined from giving or furnishing legal advice to its members or their families; from soliciting for, or on behalf of, its Regional or Legal Counsel or any other lawyer, any of its members, their families or any other person to employ such Regional or Legal Counsel or other lawyer to represent him, her or them in court or otherwise, in respect to any claim for personal injury, death or in relation to property; from informing any lawyer or lawyers or any

person whomsoever that an accident has been suffered by a member or non-member of the said Brotherhood and furnishing the name and address of such injured or deceased person for the purpose of obtaining legal employment for any lawyer; from stating or suggesting that a recommended lawyer will defray expenses of any kind or make advances for any purpose to such injured persons or their families pending settlement of their claims; from controlling, directly or indirectly, the fees charged or to be charged by any lawyer; from accepting or receiving compensation of any kind, directly or indirectly, for the solicitation of legal employment for any lawyer, whether by way of salary, commission or otherwise; from sharing in any manner in the legal fees of any lawyer or countenancing the splitting of or sharing in such fees with any layman or lay agency; from sharing in any recovery for personal injury or death by gift, assignment or otherwise; from doing any act or combination of acts that constitutes or amounts to the solicitation of legal employment for or on behalf of any lawyer, or conspiring to do so; and, in general, from violating the laws governing the practice of law in the Commonwealth of Virginia and from aiding and abetting others to do so.

"But nothing herein contained shall be construed to infringe upon or restrict the constitutional rights of the defendant, its officers, agents, servants, employees or members, to advise the defendant's members or their families or others, to obtain legal advice before making settlement of their claims for injury or death, and to recommend a specific lawyer or lawyers to give such advice or handle such claims; provided, however, that the circumstances of such advice and recommendation shall not constitute or amount to, the solicitation of legal employment for or on behalf of any lawyer or lawyers. The term 'solicit' and its derivatives, as herein employed, shall refer to the same terms as employed or intended by the common law, the statutes of this state, and Canons of Legal Ethics of the American Bar Association, adopted in this state."

The Legal Ethics Committee of the Indiana State Bar Association reiterates the position taken by the American Bar Association that an attorney making himself available before any group to answer questions concerning legal matters or in making himself available as counsel for any group in order to serve the individual needs of individual members of this group relative to legal matters that are in themselves unrelated to the activities of the organization would be solicitation as condemned by Canon 27 and Canon 35 of the American Bar Association's Canons of Professional Ethics, and is the type of solicitation which is not protected by the opinion of the Supreme Court of the United States. It is the opinion of the Legal Ethics Committee of the Indiana State Bar Association that the second paragraph of Canon 35, entitled "Intermediaries," is not in any way affected by the recent opinion of the Supreme Court of the United States where the legal service is not pursuant to a work-

connected injury or death protected by the opinion cited.

"A lawyer may accept employment from any organization, such as an association, club or trade organization, to render legal services in any matter in which the organization, as an entity, is interested, but this employment should not include the rendering of legal services to the members of such an organization in respect to their individual affairs."

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The Legal Ethics Committee further interprets the Supreme Court opinion as holding not in opposition to Canon 35 but in concert therewith. The pertinent language in Canon 35 relative to the matter before us is that the legal services be rendered in a "matter in which the organization, as an entity, is interested," and that the Supreme Court opinion merely amplifies this to mean that an individual's affairs requiring representation where the affairs are of interest to the group as a whole are not in this light the individual's affairs alone but those of the organization of which he is a member. Therefore, representation and legal advice to members of an organization having legal problems which are not connected with their membership in the organization is still prohibited under Canons 27 and 35 and should not be confused with the type of representation spoken of by the United States Supreme Court in the Brotherhood of Railroad Trainmen case.

Therefore it is the opinion of this committee that group practice as such is still an ethically prohibited activity.

Opinion No. 5 of 1966

Solicitation Of Personal Injury Claims

In Opinions No. 2 of 1961 and No. 10 of 1963 the Legal Ethics Committee of the Indiana State Bar Association held that an attorney retained by an insurance company to assert the insurance company's subrogation rights would breach Canons 27 and 28 of the Canons of Professional Ethics if he, by either letter or verbally, "nominally represents offering to represent" a named insured "in a claim for personal injuries arising out of the same accident."

Since that time the American Bar Association's Standing Committee on Professional Ethics has issued Informal Opinion No. 800 which effectively reverses the earlier opinions of the Indiana State Bar Association's Legal Ethics Committee. Following review of the positions taken by the American Bar Association and our own Committee's opinions in the past, it has been determined by the Legal Ethics Committee that the opinion, as adopted on January 5, 1966 by the American Bar Association, be adopted as the official position of this Association.

