NEW YORK STATE BAR ASSOCIATION
Professional Ethics Committee Opinions

Opinion #205 - 10/26/71 (40-71) Topic: Conflict of Interest

Digest: Improper to represent both estate and claimant against estate in negligence action.

Code*: EC 5-15
DR 5-105

QUESTION

Where a lawyer represents the estate of a decedent who was fatally injured in a two car accident, may he also represent the son-in-law of the decedent in an action against the estate of decedent for personal injuries sustained while a passenger in the decedent's vehicle in the same accident?

OPINION

The question in this case is essentially the same as that decided in two previous opinions relating to actions by children against parents, N.Y. State 74 (1968) and N.Y. State 112 (1969). A lawyer should never represent in litigation multiple clients with differing interest. EC 5-15.

It is impossible to avoid a conflict of loyalty in the situation described in the question. A decision has to be made whether to sue the lawyer's own client; even if an insurance company is involved, cooperation with the insurance company is required under the policy; it may become the duty of the attorney to press for recovery on behalf of the plaintiff against the estate exceeding the limits of coverage.

A lawyer so representing both parties could not possibly carry out his obligation of undivided loyalty to each of them. Such dual representation would be improper.

Opinion # 206 - 11/22/71
(53-70, 56-70, 4-71, 22-71)

Modifies #22 by implication
Modifies #128
Modifies #135 by implication
Overruled (in part) by 493, 494

Topic: Dual Practice of Law and Allied Occupations.

Digest: Conditions under which dual practice is permissible reviewed and modified.

Code*: Canon 9
DR 2-101, 2-102, 2-103, 2-104, 2-105, 3-101, 3-102, 3-103, 5-101(A).

QUESTIONS

The Committee is receiving an increasing number of inquiries as to whether and under what circumstances a lawyer may engage in another business or profession or be associated with laymen in another business or profession. The following are inquiries now pending:

1. May a practicing lawyer engage in the practice of law and public accounting in one office?

2. May a practicing lawyer engage in the insurance business in his law office, and may he divide commissions from such business with a layman?

3. May a practicing lawyer conduct a real estate agency and receive a legal fee and a brokerage commission from the same client in connection with the same transaction?

4. May a practicing lawyer rent office space to a real estate broker and have a common waiting room and telephone answering service?

OPINION

Over the years professional ethics committees of the American Bar Association, The Association of the Bar of the City of New York, the New York County Lawyers' Association and the New York State Bar Association have rendered numerous opinions in this area. This Committee has reviewed all of these opinions and has found that they vary widely in their conclusions and are often inconsistent or contradictory. No common thread of agreement can be found.

There are, however, a number of principles that are fairly well established and on the basis of these this Committee will attempt in this opinion to establish a few guidelines that it hopes will be helpful to the members of the profession.

A. Prior to adoption, as of January 1, 1970, of the Code of Professional Responsibility, there was no express authorization for or prohibition against engaging in dual practice of law and another business or profession. Ethics opinions were based upon former Canons 27, 33 and 34 relating to solicitation, advertising, division of fees with non-lawyers, and partnerships with non-lawyers.

The new Code of Professional Responsibility introduced the first specific rule on the subject. It provides at DR 2-102(E) as follows:

> "A lawyer who is engaged both in the practice of law and another profession or business shall not so indicate on his letterhead, office sign, or professional card, nor shall he identify himself as a lawyer in any publication in connection with his other profession or business."

By implication this would appear to permit a lawyer to practice law and simultaneously engage in any other respectable business or profession subject, however, to the restrictions stated and any other relevant restrictions in the Code.

The basic requirement of this rule is that letterheads, office signs, and professional cards may not be used to publicize simultaneously both a law practice and another business or profession in which the lawyer may be engaged. Similarly advertisements, and publications of any kind used in the other occupation may not identify a lawyer participant in the business or profession as a lawyer, with the narrow exceptions permitted by DR 2-101(B)(3). The fundamental principle behind these limitations is to protect the public and the profession against improper solicitation, advertising or commercialization, and to keep the other occupation from being used as a cloak for improper solicitation or from being deliberately used as a direct or indirect feeder of legal work.

If the business is one of the professions such as accounting or architecture in which, under the rules of ethics applicable thereto, advertising, solicitation and promotion are forbidden, it would be proper for the other business and the law practice to be conducted in the same office space, provided all requirements of DR 2-102(E) are met. Thus any office sign used by the lawyer for his law practice and for his other profession may not identify him as engaging in practice in both fields. Nor may the letterhead or professional card used in one profession make any reference to the other. Nor would it be appropriate to conduct both practices under the same name in adjoining offices, if office signs are used which make it readily apparent to clients of one profession that he is simultaenously engaged in the other. Similarly the lawyer must meet all other professional requirements relating to solicitation, such as those set forth in DR 2-103(A), which provides:

> "A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer."

If all such standards are met, it would not be improper for the lawyer to accept as clients persons who seek his legal services merely because they are also his clients in the other profession.

