

INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE

OPINION NO. 1 OF 1982

The Legal Ethics Committee of the Indiana State Bar Association has been presented with the following questions:

Can a member of a law firm represent clients before the City Planning Commission, City Board of Zoning Appeals, City Board of Aviation Commissioners and City Park Board if a member of that particular law firm is also the City Attorney?

Can a member of a law firm represent the City Planning Commission, City Board of Zoning Appeals, City Aviation Commissioners and City Park Board if attorneys representing parties before these boards are members of a firm wherein a member is a City Attorney?

In the interest of brevity and expediency, this opinion will attempt to cover both inquiries.

In Informal Opinion 855, rendered May 31, 1965, by the Committee on Ethics and Professional Responsibility of the American Bar Association, the Committee in part stated the following:

. . . Generally speaking, any persons in public office, including attorneys, have as their primary duty that of performing the functions of the office in a wholly honest impartial and ethical manner.

Under both the foregoing Canons the duties and considerations of possible conflicts are such that what a lawyer cannot do because of these ethical precepts relating to other parties neither his partner, his associate, nor one with whom he shares offices, may do.

If there is no conflict of interest nor violation of confidence, an attorney who happens to be an appointee of a mayor in one capacity may properly appear before other appointees or appointed bodies of the same mayor in other related boards, or offices, or courts and may likewise make claims against the city in fields which are not related to his office in the city . . .

Canon 4 of the Code of Professional Responsibility requires that a lawyer preserve the confidences and secrets of a client, Disciplinary Rule 4-101 requires the same thing and goes on to explain this more in detail.

Canon 5 requires a lawyer to exercise independent professional judgment on behalf of the client.

Accordingly, we must then look at the issues before us as to whether or not there is a potential violation of DR 4-101, Canon 5.

I.C. 36-4-9-12 states that in second class cities, population 35,000-249,999, the corporate counsel is head of Department of Law and that in third class cities, population less than 35,000, the City Attorney is head of Department of Law.

Indiana Code 36-4-9-12 states that:

"The head of a department of law shall . . . (3) give legal advice to the officers, departments, boards, commissions and other agencies of the city . . ."

This statute goes on to state that officers, departments, boards, commissioners and other agencies of the city may not employ attorneys without the authorization of the head of the department of law.

Without attempting to interpret the above statute which is beyond the province of this committee it would appear that the Department of Law is mandated to advise the various boards and commissions of the city. It also authorized a city board or commission to hire independent counsel, if it is their desire and approval is received by the head of the Department of Law.

Since this statute does mandate the head of the Department of Law, who is the City Attorney in third class cities, to advise the various boards and commissions and since the statute is silent as to whether or not this duty ceases upon that particular board or commission hiring independent counsel, we are of the opinion that it would be improper for the City Attorney of third class cities or a member of his firm to practice before the City Planning Commission, City Board of Zoning Appeals, City Board of Aviation Commissioners or the City Park Board. It would be very difficult for a city attorney or a member of his firm to be advising such a body, even though it might have independent counsel, and at the same time have a member of his firm practicing before this particular city board or commission. We feel that the member of the city attorney's firm would be placed in a position of attempting to serve two masters, which of course, is impossible.

In cities where the city attorney is not the head of the Department of Law a different result may be reached if the Boards and Commissions have, with the Department of Law's approval, hired independent counsel and the city attorney has been given no responsibility to these bodies.

In those instances the city attorney would evidently not be advising those Boards and Commissions by virtue of the fact that this is the responsibility of the head of the Department of Law, who has delegated this responsibility to third parties, and therefore, it would appear that there would be no conflict of interest if the city attorney or a member of his firm would practice before these particular Boards and Commissions. Thus, we are of the opinion in first

and second class cities, barring any other conflict of interest, that it would not be a conflict of interest per se for the city attorney or a member of his firm to practice before those particular Boards and Commissions mentioned herein if those Boards and Commissions had independent counsel as outlined above.

* In first and second class cities if the city attorney is eligible to practice before those Boards and Commissions as we have set out herein, then, of course, it would go without saying that it would not be improper for members of the firm advising these Boards or Commissions to still advise these Boards or Commissions while a member of the City Attorney's firm would be representing persons before them.

This is similar to the result reached in our Opinion No. 1 of 1980, wherein we indicated that it would be improper for a county attorney to have a member of his firm represent persons before the Area Planning Commission or the County Board of Zoning Appeals.

Because of our opinion herein with regard to the fact that we feel that it is improper for a city attorney in third class cities or a member of his firm to practice before the Boards or Commissions enumerated herein, that the second question presented as it pertains to third class cities has been answered by this opinion and is therefore moot and requires no further elaboration.

* Indianapolis is the only first class city in the State.

INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE

OPINION NO. 2 OF 1982

The Legal Ethics Committee of the Indiana State Bar Association has been requested to render an opinion as to whether there is a violation of the Code of Professional Responsibility for a prosecuting attorney to maintain a mutual non-legal business interest with another practicing attorney in the same community who represents criminal defendants within the same jurisdiction and whose partners and associates also represent criminal defendants as well.

This subject seems not to have been directly addressed by this Committee nor by the American Bar Association Standing Committee on Ethics and Professional Responsibility.

The Committee concludes that the prosecuting attorney and defense attorney are not prohibited from engaging in a mutual business pursuit; however, extreme care must be exercised by the prosecuting attorney and the defense attorney to not specifically violate any of the Disciplinary Rules as promulgated in the Code of Professional Responsibility which obviously apply to the activity of all attorneys. Particular care must be exercised by the defense attorney with reference to DR 5-101, "Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment," which includes financial and business property interests. All attorneys, including prosecuting attorneys and defense attorneys, must avoid even the appearance of impropriety under DR 9-101.

This opinion would govern members of the defense attorney's firm as well as the individual defense counsel and would have application to part-time as well as full-time prosecuting attorneys.

The Model Code of the American Bar Association has no provision which precludes an attorney from engaging in a second profession or business at the same time.

Reference may be had to the Indiana Code of Judicial Conduct, which although not specifically including prosecuting attorneys within its compliance requirements, does apply to Indiana judges. Said Code provides within Canon 5, "A Judge Should Regulate His Extra-Judicial Activities to Minimize the Risk of Conflict with His Judicial Duties":

C. Financial Activities

- (2) Subject to the requirement of subsection (1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity including the operation of a business.

One may find a parallel with the position of a full-time judge and a prosecuting attorney with regard to the subject of the operation of an independent business.

INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE

OPINION NO. 3 OF 1982

The Legal Ethics Committee of the Indiana State Bar Association has been asked to render an opinion pertaining to the use by attorneys of N.O.W. accounts for client trust funds. N.O.W. accounts are interest-bearing, negotiable order of withdrawal accounts and were authorized by Congress for banks and savings and loan associations in the Depository Institutions Deregulation and Monetary Control Act of 1980. In essence, N.O.W. accounts are interest-bearing checking accounts.

The issues presented in this opinion are twofold. First, does an attorney have a duty to invest his client's trust funds in interest-bearing accounts, and if so, the second issue is whether or not there is duty to account to the client for any income so realized.

Although there is some authority to the effect that a lawyer's treatment of client property derives generally from agency law which imposes duties of separation, accounting, notification and delivery on all agents possessed of a principal's property, better reasoned authority would dictate that the relationship be governed by those rules pertaining to trusts and trustees. In any event, there is no question but that a lawyer must treat the property of a client with special care and meet the highest standards of accountability. E.g., Bar Ass'n v. Marshall, (1973) ___ Md. ___, 307 A.2d 677; and In re Deschane, (1974) ___ Wash. ___, 527 P.2d 683.

The pertinent provision of the Code of Professional Responsibility dealing with this issue is DR 9-102, which reads as follows:

Preserving Identity of Funds and Property of a Client.

- (A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:
- (1) Funds reasonably sufficient to pay bank charges may be deposited therein.
 - (2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client,

in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(B) A lawyer shall:

- (1) Promptly notify a client of the receipt of his funds, securities, or other properties.
- (2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.
- (3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them.
- (4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

This rule is aimed at the separation of the funds of the client from the funds of the attorney, and it presumes the situation where the funds are held for a purpose other than for investment.

Since the purpose of the account is to keep separate, hold, and to disburse the funds of the client, rather than to "produce income," there is no duty to invest the funds so as to make them income producing under the general provisions of Indiana law pertaining to trusts.

In the event the trust account funds are invested, there are both statutory and ethical bases for requiring an attorney to account for income received from the trust accounts. Under both guidelines, there is a duty to respect the fiduciary relationship. Basically, the problem is divided into two areas: (1) Benefiting from a client's trust fund would be an unethical, and, probably, an illegal abuse of trust, and misappropriation of funds; and (2) Such benefits would impair the attorney's professional judgment concerning the affairs of the client.

Considering number (1) above, under Indiana law, the trustee has the duty to keep the trust property separate from his individual property and separate from or clearly identifiable from property subject to another trust and to maintain clear and accurate accounts with respect to the trust account.

I.C. 1971, 30-4-3-6.

