

INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE

OPINION NO. 1 OF 1990

Facts

Senior member of law firm has submitted affidavit to the Clerk, Indiana Supreme Court, requesting "inactive" but good standing status. The "inactive" status is necessitated by a failure to complete required continuing education hours. The senior member has no client contact and is not regularly present at the law office.

Issue

May the senior attorney display his name on the firm letterhead with the designation "retired" following the name?

Discussion

Rule 7.2, Professional Notices, Letterheads, Offices and Law Lists, of the Rules of Professional Conduct, contains, in part, language that a law firm may "if otherwise lawful, a firm may use as, or continue to include in, its name, the name or names of one or more deceased or retired members of the firm." Further the same rule states a lawyer shall not practice under a name that is misleading as to the identity, responsibility, or status of those practicing thereunder.

Conclusion

The proposed letterhead procedure of identifying the senior attorney as "retired" is permissible under the Rules of Professional Conduct.

INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE

OPINION NO. 2 OF 1990

The Committee has been requested to offer an opinion as to whether it is appropriate for a public defender to petition the court for fee reimbursement pursuant to P.L. 284 - 1989 (I.C. 33-9-11.5-6). This provision reads:

Payment of costs. - (a) If at any stage of a prosecution for a felony or a misdemeanor the Court makes a finding of ability to pay the costs of representation under Section 7 of this Chapter, the Court shall require payment by the person or the person's parent, if the person is a child alleged to be a delinquent child, of the following costs in addition to other costs assessed against the person:

- (1) Reasonable attorney's fees, if an attorney has been appointed for the person by the Court.
- (2) Costs incurred by the county as a result of Court-appointed legal services rendered to the person.

(b) The clerk of the Court shall deposit costs collected under this Section into the supplemental Public Defender Services Fund established under Section 1 of this Chapter.

The simple answer to this inquiry would be that it appears that it would never be appropriate for the public defender to petition the court to make this finding.

Rule 1.6 provides that a lawyer "shall not reveal information relating to representation of a client unless the client consents after consultation" Further, Rule 1.7(b) provides that:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interests.

While the request for opinion does not describe the particular context in which the public defender assigned to the case, or another staff public

defender, might petition the court for reimbursement of fees, it seems likely that any information the public defender's office may have as to the financial ability of the defendant would have been obtained during the representation of the client. It is further presumed that the motivation for a public defender to make such a request is to provide funds for the operation of the public defender's office in subsequent, unrelated matters. An attorney's request that a client make reimbursement is clearly detrimental to the client and is a breach of the loyalty owed by the attorney. That the attorney's office would benefit by the disclosure operates as an incentive for the breach and is an aggravating factor.

INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE

OPINION NO. 3 OF 1990

FACTS

An attorney sends targeted mailings to individuals involved in motor vehicle accidents for the purpose of obtaining representation. The individuals targeted are known by the attorney only insofar as the target's name appeared in some public record.

ISSUE

Whether a lawyer may solicit business for pecuniary gain by sending targeted mailings to individuals involved in motor vehicle accidents?

DISCUSSION

When this question was submitted to the Committee, Rule 7.3(d) (1) provided that a lawyer could not send a written communication to a prospective client based on the happening of a specific event. However, effective January 1, 1990, the Rule was amended and subdivision (d) was deleted. The amendment added two (2) new subdivisions, (b) and (c). Court Rules (Burns 1990).

Former subdivision (d) is set forth as follows:

- (d) A lawyer shall not contact, or send a written communication to, a prospective client for the purpose of obtaining professional employment if:
- (1) the contact or written communication is based upon the happening of a specific event;
 - (2) the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer;
 - (3) the person has made known to the lawyer a desire not to receive communications from the lawyer; or
 - (4) the communication involves coercion, duress, or harassment.

Subdivision (d) now appears as subdivision (b):

- (b) A lawyer shall not solicit professional employment from a prospective client by written or recorded communication or by in-person or telephone contact even when not otherwise prohibited by paragraph (a) if:
 - (1) the prospective client has made know to the lawyer a desire not to be solicited by the lawyer; or
 - (2) the solicitation involved coercion, duress or harassment.