The Committee quotes in its entirety Informal Opinion No. 880 of the

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American Bar Association and adopts in its entirety the policy stated therein:

"You have inquired whether language in a letter from an attorney representing an insurance company which has a subrogation claim to the insured inquiring as to his intentions regarding his separate claim arising out of the same incident constitutes solicitation in violation of Canon 27. Your inquiry obviously involves past conduct (and we therefore answer it only because it eminates from a bar association in accordance with our rules of procedure) as you enclose two form letters, one to be used where there is a known loss in addition to the subrogation claim, the other where no such additional loss is known. The pertinent language from each follows:

"!Please call me or stop at my office so that I may know whether you wish to collect for your portion of this loss, and so that I may learn from you all the circumstances surrounding this accident."

"II note from the file that your insurance fully covered this loss, but it is possible that you may have sustained an additional loss which was not covered by your insurance policy. I would, therefore, appreciate your phoning me or stopping at my office so that I can learn what your plans are in regard to this loss. This would also give me an opportunity to learn from you the circumstances surrounding this accident."

"Situations such as this, where the legitimate activities of the lawyer bring him naturally into contact with potential sources of additional legal business, present a difficult problem. He must be careful not to be put in the position of soliciting that business; yet, if there is no conflict of interest, there is nothing to prevent him from taking it if it is freely offered, and frequently it is to his and the client's mutual advantage to do so, as it saves the expense of the participation of an additional attorney in the case when one is already available who is already thoroughly familiar with it. And, in any event, if he is to represent the insurance company properly, he must in any event approach the insured in order to ascertain what he knows about the facts of the accident. Also in most if not all states a cause of action cannot be split, and if the attorney brings suit upon the subrogation claim of the insurance company, any subsequent separate claim by the insured may be forever barred. It therefore becomes necessary for the attorney to consult with the insured as to his intentions in regard to any such separate claim which he may have before suit can be brought.

"The problem therefore resolves itself into the question

of the form which this approach to the insured should take. As noted, it must contain no hint or inference of solicitation of representation of the insured apart from the insurance company's subrogation claim. This is sometimes difficult to avoid, even when the attorney acts in the best of faith; and we believe that a reasonable amount of leeway in the choice of appropriate language should be allowed. We have examined the two form letters which you submitted and we find nothing improper in them, mainly because, conceding the necessity for the attorney to know the insured's intentions in regard to his separate claim, we can think of no way in which the inquiry could be expressed more acceptably, except that any such letter should contain the following language or similar language conveying the same thought:

"'Also, please advise me the name of your lawyer if you wish to be represented by him for any part of the loss not covered by the policy, or any other claim arising out of the same accident.'"

Opinion No. 6 of 1966 Collection Notices Used By Attorney

The Legal Ethics Committee of the Indiana State Bar Association has been requested to render an opinion concerning the form which collection notices may take when such forms are utilized in the course of representation for a creditor by an attorney authorized to practice law in the State of Indiana.

Although the Canons of Professional Ethics and the opinions of the American Bar Association's Committee on Professional Ethics certainly permit the threatening of a lawsuit against the debtor by an attorney, the caveat contained in Canon 29 should at all times be adhered to. Under the heading "Upholding the Honor of the Profession" Canon 29 states in part:

"He (the lawyer) should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice."

Although Opinion No. 1 of the American Bar Association's Committee on Professional Ethics related to solicitation, the language used in the closing paragraph is quite appropriate to the subject matter before this Committee. The opinion states that:

". . . it would ordinarily be unnecessary to refer to the statements contained in such circulars or letters,

but the particularly undignified character of the statements referred to in the question submitted for the Committee's consideration justifies comment. Any conduct
that tends to commercialize or bring 'bargain counter'
methods into the practice of the law, lowers the profession in public confidence and lessens its ability
to render efficiently that high character of service
to which the members of the profession are called."

The Committee holds that not only evil, but the appearance of evil, must be avoided if the profession is to maintain its position of high public regard. Any collection notice which contains a threat to notify the debtor's employer, should the debtor not pay, or which advises the debtor of the possible cost of legal action should he not pay, would be considered unethical in that it has at least the appearance of evil and does in fact lower, in the minds of the public, the confidence which the general public must have in the profession if the profession is to effectively acquit its responsibilities to society.