D. (1) Subject to adherence to the standards set forth above, including total absence of office signs indicating that he is simultaneously engaged in the practice of two professions, it would not be improper for a lawyer to practice law and accountancy from the same office, or to accept as legal clients persons who may have initially come to him as accounting clients. To the extent that N.Y. State 128 (1970) is inconsistent with the conclusions set forth herei it is withdrawn.

Subject to adherence to the standards set forth above, it would be proper for a lawyer (2) to engage in the insurance business and share commissions with his partners and associates in that business, or (3) to engage in the real estate business and share commissions with the partners and associates in that business and with other brokers.

(4) The position of a lawyer who rents a part of his office to a real estate agent or is a tenant in a real estate office or shares telephone and reception services with a real estate business, is analogous to that of a lawyer who has a real estate office of his own. The proximity of the real estate agent gives rise to a danger or at least the appearance of a danger that an understanding or relationship exists between the lawyer and the real estate agent under which real estate legal business will be fed to the lawyer by his tenant. Unless the lawyer can establish that no such relationship exists, or unless he refrains from accepting clients who come to him through the real estate agent, he should not have such a tenant or be such a tenant.

E. Lawyers who contemplate engaging in another business or profession as permitted hereunder while simultaneously practicing law, should also familiarize themselves and comply with DR 2-101,

B. Unrelated Occupations: Where the other occupation is one entirely unrelated to the practice of law, the danger of improper or unprofessional conduct is considerably less than where such occupation is so closely intertwined with legal matters that it is difficult to distinguish the lawyer's conduct in his other occupation from his conduct as a lawyer.

A totally unrelated occupation would be one where the products or services provided to customers or clients would not involve either service or a need for service which would be essentially legal in nature. Examples of unrelated businesses would be the operation by a lawyer of a shopping center, retail store or manufacturing enterprise. Such an unrelated business could advertise its products or services to the public and be conducted in the same building as the lawyer's office, provided the requirements of DR 2-102(E) are met.

If, however, because of the proximity of the business premises to the law office, or other circumstances, clients or customers of the business are likely to believe that a relationship exists between the two, the lawyer should not accept as legal clients those who are clients or customers of the business, unless they have selected him for reasons not related to his participation in the business.

C. Related Occupations: Where the other occupation is that of accountant, collection agency, claims adjuster, labor relations consultant, business consultant, insurance agent, marriage counselor, real estate broker, income tax service, loan or mortgage broker or any other business where the lawyer participant's activity would be likely to involve frequent solution of problems that are essentially legal in nature, the risk of having the other occupation used improperly as a feeder for legal practice is very great. To avoid this every precaution should be taken to separate the other profession or business from the legal practice.

If the business is one in which advertising and promotion are permitted, no material used in connection with the business may disclose the fact that a participant is a lawyer, and the business should be conducted on premises sufficiently separate from those of the law practice to avoid having the clients or customers of the business gain the impression that the two are related. In such situations the lawyer should not accept as a legal client for matters originating through the other occupation, a person whose initial contact with him was as a client or customer of such other occupation, unless the lawyer-client relationship clearly developed entirely on the initiative of the client, without solicitation on the part of the lawyer, and was not dependent upon the lawyer's participation in the other occupation. Thus, absent such conditions, it would be professionally improper for a lawyer who conducts a real estate brokerage business to handle legal work connected with a real estate transaction which originates through his real estate business and which also constitutes the lawyer's initial contact with the client as his lawyer. Even as to totally unrelated problems, the lawyer would be well advised normally to refuse to accept as legal clients all who were initially clients of the other business because of the possible appearance of professional impropriety, unless it is clear that his client has selected him for reasons not related to his participation in the other business. CF. Canon 9.

**2-102, 2-103, 2-104, 2-105, 3-101, 3-102, 3-103, and 5-101(A), and should always bear in mind that Canon 9 provides that "a lawyer should avoid even the appearance of professional impropriety."**

Opinion #207 - 10/26/71 (24-71)

Topic: Duty of lawyer to disclose information concerning client to governmental agency.

Digest: Unless fraud is involved, lawyer has no affirmative duty to disclose information to governmental agency.

Code: DR 7-102(B)(1)

QUESTION

Does a lawyer for an executor of an estate have an affirmative duty to communicate on his own initiative information concerning a welfare recipient's interest in the estate to the Welfare Department of another state where the beneficiary resides after the lawyer has disclosed such information in an application he helped prepare for the beneficiary?

OPINION

Mere suspicion of impropriety of the beneficiary or of possible laxity on the part of the welfare agency in pursuing its remedies does not require a lawyer to affirmatively, on his own initiative, communicate facts to the welfare agency that may bear upon the status of the welfare recipient. However, if the lawyer has reason to believe that the beneficiary withheld information required by law to be furnished by the beneficiary to the welfare department, the lawyer should supply such information after giving the beneficiary the opportunity so to do.

DR 7-102(B)(1) provides that a lawyer who receives information clearly establishing that:

> "His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal."