Denver Law Review

Volume 38 | Issue 4 Article 9

April 2021

Opinion No. 17 of the Ethics Committee of the Colorado Bar Association Adopted January 20, 1961

Dicta Editorial Board

OPINION NO. 17 OF THE ETHICS COMMITTEE OF THE COLORADO BAR ASSOCIATION ADOPTED JANUARY 20, 1961

SYLLABUS

It is improper for a lawyer to prepare legal documents in connection with the sale of real property at the request of a firm, which specializes in assisting persons in the sale of their own property, and which does not act as a true broker in the transaction.

FACTS

A firm offers services in connection with the sale of real property. The services comprise, among other things, the maintaining of files and other information on available property in the area, a file of prospective buyers and sellers of property, and the closing of real estate transactions including the preparation of deeds, notes, deeds of trust, and allied documents. A seller wishing to avail himself of the services of the firm signs a contract under the terms of which he agrees that if he sells his property within the time prescribed (usually 90 days) he will pay the firm a flat fee of $300.00. The firm then places a for sale sign on the property, inserts advertisements in the newspapers, and in other respects aids the person in the sale of his property. The contract provides that the seller furnish a title insurance policy (no mention is made of an abstract of title). When the seller finds a buyer for the property, the firm or its attorney prepares the option contract and, at the appropriate time, closes the sale. No separate charge is made for the preparation of the legal documents, but the seller is informed that if he retains his own lawyer the $300.00 fee will be reduced by $25.00. Otherwise, an attorney employed or retained by the firm will prepare all the legal documents.

OPINION

The preparation of legal documents in connection with the sale of property constitutes the practice of law. This is true even though standard printed forms are used and the only service performed is filling in the blank spaces on the forms. But the Supreme Court of Colorado decided in the so-called "real estate cases" (135 Colorado 398) in 1957 that even though constituting the practice of law these documents could be prepared without charge by licensed real estate brokers with respect to transactions handled by them. The first question to be disposed of is whether the attorney in question is in violation of Canon 47 which provides that no lawyer shall permit his professional services to be used in the aid of the unauthorized practice of law.

We hold that the firm in question is not within the ambit of the real estate cases. We are convinced that the opinion of the court, as it relates to sales of real estate, is intended to apply only to the

usual seller-broker or buyer-broker relationship. In such instances the broker can prepare the legal documents necessary to close the sale by completing standard and approved printed forms. The facts of the above case disclose an entirely different relationship. The firm is not acting as a broker, though it may be licensed as such, but rather is offering certain *services* for sale, including services which are the practice of law. We cannot believe that the protective umbrella of the court was intended to extend so far. Thus the activities of the firm, in our opinion, constitute the unauthorized practice of law.

It follows that the attorney in question, by aiding or making possible this unauthorized practice, is in violation of Canon 47.

By his conduct the attorney also violates Canon 35, which states in part:

> The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary. A lawyer's relation to his client should be personal, and the responsibility should be direct to the client.

Who is the client? Even though the attorney is employed or retained by the firm, the legal documents he prepares affect the rights and liabilities of the buyer and seller of the property, not the firm. Therefore, the intervention of the firm between the attorney and the parties to the sale is improper.

Furthermore, the attorney also violates Canon 6, since he is in effect representing both buyer and seller. This canon provides that it is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts.

Lastly, Canon 27 prohibiting advertising is violated, since the described activity is a feeder supplying the lawyer with legal business from persons who would not otherwise seek him out.

OPINION NO. 18
OF THE ETHICS COMMITTEE OF THE COLORADO BAR ASSOCIATION
ADOPTED JANUARY 20, 1961

SYLLABUS

It is improper for an attorney who is also a city councilman (a) to appear on behalf of a defendant who is charged with violation of a city ordinance in the municipal court of that city; and (b) to represent a client before administrative departments or agencies of that city. It is also improper for a member or associate of the

law firm of which the city councilman is a member to act as an attorney in either of the above situations.

