Ethics Committee Adopts Opinions Relating to City Judges, their Law Partners or Associates

Formal Opinions No. 1 of 1974 and No. 2 of 1974 relating to City Judges in Indiana have been approved and adopted by the Legal Ethics Subcommittee of the Professional Responsibility Committee of the Indiana State Bar Association.

For the information and guidance of the judiciary and the practicing bar the two opinions are published herewith:

Opinion No. 1 of 1974

CRIMINAL COURT JUDGE AND CRIMINAL COURT REFEREE SHOULD REFRAIN FROM THE PRACTICE OF CRIMINAL LAW IN ALL COURTS OF INDIANA

We have been asked by a part-time city Judge whether it is proper for him or his chief referee and law partner to practice in other criminal courts. The particular City Court has jurisdiction of some misdemeanors, of traffic violations and of city ordinance violations but does not serve the function of a magistrate in felony matters.

Our opinion is that a criminal court Judge and criminal court referee should refrain from the practice of criminal law defense in all courts.

It is obvious that a Judge or referee may not practice in their own court. Indiana Opinion 1964-7. In addition, court officials may not practice criminal law in any court of the same judicial system. ABA Opinion 242. Confronting prosecutors and police witnesses from the bench one day and dealing with them for plea bargaining purposes or as opposing counsel and hostile witnesses the next presents conflicts which interfere or give the appearance of interference with the even application of justice.

The issue of criminal law defense outside the judicial system by a part-time criminal court Judge or referee is more difficult of solution and depends upon reference to abstract ideals.

The Code of Judicial Conduct and Ethics adopted by the Supreme Court of Indiana on March 8, 1971 states:

> "A Judge's official conduct should be free from impropriety and the appearance of impropriety. . . ."

In addition, Canon 9 of the Code of Professional Responsibility requires that lawyers avoid the appearance of impropriety. Under Canon 9, EC9-6 enjoins lawyers to encourage respect for Judges and courts as a positive ethical duty.

Canon 8 provides a professional responsibility to assist in the improvement of the legal system; and EC8-8 prohibits a lawyer-public employee from engaging "in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties."

Canon 5 deals with conflicts of interest and the maintenance of independent judgment. ABA Opinion 192 touches upon the *appearance* of conflicts and impropriety as follows:

> ". . . an attorney holding public office should avoid all conduct which might lead the layman to conclude that the attorney is utilizing his public position to further his professional success or personal interest."

The situation of a criminal court Judge or referee is similar to that of prosecuting attorneys and their deputies. Each represent a branch of government under our Constitution and State laws. Each has a responsibility and a role in the administration of criminal justice. The public must have absolute confidence in the strict impartiality of prosecutors and Judges. These considerations have led to rulings that prosecutors, their deputies and the partners and associates of either may not represent criminal defendants in any court. ABA Opinions 118, 142; Indiana Opinions 1964-2, 1972-2. Substantially similar reasoning applies to criminal court Judges and professional staff personnel.

Our ruling is in conflict with a prior opinion of a predecessor committee, Indiana Opinion 1967-13. We hereby overrule that opinion. Ethical standards of conduct for Judges and lawyers are in a state of evolution. Increasingly higher standards of conduct must be expected and willingly accepted by the Indiana Bar.

We recognize further a distinction may be drawn in the circumstance of an appointment to represent an indigent criminal defendant in a court outside the particular judicial system as, for example, for a federal district court. The features of such a case may distinguish it from the facts presented for decision in this opinion. ABA Opinion 55; ABA Informal Opinion 997.

Opinion No. 2 of 1974

PARTNERS AND ASSOCIATES OF PART-TIME CITY JUDGE ARE DISQUALIFIED FROM PRACTICE IN THAT COURT AT ALL TIMES

We have received the following inquiry:

> "'A' is the elected City Judge (a part-time judgeship). 'B' and 'C' are associated in the practice of law and share office space together. Is it unethical for 'B' and 'C' to practice in the City Court, under such circumstances as where, the Elected Judge, disqualifies himself from hearing any said cases, appoints a panel from which a special judge is selected and makes absolutely no entry in said case whatsoever?"