All funds of the clients paid to the attorney other than advances of costs and expenses shall be deposited in one or more identifiable bank accounts

. . . and no funds belonging to the lawyer . . . shall be deposited therein as per DR 9-102. Furthermore, a lawyer shall promptly notify a client of the receipt of his funds and maintain a complete record of all his funds coming into the possession of the lawyer. He must also render appropriate accounts to the client concerning such funds, and pay over such funds which the client is entitled to receive upon request.

While the great danger of co-mingling trust funds with the trustee's personal funds is that a client's money would become mixed with the attorney's and, therefore, subject to his creditors, there is also the prohibition against the attorney using the trust funds in any way for his personal benefit. Since the basis of the trust theory is that the lawyer is to administer the trust solely for the benefit of the client, any interest accruing from the funds belong to the client. See, Restatement of Trusts 2d, § 203. There is no justifiable distinction between a trustee using trust funds to purchase an investment and then repaying the borrowed capital, and a trustee merely keeping the income from an unauthorized investment. Both are illegal and unethical. See, e.g., In re Neal, (1976) ___ Ind. ___, 350 N.E.2d 623. The trustee is accountable to the beneficiary for all profits received of the trust fund, and the capital is to be used solely for the benefit of the beneficiary. I.C. 1971, 30-4-3-6(b)(1); See, Restatement of Trusts 2d, § 170, § 203.

Now, considering number (2), by placing trust funds in an interest-bearing account, the attorney also creates a possible conflict of interest. If the duty of the trustee in the exercise of any power conflicts with his individual interests or his interest as trustee of another trust, the power may be exercised only with Court authorization. I.C. 1971, 30-4-3-5; See also, I.C. 1971, 30-4-3-6(b)(1). Except with the consent of his client after full disclosure, an attorney shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial business or personal interest. DR 5-101. After accepting employment, an attorney carefully should refrain from acquiring a property right or assuming a position that would tend to make his judgment less protective of the interests of his client. EC 5-2.

In the case of the N.O.W. accounts, there is a clear danger that the judgment of the controlling attorney regarding the amounts to be held in trust and the timing of their disbursement could be affected by his interests in the income from the account.

In conclusion, while entrusted with the monies held for disbursement, an attorney does not have to invest such monies, but if he does make an investment or receive any income from the trust, he must account to the client. Failure to account would constitute a breach of the fiduciary duty of loyalty and probably a misappropriation of funds.

INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE

OPINION NO. 4 OF 1982

LAWYER ADVERTISING

The Legal Ethics Committee has received an inquiry on proposed communication method, viz:

CLIENT BULLETIN

The Committee has been furnished four separate regular newsletters which are now distributed by several Indiana accounting firms to their clients. Many of the subjects covered in the newsletters are the same subjects with respect to which attorneys provide counsel to clients on a regular basis, particularly in the tax and estate planning areas. Each newsletter contains an appropriate disclaimer, e.g., "Application to a specific situation should only be made after professional advice has been obtained." A law firm desires to publish and distribute a dignified publication so that it may be distributed to existing clients, which is not self-laudatory, so their clients can be reminded of new developments of significance in areas of law with respect of which they should be acquainted.

The attorney also forwards a sample proposed copy of a quarterly summary of selected developments in the law which describes changes in estate planning, tax planning, business finance as well as business practices.

In Opinion No. 3 of 1980 this Committee ruled that an eight (8) page, black-and-white brochure constituted a self-laudatory statement contrary to DR 2-101(A). The Committee feels that the distribution of a client bulletin such as is proposed in the instant query is proper and may be distinguished from a self-laudatory brochure. It has been held generally that an attorney, while under no duty to notify his clients of changes in testamentary and/or estate tax laws and regulations, may recommend that a review be made by some attorney. The notification should not direct the client to a particular attorney; c.f., Alabama State Bar Opinion-December 1, 1976: 38 Ala. Law. 39 (1979); Hawaii State Bar Association Opinion 78-10-21 (October 13, 1978); Mississippi State Bar CPR 39 (June 2, 1977); Oregon State Bar Desk Book, Opinion 375 (11/77).

The Committee feels the reasoning set forth in Illinois State Bar Association Opinion No. 623 (12-9-78) is applicable to the instant inquiry, viz:

. . . "I am aware of a newsletter providing tax and financial information which I would like to purchase

and distribute to my current and regular clients. May I do so? May I have my firm name printed on the brochure?

"Yes. As discussed above, an attorney may communicate with his or her own current and regular clients as long as the communication is not "deceptive" within the meaning of DR 2-101. Such "Deception" in this case might include, for example, sending the brochure with only the attorney's name on it and creating the impression that the attorney had prepared or vouched for the information contained in the brochure. However, if the attorney simply wishes to transmit information that he or she believes might be useful to the client and makes clear the source of that information, there is nothing improper about this communication"

Although not mentioned in the latter opinion, the Supreme Court of that state had occasion to review a two-page communication entitled "Tips from your Lawyer for 1973" and found that the letter did contain information of value and did not, under the circumstances, constitute an improper effort to solicit business; In re Madsen, (Ill. 1977) 370 N.E. 2d 199.

