NEW YORK STATE BAR ASSOCIATION
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Committee on Professional Ethics

NYSBA

Opinion #471 - 6/9/77 (58-77)

Topic: Partnership; conflicting interests; fiduciary obligation; receiver in mortgage foreclosure action.

Digest: Receiver in mortgage foreclosure action may retain his firm to act as his counsel.

Code: Canons 1, 2, 5 and 9
EC 5-1, 5-2
DR 2-106, 5-101(A)

QUESTION

May a receiver in a mortgage foreclosure action retain as his counsel therein the law firm of which he is a member?

OPINION

Under the law of this State, a receiver in a mortgage foreclosure action cannot retain counsel without authorization from the court. CPLR 6401(b). Usually, the order authorizing the receiver to retain counsel does not specify the firm which he is to employ. It is in this context that the question arises as to whether the receiver may ethically retain the law firm of which he is a member to act as his counsel.

We note that a receiver in a mortgage foreclosure action occupies the position of a fiduciary with respect to persons having an interest in the property. He is thus under an obligation to minimize the cost of his receivership and, where he has been authorized to retain counsel, he is obligated to make certain that the fees incurred for legal services are both reasonable in amount and necessary for the proper administration of his receivership.

For many years, a significant body of authority was of the opinion that the receiver's duty to minimize the cost of his receivership precluded him from retaining his firm as counsel.

In 1930, when the Committee on Professional Ethics of the New York County Lawyers' Association was asked to review this question, it divided and issued two inconsistent answers, one of which held:

> "In the opinion of the Committee, the respective duties of the receiver and of his counsel to the estate are such that neither should have pecuniary interest in the compensation of the other therefrom; hence it is improper that they should share the same as partnership earnings or otherwise. Both receiver and counsel should observe the principle that a fiduciary may not place himself in a position where his personal interest may in any manner conflict with his official duties."

Eight years later, when this question was presented to the Committee

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on Professional Ethics of the American Bar Association, it was held, without dissent, that Canons 6 and 32 of the then operative Canons of Professional Ethics, which respectively dealt with conflicting interests and the lawyer's duty to serve his client with undivided loyalty, required that a receiver retain independent counsel. The ABA reasoned that the receiver would naturally want to maximize his firm's income and that this inclination was inconsistent with his fiduciary obligation to minimize the cost of his receivership, saying:

> "We conclude that the dual relationship which the lawyer here assumes does not leave him wholly free to give that undivided loyalty to his client which should always obtain in the relation of attorney and client." ABA 181 (1938)

In 1946, the ABA reversed its position. The reason for the ABA's change in position was apparently threefold. First, the ABA recognized that the courts had failed to find any impropriety in a fiduciary retaining his firm to act as counsel. Second, the ABA noted that in many instances it would avoid duplication of work and therefore be more economical for the fiduciary to retain his own firm. Finally, the ABA acknowledged that in any event the court would pass upon the propriety of the legal fees charged by the firm. Although the specific question before the ABA related to a trustee in bankruptcy, the ABA took the occasion to render an opinion which was applicable to all fiduciaries and expressly overruled ABA 181, supra, explaining:

> "While the specific question as to trustees in bankruptcy might be disposed of on the ground that it involved a question of judicial discretion, the same principle would be applicable to receivers, the specific object of Opinion 181, and also to executors or other fiduciaries. It is believed to be general practice where a lawyer is appointed executor, to have his firm represent him and, so far as we know, no question has been raised as to the propriety of this. The fees of counsel for all fiduciaries could in any case be questioned by any interested party and be subject to the approval of the court in which the accounting was rendered. The Committee is of the opinion that there is no ethical impropriety in a trustee in bankruptcy being represented by the firm of which he is a member and that the same principle applies to executors, administrators, guardians, etc. and other similar fiduciaries.
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> "The Committee is of the opinion that the same principle applies to receivers. Accordingly, Opinion No. 181 is overruled." ABA 272 (1946)

Canons 6 and 32 of the former Canons of Professional Ethics are generally analogous to Canons 1, 2, 5 and 9 of the present Code of Professional Responsibility and, to the extent relevant to the subject issue, are specifically covered by the provisions of EC 5-1, EC 5-2

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and DR 5-101(A). Whether the subject issue is considered in the light of the former Canons or the present Code, the principle is the same. A lawyer should not permit his personal interests to affect his professional judgment.

While other bar associations have continued to debate the propriety of a fiduciary retaining his firm to act as his counsel, we are persuaded that the better rule is that adopted by the ABA. Cf., N.C. Op. 466 (1964) and L.A. Op. 219 (1955), respectively indexed at 3490 and 462, O. Maru, Digest of Bar Association Ethics Opinions (1970).

All lawyers are bound to observe the provisions of DR 2-106 concerning the amount of fees which may properly be charged for legal services. There is no reason to impute an improper motive to the receiver's firm or assume that it will charge more for its representation of the receiver than is appropriate. Any suspicion of impropriety entertained by interested persons should be effectively dispelled by the supervisory powers of the court and its ability to pass upon the amount of the firm's fee. Moreover, in many instances, an inflexible rule which precluded a receiver from retaining his firm might visit unnecessary hardship and expense upon the very persons whom the rule is designed to benefit. The difficulties incident to communicating with independent counsel, as well as the time, cost and duplication of effort thereby incurred, where possible should be avoided.

For the reasons stated, the question posed is answered in the affirmative.