Reference is made to Indiana Opinions 1973- , 1973-3, 1972-2 and 1964-7. Reference also is made to Canons 8 and 9 of the Code of Professional Responsibility and the preamble and No. 1 of the Code of Judicial Conduct and Ethics.

The part-time city Judge may not practice in his own court under any

(Continued on page 23)

ATTORNEYS AND ETHICS

(Continued from page 22)

At other times, the lawyer may discover, after he has accepted employment, that another attorney had been previously employed by his client relative to the same matter. When the attorney discovers at the time set for trial that his client had employed another attorney previously, and had not paid the fee of such other attorney nor notified him of his discharge, he may still properly proceed to represent a criminal defendant after he has been employed, even after discovering the above at the time set for trial.[4]

In addition, when a client rejects a settlement offer which his attorney feels should be accepted, the attorney has no right to withdraw because of his client's rejection;[5] however, if a lawyer's client refuses to proceed further in the litigation, prior to judgment, and the lawyer was employed on a contingent fee basis, the lawyer may then withdraw from the case.[6] On other matters in relation to fees, an attorney may properly withdraw from employment and charge his client for services already completed after the attorney accepts the employment and later discovers that his client's story is untrue and that he has no cause of action.[7] However, a caveat to fees in general is stated in Disciplinary Rule DR2-110 (A) (3) which holds:

DR2-110: Withdrawal from Employment.

(A) In general.

(3) A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned.

The overriding reasons for this Disciplinary Rule relative to withdrawing from employment appears to be exemplified by Ethical Consideration 2-32, which says:

EC 2-32: A decision by a lawyer to withdraw should be made only on the basis of compelling circumstances, and in a matter pending before a tribunal he must comply with the rules of the tribunal regarding withdrawal. A lawyer should not withdraw without considering carefully and endeavoring to minimize the possible adverse effect on the rights of his client and the possibility of prejudice to his client as a result of his withdrawal. Even when he justifiably withdraws, a lawyer should protect the welfare of his client by giving due notice of his withdrawal, suggesting employment of other counsel, delivering to the client all papers and property to which the client is entitled, cooperating with counsel subsequently employed, and otherwise endeavoring to minimize the possibility of harm. Further, he should refund to the client any compensation not earned during employment.

---

[1] Formal Opinion No. 90 dated December 3, 1932

[2] Informal Opinion No. 807 Dated March 3, 1965

[3] Formal Opinion No. 47 dated September 18, 1931

[4] Formal Opinion No. 130 dated March 15, 1935

[5] Informal Opinion No. 445, The American Bar Foundation, Opinions on Professional Ethics 187 (1st ed. 1967)

[6] Informal Opinion No. 780 dated July 20, 1964

[7] Formal Opinion No. 88 dated December 2, 1932

COMMITTEE ISSUES NEW OPINIONS RE CITY JUDGE

(Continued from page 21)

circumstances. His partners and associates may not do what the Judge himself is prohibited from doing. In short, the partners and associates of a Judge are disqualified from practicing in the Judge's court even though a special judge or a judge pro-tem may preside. ABA Opinion 104.

In Indiana Opinion 1973-3, the committee discusses criteria for a distinction between being partners and associates in a practice or of being space-sharers in the practice. It is recognized that under specific strictly regulated circumstances, lawyers may share some facilities and yet conduct separate practices so as not to mislead the public to believe that there is an association.

Regardless of whether the criteria described in Indiana Opinion 1973-3 are met, the lawyers sharing space may still bear such a close relation so as to create a conflict of interest. ABA Informal Opinion No. 995. If the relation between the part-time Judge and a space-sharing lawyer with a separate practice is such that the lawyer should not appear before the Judge, the lawyer should not practice in the Judge's court before Judges pro-tem or special Judges.

ATTORNEY'S PROFESSIONAL DUTIES IN DETERMINING PLACE OF FILING ACTION

LEGAL ETHICS OPINION
No. 3, of 1974

In September, 1970, the Legal Ethics Committee issued Formal Opinion No. 1 of 1970 (Res Gestae Oct., 1970, Pg. 6). As with most opinions, the opinion was drafted in response to specific fact situations presented to the Committee, though the specific facts were not elaborated on in the opinion.

