Denver Law Review

Volume 39 | Issue 4 Article 7

April 2021

Opinion No. 21 of the Ethics Committee of the Colorado Bar Association, Adopted August 11, 1961 - Amended July 20, 1962

Dicta Editorial Board

OPINION NO. 21 OF THE ETHICS COMMITTEE OF THE COLORADO BAR ASSOCIATION, ADOPTED AUGUST 11, 1961 AMENDED JULY 20, 1962

Comment: Opinion No. 21 was first adopted August 11, 1961, and appeared in the November-December, 1961 issue of *DICTA* (Vol. XXXVIII, P. 369). The Committee subsequently clarified that Opinion, and it appears below in its final form.

SYLLABUS

Persons associated in the same law firm may not ethically charge separate fees as an estate fiduciary and attorney for their respective services to the estate.

FACTS

A and B are members (or associates) of the same firm practicing law in Colorado. A client of the firm dies, leaving a will naming A as executor, and A retains B as attorney for the estate. May they ethically charge and receive both an executor's fee and an attorney's fee in connection with the administration of this estate?

OPINION

In *Doss v. Stevens* (1899) 13 Colo. App. 535, 59 Pac. 67, our court held that an administrator who is an attorney cannot be allowed compensation for his professional services to an estate as an attorney. The rule of law has never been altered. The court quoted with approval an Illinois case (*Willard v. Basset*, 27 Ill. 37) stating unequivocally:

> "The authorities are uniform that this (dual compensation) should not be allowed, and every principle of sound policy forbids it. ***To allow him to become his own client, and charge for professional services for his own case, although in a representative or trust capacity, would be holding out inducements for professional men to seek such representative places to increase the professional business, which would lead to most pernicious results. This is forbidden by every sound principle of professional morality, as well as by the policy of the law."

In Opinions 49 and 72 the American Bar Association Committee has held:

> "The relations of partners in a law firm are such that neither the firm nor any member or associate thereof may accept any professional employment which any member of the firm cannot properly accept."

Lawyer A cannot be his own client in the sense that he *both* takes a fiduciary fee *and* pays himself another fee for legal services rendered to himself. That which is thus improper for Lawyer A alone is likewise improper for Lawyer B under the instant facts,

namely, any arrangement by which Lawyer A both takes a fiduciary fee *and* claims an allowance from the estate for another fee for Lawyer B for legal services rendered to him. Either alternative is, in our opinion, an improper pyramiding of fees.

This opinion neither sanctions nor condemns as a matter of professional ethics the apparently widespread practice by which Lawyer A waives any fiduciary fee for himself and (with court approval) either claims an attorney fee for himself for handling the estate affairs, both administrative and legal, or seeks only an allowance for Lawyer B for legal services to the fiduciary. The Committee refrains from passing upon any problems posed by a direction in a Will whereby a testator authorizes his executor, an attorney, to be allowed not only his fee as executor, but also a further fee as attorney for the executor if he acts as his own lawyer (see, for example, *In Re Thompson's Estate*, 50 Cal. 2d 613, 328 P.2d 1, 65 A.L.R.2d 805).

OPINION NO. 23 OF THE ETHICS COMMITTEE OF THE COLORADO BAR ASSOCIATION ADOPTED JULY 20, 1962

SYLLABUS

It is unethical for an attorney to represent the guardian of a minor when the attorney is selected or employed by the insurance company with whom a damage settlement for injuries sustained by the minor has been negotiated.

FACTS

In a recent case an insurance company negotiated a settlement with the natural guardian of a minor who had been injured by an act of an insured person of the insurance company. The insurance company, with the consent of the guardian, selected or employed an attorney to represent the guardian in commencing the guardianship proceedings and obtaining court approval of the settlement agreement. The attorney disclosed to the court his relationship to the insurance company. The court denied the right of the attorney to appear on behalf of the guardian.

OPINION

On the factual situation presented, it is the opinion of the Committee that the actions of the attorney violated Canons 6 and 35 of the Canons of Ethics.

Canon 6 prohibits an attorney from representing conflicting interests. It is patently apparent that the attorney was attempting to represent incompatible interests. He could not conceivably be considered as appearing before the court even as an impartial person advocating the fairness of the settlement agreement, when he was initially selected or employed by the insurance company to represent the guardian. The attorney represents only the lay agency which intervened in violation of Canon 35 between himself and the alleged client.

A proviso to Canon 6 permits an attorney to represent conflicting interests if the express consent of all concerned is given after a full disclosure of the facts. This proviso cannot be construed as having universal application. It cannot be employed to permit an attorney to represent both the plaintiff and the defendant in an adversary proceeding, nor can it be employed to permit an attorney to represent a fiduciary when the consent of the fiduciary to the conflicting interest of the attorney would constitute a breach of the fiduciary's duty.

The propriety of the court's action in guarding the interests of the minor under similar facts is fully established in *Seaton v. Tohill*, 11 Colo. App. 211, 53 Pac. 170.

It should not be concluded from this opinion, however, that it would be improper for the insurance company to agree to reimburse the guardian for legal fees incurred by the guardian in connection with the proceeding, when the selection and employment of the attorney is entirely within the discretion of the guardian.

OPINION NO. 24 OF THE ETHICS COMMITTEE OF THE COLORADO BAR ASSOCIATION ADOPTED JULY 20, 1962

SYLLABUS

It is not unethical for a firm of attorneys to have its offices in the business premises of a financial institution which is a client of the firm even though one of the attorneys may hold an executive position in the institution. However, in such a situation, the firm of attorneys will have to use great care to be certain that the close connection with the financial institution is not in any way used, directly or indirectly, for the purpose of soliciting professional employment for the law firm.

FACTS

A firm of attorneys has its offices in the business premises of a financial institution. One or more of the members of the firm hold important executive positions in the institution. The firm is the legal representative of the institution. A portion of the firm's business consists of examining real estate titles for the institution, preparing instruments of conveyance and security, and closing loans.

Is such an arrangement proper under the Canons of Ethics?

OPINION

Canon 27 of the Canons of Professional Ethics prohibits the solicitation by a lawyer of professional employment. The ABA Committee on Professional Ethics has, in several opinions, warned against the indirect solicitation of business through a relationship which an attorney may have with a lay agency. (See ABA Committee on Professional Ethics Opinions Nos. 31, 35, 57 and 225.) The following admonition of the ABA Committee in its Opinion No. 57,

quoted in Opinion No. 7 of this Committee, is directed to this problem and is worthy of being quoted again:

> "It is not necessarily improper for an attorney to engage in a business; but impropriety arises when the business is of such a nature or is conducted in such a manner as to be inconsistent with the lawyer's duties as a member of the Bar. Such an inconsistency arises when the business is one that will readily lend itself as a means for procuring professional employment for him, is such that it can be used as a cloak for indirect solicitation on his behalf, or is of a nature that, if handled by a lawyer, would be regarded as the practice of law. To avoid such inconsistencies it is always desirable and usually necessary that the lawyer keep any business in which he is engaged entirely separate and apart from his practice of the law and he must, in any event, conduct it with due observance of the standards of conduct required of him as a lawyer."

The facts indicate that the law firm has a very close connection with the financial institution in whose offices it conducts its practice. The close physical arrangement may, of itself, cause the lay agencies to serve as "feeders" of professional employment to the firm, in violation of Canon 27. A heavy duty rests upon all members of the law firm, and particularly upon the lawyer who holds an executive position with or controls the lending institution, to see that no such violation is allowed to occur. All persons connected with the lay agency must be made to clearly understand that the law firm is not associated with the lending institution and that it would be unethical for the members of the law firm to take advantage of the close relationship for the purpose of providing the law firm with additional professional employment.

The question is whether in fact indirect solicitation would be probable. If, for example, the financial institution is a bank, industrial bank, or savings and loan association, having a ground floor office which is visited by large numbers of the public, and if it contains signs identifying the firm, or identifying individuals as lawyers, there would surely be a dangerous posibility of solicitation, and perhaps advertising. Borrowers might infer that employment of the firm was necessary or at least highly desirable, in order to obtain loans. The firm should move its offices to another part of the building.

If, on the other hand, the financial institution is a life insurance company, or some other entity having an upstairs office which is not visited by large numbers of the public, the possibility of indirect solicitation is probably remote. There may be difficult borderline cases between these two extremes.

On carefully reviewing the situation, the members of the law firm may determine that it is impossible to effectively avoid violations of Canon 27 while the firm is practicing in the same premises as the lending institution with which one of its members is so closely associated. While this Committee believes that the relationship, of itself, does not automatically result in unethical conduct, it calls attention to the duty of the lawyers to carefully conduct their practice in such a manner that any such violations will be avoided.