The proposed client bulletin contains a logo and this committee finds that it should be removed due to our Opinion No. 4 of 1981.

INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE

OPINION NO. 5 OF 1982

The Legal Ethics Committee has been asked to render an opinion on whether the name of a secretary, paralegal, legal assistant or administrative assistant may appear on the letterhead of a law firm or on his or her own individual letterhead which would contain the firm name.

The Indiana Code of Professional Responsibility DR 2-102 and A.B.A. Informal Ethics Opinions Nos. 123, 124, 619, 1185 and 1367 clearly indicate that the name of a secretary or legal assistant may not appear on a law firm's letterhead. As is indicated in A.B.A. Informal Opinion 909 which quotes Drinker's Legal Ethics:

"Attorney-at-law on a letterhead implies the right to practice law at the address given."

The A.B.A. Informal Opinion 1367 has indicated that paralegals or legal assistants may conduct correspondence on behalf of the firm on firm letterhead as long as they indicate their capacity: office manager, administrative assistant or whatever with clarity.

In A.B.A. Informal Opinion 909 it was deemed permissible for the investigator/photographer of a law firm to use a card containing his name and title and the name of the law firm. In A.B.A. Informal Opinion 1000, it was deemed proper for a "staff investigator," who is a salaried, full-time investigator employed by a law firm, to have his own individual letterhead. This letterhead would be used only by him, would not in any manner indicate or imply he was entitled to practice law, and would not contain the name of an attorney or law firm. Use of such cards was extended to legal assistants in A.B.A. Informal Opinion 1185, although the names of such persons could not be placed on the firm's letterhead.

We likewise hold: It would not be proper for a secretary, paralegal, legal assistant or administrative assistant to have his or her name on an attorney's letterhead.

INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE

UNPUBLISHED OPINION NO. U1 OF 1982

The Legal Ethics Committee of the Indiana State Bar Association has been presented with the following problem:

Attorneys A and Z are two of several partners of a large law firm located in a small, rural Indiana county. Attorney A represents Mrs. Jones in a divorce action. Prior to the commencement of the divorce action, Mrs. Jones' brother-in-law had agreed to purchase certain assets owned solely by Mrs. Jones' husband. After the filing of the divorce, Mrs. Jones' brother-in-law contacts Attorney Z and proceeds to ask questions about the Jones' divorce in order to ascertain the effect the purchase of these assets from Mrs. Jones' husband will have on the husband, on Mrs. Jones and on their divorce.

The questions raised by this fact situation are: What are the problems involved in having one partner represent Mrs. Jones while another partner discusses aspects of the case with her husband's brother? What should be done to adequately and ethically correct the situation?

The examination of each attorney's actions in the above hypothetical situation reveals the following:

Attorney Z should not have had the conversation with Mrs. Jones' brother-in-law since such conversation was not among the allowable extrajudicial statements enumerated in DR 7-107 (G). As said, Attorney Z should have followed the directions of DR 7-104 (A) (2) and advised Mrs. Jones' brother-in-law to secure counsel to represent his interest in the assets in question. To do so would have had the effect of avoiding even the appearance of professional impropriety as required by Canon 9.

Although Attorney Z was actually responsible for discussing Mrs. Jones' case with a third party, the Code puts a heavy burden on Attorney A as counsel for Mrs. Jones to make certain that no such conversations occur. Although DR 4-101 (D) protects the attorney-client privilege by requiring a lawyer to, "exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client . . .," DR 7-107 (J) goes further by requiring Attorney A to, "exercise reasonable care to prevent his employees and associates from making an extrajudicial statement that he would be prohibited from making under DR 7-107."

This extra step of protection insures that the attorney exercises his professional judgment solely for the benefit of his client, free of compromising influences and loyalties, especially those of third persons. EC 5-1 and EC 5-21.

Keeping in mind that Attorneys A and Z are both members of a large firm located in a small rural Indiana county and that such a situation increases the possibility of Code violations, the Legal Ethics Committee offers the following as a solution to the problem presented above:

The Legal Ethics Committee believes that Attorney A should fully disclose to Mrs. Jones the existence and contents of the discussions between Attorney Z and Mrs. Jones' brother-in-law. Thereafter, due to the violations of the disciplinary rules, Attorney A should ask Mrs. Jones to allow him to step off the case. This action is in accordance with Canon 4 "Preserving the Confidences and Secrets of a Client" and Canon 9 "Avoiding Even the Appearance of Professional Impropriety."