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Opinion No. 25 of the Ethics Committee of the Colorado Bar Association Adopted August 25, 1962

Dicta Editorial Board

OPINION NO. 25 OF THE ETHICS COMMITTEE OF THE COLORADO BAR ASSOCIATION ADOPTED AUGUST 25, 1962

SYLLABUS

It is unethical for a lawyer to consent to or acquiesce in an arrangement whereby his name or signature appears on a summons as attorney when the summons is in fact prepared by his client, a collection agency, and not under his direction and control.

FACTS

An attorney represents a collection agency. The collection agent frequently finds it necessary to file suit on claims assigned to it. Lay employees of the agency, with the consent of the attorney, prepare the Justice Court summons in each such case within that court's jurisdiction and cause the attorney's name or signature to be placed on the summons, together with the telephone number of the agency. Defendants in the cases frequently call the number shown on the summons purporting to be the attorney's number and lay employees answering such calls fail to disclose the fact that they are not attorneys and instead give the impression that it is the attorney's office that has been contacted. The attorney representing the agency has no knowledge of the case at all until just prior to the time it goes on trial. A substantial portion of the cases are settled before such time and consequently never come to the attention of the attorney.

Is the attorney in violation of the Canons of Ethics?

OPINION

The attorney is in violation of the Canons of Ethics.

The collection agency is practicing law in the preparation of the summons and subsequent negotiations with the respective defendants. The attorney has allowed his name to be used by a lay agency in direct violation of Canon 35 (prohibiting lay intermediaries) and Canon 47 (aiding the unauthorized practice of law.)

Furthermore, Canon 9 may also be involved, since it provides in part that "it is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law." The lawyer has consented to an arrangement tending to mislead defendants in the cases filed by the collection agency. The actions or statements of the lay employees of the agency in dealing with a defendant after a suit is filed (purportedly by the lawyer) are beyond the knowledge or control of the lawyer, and this very fact is sufficient to condemn the arrangement under Canon 9.

The lawyer is also in violation of Canon 22 requiring candor and fairness in dealings with courts and other lawyers. The filing

of a summons showing the lawyer's name is a representation not only to the defendant but to the Court that the lawyer has knowledge of the case and that the summons was drawn by him or drawn under his direction and control.

We, therefore, conclude that the conduct of the lawyer is unethical. The mere acquiescence by the lawyer is an arrangement whereby his name or signature appears on pleadings or other documents not prepared by him, and not under his direction and control, is sufficient without other facts to render the conduct unethical. Although not directly in point, we refer for instructive purposes to our prior Opinion No. 7 regarding the relationship between attorneys and collection agencies. See also Opinion No. 35 of the American Bar Association Ethics Committee.

OPINION NO. 26 OF THE ETHICS COMMITTEE OF THE COLORADO BAR ASSOCIATION ADOPTED SEPTEMBER 28, 1962

SYLLABUS

An attorney who is executor or administrator of an estate or who is attorney for an estate may not ethically charge or receive or participate in a commission on the sale of real estate or other assets of the estate whether or not he has a real estate broker's or agent's license.

FACTS

An attorney is the executor or administrator of an estate or is attorney for the estate. In settlement of the estate, real estate or other assets belonging to the estate are sold. May the attorney, who has, or is connected with someone who has, a real estate broker's or agent's license receive or participate in a commission on the sale?

OPINION

An executor or administrator of an estate, whether lawyer or layman, is forbidden to so deal with the assets of the estate that he makes a personal profit out of such dealings, whether such profit depletes the estate or not—*In re Macky's Estate,* 73 Colo. 1, 213 P. 131 (1923). In the *Macky* case it was held that an executor could not receive a commission on premiums paid for his bond as executor.

In *Murray vs. Stuart,* 79 Colo. 454, 247 P. 187 (1926), directly in point, it was held that an administrator who participated in the sale of realty belonging to an estate could not lawfully charge or collect a commission on the sale, even though it was agreed the commission would be paid. The Court held that this agreement was contrary to public policy inasmuch as it was in breach of the administrator's trust.

As a fiduciary, an executor or administrator occupies a position of trust and confidence and is held to the highest degree of good faith. The purpose of the rule forbidding a fiduciary to profit personally from his dealings with the assets entrusted to him is to prevent both the fact and the appearance of fraud and breach of the confidential relationship.

The lawyer, who is enjoined from any conduct involving disloyalty to the law and is held to the utmost fidelity to private and public duty by Canon 32, and who is required by Canon 29 at all times to uphold the honor and maintain the dignity of the profession, is no less bound to observe the law and appearances than the lay fiduciary.

Therefore, the lawyer, acting as executor or administrator, may not receive or participate in a commission on the sale of estate assets.

The rationale of the above applies just as strongly to the attorney for an estate. He is in no less a confidential position with regard to his client than is an executor or administrator with regard to the beneficiary of an estate. To hold otherwise and to permit a lawyer for an estate to receive or participate in commissions for dealing with estate properties or interests when he is not permitted to do so as executor or administrator would be to hold that a lesser degree of fidelity to his trust is required of a lawyer acting as such than is required of the same lawyer acting in the lay position of executor or administrator. To state the proposition is to refute it.

Canon 11 provides in part:

> Money of the client or collected for the client or other trust property coming into the possession of the lawyer should be reported and accounted for promptly, and should not under any circumstances be commingled with his own or be used by him.

Therefore, any commission coming to a lawyer for an estate as the result of his dealing with estate property is trust property belonging to the estate and must be turned over to it.