The Indiana Rules of Procedure adopted by the Supreme Court of Indiana in 1969 became effective January 1, 1970. Trial Rule 75 concerning venue requirements made a substantial change in the procedural law of the State of Indiana.

Shortly after the rule became effective, a practice arose of filing cases in the county where the attorney resided and practiced, even though the defendants in the suit resided several counties distant. It sometimes appeared that the only reason for such filings was the convenience of the attorney. Complaints were made that persons residing 50 to 100 miles away had to secure an attorney in a distant county to defend a suit. This could be a matter of considerable inconvenience and expense. It was against this background and upon this complaint that Opinion No. 1 of 1970 was issued.

It was the opinion of the Committee that such practice was unethical. That opinion provided in part as follows:

"Trial Rule 75 specifically sets forth the criteria of 'preferred venue'. A lawyer's oath requires him to avoid vexatious or harassing techniques. Filing cases in the wrong county leads to unnecessary inconvenience and unnecessary legal work, and is unfair to the client, the court, and the public.

The Legal Ethics Committee maintains that a member of the legal profession has an obligation conscientiously to file a proper case in the proper court in the proper county, and he therefore has the duty to conscientiously determine the county of preferred venue in filing any action.

The Committee therefore holds that the deliberate filing of a lawsuit in a county other than a proper county of preferred venue is unethical and is to be condemned."

Further experience with Trial Rule 75 indicates that the 1970 opinion did not take account of the full scope of changes intended to be made by the adoption of Trial Rule 75, nor recognize the legitimate advantages that can be obtained by using the flexibility of filing location allowed by the rule. Accordingly, the committee deems it advisable to supplement Opinion No. 1, of 1970, by explaining in somewhat greater detail the factors involved in determining the place of filing an action.

There is language in Trial Rule 75 which supports, in toto, the previous opinion. Trial Rule 75 reads, in part:

"(A) *Venue.* Any case may be venued, commenced and decided in any court in any county, except, that upon the filing of a pleading or a motion to dismiss allowed by Rule 12 (B)(3), the court, from allegations of the complaint or after hearing evidence thereon or considering affidavits or documentary evidence filed with the motion or in opposition to it, shall order the case transferred to a county or court selected by the party first properly filing such motion or pleading *if the court determines that the county or court where the action was filed does not meet preferred venue requirements or is not authorized to decide the case and that the court or county selected has preferred venue and is authorized to decide the case . . .*

(B) *Claim or proceeding filed in improper court.* Whenever a claim or proceeding is filed *which should properly have been filed in another court of this state,* and proper objection is made, the court in which such action or proceeding is filed shall not dismiss the same, but shall order said cause transferred to the court in which it should have been filed. The person filing such claim or proceeding shall pay such costs as are chargeable upon a change of venue and the papers and records shall be certified to the court of transfer in like manner as upon change of venue. Such action shall be deemed commenced as of the date of filing the claim in the original court.

(C) *Assessment of costs, traveling expenses and attorney's fees in resisting veue.* When the case is ordered transferred under the provisions of this rule or Rule 21 (B) the court shall order the parties or persons filing the complaint to pay the filing costs of refiling the case *in the proper court* and pay mileage expenses reasonably incurred by the parties and their attorneys in resisting the venue; and if it appears that the case was commenced *in the wrong county by sham pleading, in bad faith, or without cause,* the court shall order payment of reasonable attorneys' fees incurred by parties successfully resisting the venue."

The underlined sections in the foregoing portion of the rule all seem to imply that there is an *obligation* to file a case in a county of preferred venue and that there is a proper court and county for filing a claim as opposed to an improper court and county.

At the same time, there is considerable evidence that it was the intention of the rule to liberalize the requirements as to the place of filing. The rule itself provides:

"any case may be venued, commenced and decided in any court in any county, . . ."

The Advisory Committee note on Trial Rule 75 states in part as follows:

"One of the main objectives of this rule providing for the place where actions may be brought, is to allow an action to be brought in any court in the state, subject to the right of an objecting party to trans-

(Continued on page 25)

ATTORNEYS PROFESSIONAL DUTY IN DECIDING VENUE

(Continued from page 24)

fer the case to a proper county or court as provided by this rule."

The "Primer of the 1969 Indiana Rules of Procedure," published by the Indiana State Bar Association in October, 1969, introduces Rule 75 with the following statement:

"Rule 75 gives Indiana a wholly new approach to venue, premised on the concept that a case can be filed in any county in any court, subject to transfer to the preferred venue."

As a matter of law all previous requirements as to venue have been superseded by this rule. *Etherton vs. Wyatt, 1973 Ind., 293 N.E. 2d 43.*

Since Trial Rule 75 became effective, there has been considerable experience in the application of this rule. It can be considered to be reasonable to file a case in some county other than a county of residence. There are times when a person's county of residence is not the most convenient county in which to defend a legal action. This occurs where people live near county boundaries or where they live in areas of one county but do most of their business transactions in another county. It has become fairly common practice to file some actions in another county for justifiable reasons.

The county of "preferred venue" is not necessarily the county of residence of the defendants. The rule provides ten criteria which can be used to determine a county of preferred venue.

The Committee is now of the opinion that the following would be a fair summary of the professional duties of the attorney in determining the place of filing any action:

1. An attorney does have a duty to determine the proper county in which to file any action. There should be a legitimate reason for filing a case in any particular court. Normally this will be a county of preferred venue.

2. The filing of an action in a county other than a county of preferred venue is not in itself a violation of the code of professional responsibility.

3. Whether filing of a case in a county other than a county of preferred venue is proper is determined by the reason for such filing. If the choice of county was determined by the desire to avoid inconvenience to the defendant, the filing would be proper. If "by sham pleading, in bad faith, or without cause," such filing would be highly improper and would be a violation of the lawyer's professional responsibility.

Motive and reason for filing are the deciding factors. The lawyer who conducts himself in accord with his professional responsibility will use great care before filing a case in any county other than a county of preferred venue. Such filing will not be done for the purpose of harassing or causing inconvenience to a defendant. Convenience to the lawyer alone would not be a sufficient reason to justify such filing.

The discharge of professional responsibility requires more than a strict adherence to legal requirements. The attorney should file a case in a county of preferred venue unless filing in another county offers an element of convenience or benefit to the parties. If that benefit is to the defendant, there can be no question as to the good faith of the attorney.

7TH CIRCUIT LAWYERS CITE NEWS MAN, BYRON C. WELLS

Byron C. Wells, a governmental affairs reporter for The Indianapolis Star, was presented May 14 with a news media award by the Awards Committee of the Bar Association of the Seventh Federal Circuit.

The presentation was made in the Pfister Hotel at Milwaukee, Wisconsin.

The award was made for two series of stories written by Wells, one an analysis of the legal issues involved when an attorney violates court rules against discussing a case prior to trial, and the other on inmates who have become "jailhouse lawyers" in filing motions for new trials.

Wells, a reporter for The Star seven years, covered the police and Federal beats before being assigned to the State House. He took time out to complete his education at Indiana University in 1971, receiving a bachelor's degree.

The only other award made by the bar association was to WGN Continental Broadcasting Company of Chicago.

(Name)
Attorney at Law
City, Indiana' "

The Disciplinary Commission seeks our opinion as to whether or not such conduct constitutes a violation of the Canons of Professional Ethics.

DR2-101 (B) reads, in part, as follows:

> *"A lawyer shall not publicize himself, his partner, or associate as a lawyer through newspaper or magazine advertisements,* radio or television announcements, display advertisements in city or telephone directories, or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf . . ."

The American Bar Association Legal Ethics Committee, in its Formal Opinion 309, made the following specific statement on this issue:

> "It is improper for an attorney to send Christmas greetings which are published in a newspaper, even though the greeting contains no reference to the fact that the well-wisher is an attorney."

an attorney to an individual (client or lawyer) where there is a personal *relationship between the attorney and* the individual. Certainly the use of an advertisement would not constitute the limitation of Christmas greetings to those situations where there is a "personal relationship".

tute or give the appearance of solicitation. (Canon 9, DR2-101 (B), DR2-102 (A)). It is our opinion that the use of an advertisement in the manner described by the Disciplinary Commission would be improper and unethical.

Issued May 28, 1974