Also pertinent to the discussion is subdivision (c):

- (c) Every written or recorded communication from a lawyer soliciting professional employment from a prospective client potentially in need of legal services in a particular matter, and with whom the lawyer has no family or prior professional relationship, shall include the words "Advertising Material" conspicuously placed both on the face of any outside envelope and at the beginning of any written communication, and both at the beginning and ending of any recorded communication. A copy of each such communication shall be filed with the Indiana Supreme Court Disciplinary Commission at or prior to its dissemination to the prospective client.

Indiana's Rule 7.3(a)-(c) is exactly the same as 7.3(a)-(c) of the ABA Model Rules, with the exception of the last sentence in Indiana Rule 7.3(c). The ABA rules were amended in February of 1989 in response to Shapero v. Kentucky Bar Association, 486 U.S. 466 (1988). In Shapero, the court held states may not categorically prohibit targeted direct mail solicitation of clients. In place of a complete ban, the Shapero Court suggested other means could be used to regulate direct mail solicitation. For example, a state may require lawyers to file targeted letters with a state agency, explain how facts were discovered and verified, or require letters to be labeled "advertisement." Id. at 476-78. Prior to Shapero, ABA Model Rule 7.3 prohibited mailing letters that were targeted to specific clients, much like Indiana's prior Rule 7.3(d) (1). The new ABA Rule 7.3 allows for direct mail advertising, and, incorporates the court's suggestions for permissible restrictions. ABA/BNA Lawyer's Manual on Professional Conduct 81:402. Therefore, because Indiana's Rule of Professional Conduct 7.3 is the same as the American Bar Association's Rule 7.3, Indiana is now consistent with Shapero and Rule 7.3 (c) allows targeted mailings to individuals potentially in need of legal services.

CONCLUSIONS

A lawyer may solicit business for pecuniary gain by sending targeted mailings to individuals involved in motor vehicle accidents. However, the mailings must comply with Rule 7.3(c). Thus, the words "Advertising Material" must be placed at the beginning of every letter or printed material mailed. Additionally, the words "Advertising Material" must be placed on the outside of every envelope used for the mailing. Finally, a copy of the letter or printed material must be filed with the Indiana Supreme Court Disciplinary Commission.

INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE

UNPUBLISHED OPINION NO. U1 OF 1990

The Committee has been requested to review some advertising information in reference to a mail solicitation for participation in a group legal services plan. In this instance, the solicitation is being done by a company called "Legal Services Plan of America" to customers of a mortgage company.

The advertising information includes a "personal" letter to the customer, a solicitation announcement from the Senior Vice President of the mortgage company touting the plan, a pamphlet entitled "Why Should You Consult a Lawyer," and its components, and another pamphlet entitled, "How Can You Afford a Lawyer," and an application for membership, which includes the following:

1. agreement to enroll in plan;
2. agreement to add the monthly cost of the plan (\$6.75 per month) to the customer's house payment;
3. agreement that customer can cancel anytime;
4. agreement that customer's plan attorney will forward information to the plan offices "for quality control and statistical purposes only."

The customer has to sign the application agreeing to the four terms cited above before he/she can enroll in the plan. The plan sets forth the "benefits" offered to the customer, including what they can expect for their \$6.75 per month, subject to limitations which are listed by footnote concerning various state requirements, and a suggested minimum fee schedule for certain basic types of legal work.

The information provided does not indicate whether the plan is registered under Admission and Discipline Rule 26.

Issues

The inquiring attorney has requested the Committee to consider the following:

1. Whether the solicitation material sent to the

customer is "misleading."

2. Whether the solicitation material runs afoul of any other proscription of the Rules of Professional Conduct.
3. Other issues that concern a referral system operated by non-lawyers.

