

Committee on Professional Ethics



Opinion #251 - 5/24/72 (31-72)

Topic: Receipt of fee in divorce action in addition to that allowed by Court

Digest: Provided that by its order the Court has not determined the reasonable value of his services, a wife's attorney may, after full disclosure, receive a fee from the wife in addition to that paid by the husband if the aggregate fees are not excessive

Code*: DR 2-106(A); EC 2-17

QUESTION

In a matrimonial action is it proper for the wife's attorney to negotiate for, and receive, a fee from the wife additional to that allowed by the Court and paid by the husband to the wife's attorney on an application for temporary alimony and counsel fees?

OPINION

It is not unethical for the attorney to accept such additional fee, provided that the client is fully informed as to the fee which the attorney has already received by direction of the Court, and further provided that the aggregate of the fees is not excessive or unreasonable. N.Y. City 23(1925).

However, where a court fixes a fee as reasonable it is improper to make an additional charge. ABA Inf. 276 (1960); ABA Inf. 1013 (1968). This rule applies only in the event the Court intended by its order to determine what was a reasonable fee for the services performed. ABA Inf. 1013 (1968).

In fixing counsel fees in a matrimonial action, a court does not necessarily determine that such fees are reasonable compensation to the wife's attorney. Other factors, such as the husband's resources and ability to pay, are taken into consideration in fixing counsel fees.

Since on an application for temporary alimony and counsel fees the Court does not purport to fix the reasonable value of the services, the attorney is free to negotiate an additional fee from the wife provided that she is fully informed of the Court's order and that the aggregate fee is not excessive. DR 2-106(A); EC 2-17.

Committee on Professional Ethics



Opinion #252 - 5/24/72 (29-72) Topic: Village justice representing private client before village zoning board.

Digest: Village justice may represent a client before village zoning board only where no conflict of interest and no appearance of professional impropriety.

Code*: Canon 9
EC 8-8, 9-2, 9-3, 9-6.
DR 9-101.

Judicial Canon: 31

QUESTION

May a part-time village justice represent a client in zoning variance and special permit applications before a zoning board of the village in which he serves as justice?

OPINION

Judicial Canon 31, inter alia, provides:

"The judge who is not forbidden to practice law, and does practice, is in a position of great delicacy and must be scrupulously careful to avoid conduct in his practice whereby he utilizes or seems to utilize his judicial position to further his professional success."

Our Committee has interpreted these provisions as permitting part-time judges to engage in private practice not forbidden by law, before tribunals of which they are not a member, provided the circumstances would not give rise to any possible "appearance of impropriety, prejudice or favoritism." N.Y. State 150 (1971). See also, N.Y. State 19 (1965); N.Y. State 39 (1966); N.Y. State 57 (1967); N.Y. State 146 (1970); N.Y. State 214 (1971); N.Y. State 228 (1972); and N.Y. State 232 (1972).

The ethical propriety of a part-time village justice representing a private client before a zoning board of the village in which he serves as justice depends upon the circumstances of each particular case. The representation would be proper only if it were clear that there were no conflict between his duties to the public as a judge and his duty of undivided loyalty to his client; and provided there were a total absence of "even the appearance of professional impropriety." Canon 9. See

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also, EC 9-2; EC 9-3; EC 9-6; EC 8-8; DR 9-101.

For example, the part-time village justice could not represent a client in zoning or other litigation to which the village were a party. Nor should he undertake to represent a private client in a zoning matter, if there were any possibility that his client might be charged with a violation of a village zoning ordinance. Service by the village justice as a village zoning board member would, of course, likewise disqualify him from all practice involving zoning within the board's jurisdiction.

The mere fact that the village pays the justice's salary would not, however, disqualify him from representing private clients in zoning variance and special permit applications before the village board. Cf. A.B.A. Inf. 798 (1964).