FACTS

An attorney in the private practice of law is also a member of the city council. The city council does not appoint municipal judges or administrative department or agency heads, but does appoint the members of the board of adjustment which hears zoning and building appeals. The limits of the salaries of municipal judges are established by city charter but the council has authority to fix the salary within such limits. The council approves the budget of the municipal court and appropriates funds for the operation of that court as well as all city departments and agencies.

OPINION

In Opinion No. 14 this Committee concluded that in a situation where the city council hired the municipal judge and fixed his salary it was improper for an attorney-councilman to practice in the municipal court on behalf of defendants charged with violations of city ordinances. The practice there condemned is equally improper where the council, although not directly appointing the judge, must approve the court's budget and appropriate funds for its operation.

The same conclusion must be reached with respect to the representation of a client by an attorney-councilman before an administrative department or agency of the city. Even though the conduct of both the department and the attorney is scrupulously correct, it is likely that an individual client, or the public, will believe that an attorney-councilman would receive a more favorable reception from a municipal department or agency than would a non-councilman. An attorney who is also a public officer has an obligation to avoid any appearance of possible impropriety resulting from his dual position.

The pertinent rule regarding the appearance before municipal courts, departments or agencies of other members of the firm of which the attorney-councilman is a member has been stated as follows:

> "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." Opinions 49 and 72 of the Committee on Professional Ethics of the American Bar Association. To the same effect are Opinions 33 and 103 of the same committee.

The foregoing rule is frequently harsh in its application, particularly where, as here, an entire firm is precluded from a substantial area of private practice because one firm member, often at a financial sacrifice, serves part time in a public or political position. The rule, and the policy considerations upon which it is based, are nevertheless too firmly established to permit of modification at this time.

OPINION NO. 19 OF THE ETHICS COMMITTEE OF THE COLORADO BAR ASSOCIATION ADOPTED MARCH 17, 1961

SYLLABUS

A lawyer who habitually and deliberately performs legal services for less than the customary charges of the Bar for similar services or less than the fees recommended in the minimum fee schedule adopted by his local Bar Association is engaged in the improper solicitation of business which is unethical.

FACTS

A lawyer engaged in the practice of law has over a period of time habitually and deliberately performed legal services for less than the customary charges of the Bar for similar services or less than the fees set forth in the minimum fee schedule adopted by his local Bar Association.

OPINION

Canon 12 of the Canons of Professional Ethics advises that in fixing fees lawyers should avoid charges that overestimate their advice and services, as well as those which undervalue them. Canon 12 states, in part:

> In determining the amount of the fee, it is proper to consider: (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause; (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other employment while employed in the particular case or antagonisms with other clients; (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client. No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service. In determining the customary charges of the Bar for similar services, it is proper for a lawyer to consider a schedule of minimum fees adopted by a Bar Association, but no lawyer should permit himself to be controlled thereby or to follow it as his sole guide in determining the amount of his fee. In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade.

We note that a fee schedule is not to be viewed by lawyers as controlling or as an absolute criterion in fixing the amount of their fees. However, "Efforts, direct or indirect, in any way to encroach upon the business of other lawyers are unworthy of those who should be brethren at the bar." Opinion No. 8, Committee on Professional Ethics of the State Bar of Wisconsin (1957). It should be obvious that any lawyer who, in setting his fees, deliberately and habitually undercuts the customary charges of the bar for similar services is soliciting employment. This fact is bound to become known to the public. Such solicitation of employment, directly or indirectly, is proscribed by Canon 27 of the Canons of Professional Ethics. See also Opinion No. 7, Committee on Professional Ethics of the Idaho State Bar (March, 1958). This would be true regardless of the existence of a minimum fee schedule.

Canon 12, as construed in Opinions 28, 56 and 171 of the Committee on Professional Ethics of the American Bar Association, seeks to preserve the personal relationship between lawyer and client, leaving the fixing of the fee to the independent judgment of the lawyer in each case. Canon 12 lists a number of considerations to assist the lawyer in determing a reasonable charge. One of these considerations is a schedule of minimum fees adopted by his Bar Association.

As stated by the President of the Illinois Bar Association, "It is a far cry from the honest effort of a conscientious lawyer to determine what would be a reasonable fee for him to charge, to the practice of habitually under-cutting the fees charged by the other members of the bar, and letting it be known that whatever his brothers charge, he will take on the work for less." The Board of Governors of the Illinois State Bar Association held, in Professional Ethics Opinion No. 194, that this conduct amounted to advertising and solicitation in a not-too-subtle form and, therefore, was violative of Canon 27.

Finally, we note that Resolution XXVIII of Hoffman's Fifty Resolutions (1836) states "As a general rule I will carefully avoid what is called the 'taking of half fees'. And though no one can be so competent as myself to judge what may be a just compensation for my services, yet when the quiddam honorarium has been established by usage or law, I shall regard as eminently dishonorable all underbidding of my professional brethren. On such a subject, however, no inflexible rule can be given to myself, except to be invariably guided by a lively recollection that I belong to an honorable profession." The Fifty Resolutions of David Hoffman of the Baltimore bar, along with Sharswood's *Professional Ethics,* formed the foundation for our modern Canons of Ethics. Our thesis is that the practice of law today is the same honorable profession as that of which David Hoffman spoke.

OPINION NO. 20 OF THE ETHICS COMMITTEE OF THE COLORADO BAR ASSOCIATION ADOPTED JUNE 23, 1961

SYLLABUS

Although controversies with and lawsuits against clients concerning compensation are to be avoided by the lawyer, a lawyer may ethically seek recovery of a fee for services rendered to which the client has agreed and which the client has promised but failed to pay, either by a lawsuit against the client in the lawyer's own name or by assignment of the claim against the client to a collection agency.

FACTS

A lawyer performs non-litigation legal services for a client for an agreed fee. After the services have been concluded to the apparent satisfaction of the client and the work product has been delivered to the client, the lawyer renders a statement in the agreed amount which the client fails to pay. The lawyer's discussions with the client about the bill do not disclose any dissatisfaction with the services nor the amount of the fee and the lawyer knows of no reason why payment of the fee would cause the client undue financial hardship, but repeated promises by the client to pay the bill are not fulfilled. May the lawyer ethically: (1) assign the bill to a collection agency? or (2) sue the client in the lawyer's own name?

OPINION

Canon 14 of the CANONS OF PROFESSIONAL ETHICS provides:

> Controversies with clients concerning compensation are to be avoided by the lawyer so far as shall be compatible with his self-respect and with his right to receive reasonable recompense for his services; and lawsuits with clients should be resorted to only to prevent injustice, imposition or fraud.

This admonition against controversies with or lawsuits against clients is couched in forceful terms and should be considered a strong substantive limitation on the actions which a lawyer may take in efforts to collect a fee. Ours is a learned profession, not a mere money-getting trade. (See Canon 12.) However, Canon 14 also gives clear recognition to the right of a lawyer to be reasonably compensated for his services and to the right to bring suit to collect this compensation where necessary.

The facts presented indicate that no settlement fund or judgment belonging to the client is available upon which he might assert the lien granted by C.R.S. '53, 12-1-10. Further it appears that he has already delivered to the client any papers against which he could assert a lien pursuant to C.R.S. '53, 12-1-11. The fact that he

has not availed himself of this statutorily prescribed method of enforcing payment for his services does not, however, cause him to lose the right to avail himself of other legitimate means of obtaining a reasonable recompense for his services.

It should be noted that no controversy is presented as to the amount of the fee; the only question relates to the methods of collection which may be used. The facts imply that the lawyer has reasonably reached the conclusion that satisfaction of his claim cannot be obtained without resorting to one of the two suggested methods for obtaining such recovery, but it is the opinion of the committee that the lawyer should honestly reach this conclusion before embarking on either course. Only where circumstances imperatively require it should the lawyer resort to either of these means to compel payment.

It is the opinion of the committee that in this case, if the lawyer has reasonably concluded that only by resort to one of the two suggested methods of collection could he collect the fee, he may use either method for that purpose. Neither assignment of his claim to a collection agency nor suit in the lawyer's own name for the purpose of collecting the fee would be unethical.