Argument

The Committee notes at the outset that the Rules of Professional Conduct apply only to attorneys, and not otherwise to the company advertising its legal plan services. As such, the Committee cannot undertake to comment on the advertising as being "misleading" unless it falls within the purview of our Rules of Professional Conduct. In this instance, the advertisement does not. However, previous inquiries initiated by an attorney whose law firm was called upon to be a "referral attorney" and render legal services pursuant to a "plan" was approved with reservations in our Opinion No. 4 of 1986. In that opinion, the Committee required that the "referral attorney," prior to receiving referrals from the group legal services plan, assure himself or herself that the group legal services plan has been filed in compliance with Admission and Discipline Rule 26.

Since the Committee has not been provided with the referral contract, we formulate no opinion on whether this plan for the referral attorney meets the requirements of Rule 7 of the Rules of Professional Conduct. We do not express an opinion on the advertising performed by the legal services plan company for the reasons noted above. We further can make no determination whether this group legal services plan meets the requirements of Admission and Discipline Rule 26 because we have not been provided with sufficient information.

INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE

UNPUBLISHED OPINION NO. U2 OF 1990

Issue

Are the facts sufficient to allow a lawyer to act both as an advocate and as a witness under the "substantial hardship" portion of Rule 3.7?

Rule 3.7 Lawyer as a Witness

- (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
- (1) the testimony relates to an uncontested issue;
 - (2) the testimony relates to the nature and value of legal services rendered in the case; or
 - (3) disqualification of the lawyer would work substantial hardship on the client.
- (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Facts

A lawyer and his family invested in a real estate enterprise and in the process borrowed a substantial amount of money from a lending institution with long-term mortgage financing. A problem arose in that the enterprise did not generate cash during three months of the year and a modification of the loan was negotiated which, in effect, eliminated the requirements of the payments during those three months. Apparently the lending institution used an amortization table which did not reflect the fact that payments were only being made nine months out of the year. The lending institution was taken over by the FSLIC and the mortgage is being managed by a new mortgage corporation. Thereafter, the new mortgage corporation discovered the problem with the amortization schedule and notified the attorney and his family of the error and advised the attorney and his family that the amount due on the mortgage was greater than shown on the amortization schedule.

The lawyer feels that he is a principal witness as to the "intent of the parties" at the time of the modification agreement. However, he and his family want him to continue as the lawyer in the case because it would

cost them multi-bucks to hire another lawyer to try the case. The case will be tried by the court and not a jury. The opposing counsel has agreed to allow him to testify and still remain the advocate in the lawsuit. The lawyer has obtained signed consents including a request that he be allowed to be a witness and advocate from each member of his family.

Discussion

In his memorandum regarding the application of Rule 3.7, the lawyer cites the case of Jackson v. Russell, 498 N.E. 2d 22 (Ind. App. 1st Dist. 1986). In that case the judge did disqualify the attorney and in affirming this decision, the Court of Appeals said:

The hardship exception is not meant for a case where a possible disqualification was visible early on, but "the parties went right on increasing the helpless dependence of client upon lawyer." General Mill, at 713. Instead, the duty to withdraw from representation is clearest when the need to be a witness is well known in advance. Id., at 714. Therefore, absent "the distinctive value" of an attorney or his firm as counsel in a particular case, hardship alone will not be enough to prevent disqualification of an attorney where there is a conflict between acting as counsel or as a witness.

It would appear from reading the pleadings, and other material sent to the Committee by the lawyer, the opposing counsel feels that the testimony of the lawyer relates to an uncontested issue. That is, an oral statement of what the parties intended is not controlling when all of the documents are in writing and not ambiguous. If this is the case, then exception one applies and the lawyer may remain as an advocate in the case. He could probably even get his opposing counsel to stipulate his testimony so that he may avoid taking the witness stand. However, if the lawyer is correct in stating that he is the primary witness, then under Rule 3.7 he cannot act as an advocate, particularly as stated in the Jackson opinion, when he knows well in advance that he is such a key witness.

INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE

UNPUBLISHED OPINION NO. U3 OF 1990

The question presented to the Committee for a formal opinion is whether a firm or its members may be deemed in violation of Rule 1.5 of the Indiana Rules of Professional Conduct if it initiates a civil action for collection of attorney fees against a former client.

Facts

A number of years ago the inquirer and his firm were retained by a client under the terms of a written contingency fee agreement which provided that the firm would receive 25% of any recovery of any IRS refunds regarding a change in federal law which the firm was seeking on behalf of the client with respect to certain federal estate and gift tax legislation. A change in the law would benefit client and entitle him to claim tax relief from the Internal Revenue Service. The firm also was entitled to any out-of-pocket expenses. The firm sought legislative relief in the 98th Congress and was unsuccessful. The contingency fee agreement then was amended to provide that the firm's efforts would continue in the 99th Congress. Again, the firm was unsuccessful.

The firm continued to represent the client's interests in the 100th Congress, but did not seek to amend the contingency fee agreement to provide for the firm's continued representation of the client in that respect; however, the firm did send the client a letter proposing new terms and increasing the contingency fee percent to 33-1/3% of any funds the client might receive from the Internal Revenue plus the firm's out-of-pocket expenses. The firm continued to represent the client's interests, even though no response was received to the letter. The firm was successful in getting the 100th Congress to enact the remedial legislation sought and then contacted the client. The client responded by terminating the firm's services and retaining another attorney. The firm now is proposing litigation to recover its attorney fees. The inquirer also indicated that the firm is employing him specifically to seek recovery of attorney fees if this Committee renders a favorable opinion.

Argument

Rules 1.5 and 1.16 of the Indiana Rules of Professional Conduct are applicable in considering contingent attorney fees and the circumstances of attorney discharge by a client. Rule 1.5 provides that:

- (c) A fee may be contingent on the outcome of the matter for

which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

Also pertinent is Rule 1.5(d) which provides the following:

- (d) A lawyer shall not enter into an arrangement for, charge or collect:
 - (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or
 - (2) a contingent fee for representing a defendant in a criminal case

The Committee notes at the outset that a contingent fee arrangement for the recovery of a tax refund is not prohibited by Rule 1.5.

Our Opinion No. 6 of 1988 indicated that a client had the absolute right to discharge his lawyer for any reason. See Rule 1.16(a)(3). Rule 1.16(d) also requires that "upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel" The commentary to this rule so indicates that this subsection is applicable even if a lawyer has been unfairly discharged by the client. Since the firm believes it was instrumental in getting this remedial legislation passed for and on behalf of the client's interest, it believes it is entitled to compensation regardless of the discharge.

The question of what constitutes the "contract" of the parties and whether such is enforceable as a contingency fee contract or under another legal theory, such as quantum meruit, is a question of law. Our Seventh Circuit Court of Appeals in an Illinois case has held the fact that the contingency fee agreement may be challenged as invalid and

unenforceable because it violates Rule 1.5 of the Indiana Rules of Professional Conduct can be considered a question of public policy and, therefore, is a conclusion of law. See Danny Cross v. American Country Insurance Co., No. 88-2318, U.S. Court of Appeals (7th Cir., 1989), reported in National Reporter on Legal Ethics, N.7, 1989, US:CA:172-180. In Indiana, the reasonableness of an attorney fee claim has been judged by the standards set forth in our old Rules of Professional Responsibility, DR 2-105, the predecessor to this section. See also Estate of Newman v. Hadfield, 369 N.E. 2d 427 (1977).

Conclusion

It appears from the facts as presented that the filing of a claim for attorney fees under any legal theory is not on its face violative of Rule 1.5 of the Indiana Rules of Professional Conduct. However, this Committee will not give an opinion as to the validity of such contingency fee contract and whether it violates Rule 1.5 because it may be unenforceable under considerations of public policy and reasonableness of the claim. That is a question of law and not for this Committee to decide. Therefore, although the Committee states that the mere filing of a claim for attorney fees would not violate the Indiana Rules of Professional Conduct, it cannot give an opinion whether in fact the violation of Rule 1.5 may be used as a defense in the action for attorney fees, and the resulting implications if such a defense is successful.

