ETHICS OPINION NO. 1 (1971):

Attorney Fees in Divorce Cases; Additional Charge by Wife's Counsel Above Court Award

Issued May 17, 1971 by the
Legal Ethics Committee of the
Indiana State Bar Association,
Frederick E. Rakestraw, Chairman

The Legal Ethics Committee has received several inquiries and complaints concerning the matter of attorneys' fees sought in divorce cases under Burns 3-1216 and 3-1220 where the attorney representing the wife seeks to have the husband pay her attorney's fees. Some complaints have involved additional charges being made to the wife after a court has set and allowed attorney's fees to be paid by the husband. In some cases the attorney has previously received payment, and has not disclosed that payment to the Court allowing the attorney's fee or to the opposing party. Some attorneys have taken the position that any dealings they may have with their clients are privileged and need not be revealed to the Court or to the opposite side.

The Committee has considered the questions involved, and feels that there are ethical considerations which should influence an attorney's conduct in this area. The primary consideration would probably be Canon 9 "A lawyer should avoid even the appearance of professional impropriety."

When a lawyer seeks an allowance for attorney's fees he presents to the Court evidence as to the work performed, the amount in controversy, the difficulty involved, and his professional abilities. These are the same factors which have a bearing on the charges a lawyer would make of his client in any other situation. If the Court, based upon these considerations, set a fee and the lawyer then makes an additional charge, it certainly presents the appearance of professional impropriety. The Court has already made a determination of the value of those services.

Certainly the concealment from the Court of any sum previously paid to the lawyer would be improper, since the Court is requested to make an order for fees without having relevant information. It could even be considered a fraud on the Court.

It is, therefore, the opinion of the Committee that in any event a lawyer seeking an allowance for attorney's fees has an obligation to reveal to the Court and to the opposing party any payments which have previously been made by his client.

It is true, of course, that an attorney does have the right to contract with his client for the payment of his fees. Such a contract, whether oral or written, could include a provision that the client would pay what was believed to be a reasonable amount, even if the Court should allow some other amount. If there is such a prior agreement with the client, prudence would dictate that this should also be revealed to the Court at the time evidence is presented on the request for the allowance of attorney's fees.

We believe that the factors involved are amply summarized in Wise, *Legal Ethics*, Chapter 19, 288, where the following comment is made:

> "There are a number of canons, partially interrelated, which deal with the duty of lawyers to be candid and fair with their clients, with other lawyers, with the courts, and in their professional conduct generally. They are, of course, but another aspect of the fact that the law is a service profession and not a business. A lawyer is not only under obligation to refrain from making misrepresentations, but he also is denied the luxury of material concealment generally regarded in the trades as "smart business". There are many situations in which there is a duty upon a lawyer to make full disclosure where there would be no such requirement in a business transaction."

The application of these factors by the lawyer would do a great deal to avoid any misunderstandings or embarrassing situations.

ISBA Legal Ethics Committee Adopts Opinion on "Appearance of Professional Impropriety"

Cities established canons and previous opinions in important notice

INDIANA STATE BAR ASSOCIATION LEGAL ETHICS COMMITTEE OPINION NO. 2-1971

The Committee has received the following inquiry:

> "A law firm is employed by a client interested in a casualty loss, and in the course of the investigation of the loss, members of the firm contact others who have possible mutual claims. What ethical problems are presented in connection with the subsequent employment of the law firm by those having mutual claims who are so contacted?"

Apparent in this statement of facts are complex ethical problems. A clear statement of the problems and their solution is required for the guidance of the profession in handling with propriety a problem with which lawyers are frequently confronted.

The proper activities of an attorney in handling a case for a client necessarily may place him in contact with others with mutual claims and thus potential sources of related legal business. The circumstances under which such business may be accepted and the required form of the lawyer's approach have been discussed previously in *American Bar Association Informal Opinion* 880 (1966) and by this Committee in Opinion No. 5 of 1966.

Canon 5, "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client," presents the first requirement in deciding whether or not the investigating firm may undertake representation of others having mutual claims. The propriety of representing multiple clients depends in part on whether the clients have potentially differing interests and whether the lawyer's loyalty may possibly be diluted by the acceptance of additional employment. All doubts about the propriety of the representation must be resolved against the representation. A lawyer may not represent multiple clients unless he has first explained to each client the implications of the common representation; and he may accept or continue employment only if the clients all consent after a full disclosure. *Code of Professional Responsibility* E.C. 5-14, 5-15, 5-16 and 5-17; D.R. 5-105; *American Bar Association Opinion* 247 (1942).

Second, a lawyer may not solicit legal work or recommend himself to one not seeking his advice. *Code of Professional Responsibility* D.R. 2-103; *American Bar Association Informal Opinion* 1161 (1971). If the attorney as a professional sees fit to recommend to one not his client that he employ counsel, such attorney may not accept the employment if offered to him. *Code of Professional Responsibility* D.R. 2-104. A lawyer may not be motivated to offer advice for the purpose of obtaining personal benefit; and, pursuant to the *Code of Professional Responsibility* E.C. 2-3, "a lawyer should not contact a nonclient, directly or indirectly, for the purpose of being retained to represent him for compensation" *American Bar Association Informal Opinion* 5 (1924).

Third, the problem of preserving the confidences and secrets of a client is inherent in multiple representation. Information received by a lawyer from a client may not be revealed without the consent of the client after a full disclosure to the client *Code of Professional Responsibility, Canon 4;* E.C. 4-1, E.C. 4-2, E.C. 4-4 and E.C. 4-5; D.R. 4-101; *Burns' Indiana Statutes Annotated* § 2-1714; *Borum v. Fouts* (1860) 15 Ind. 50; *George v. Hurst* (1903) 31 Ind. App. 660, 68 N. E. 1031.

Finally, pursuant to *Code of Professional Responsibility, Canon 9,* a lawyer is obliged to avoid at all costs the appearance of any professional impropriety. As is stated in E.C. 9-1, every lawyer is duty bound to promote public confidence in the legal profession. Any act which may cause a layman to suspect disreputable practices must be shunned. *American Bar Association Informal Opinion* 49 (1931).

The conclusion of the Committee is that any lawyer when presented with the opportunity of multiple representation must guard against potential unethical conduct and the appearance of a breach of ethics. An attorney *may not solicit employment* from potential mutual claimants. It must be clear that the claimant voluntarily seeks and requests the attorney's representation; and the attorney may not accept employment unless the client has initiated negotiations for the services. (The attorney who without request from the layman suggests the need for representation must not under any circumstances undertake the professional work.) The attorney must reveal to his existing client or clients and to the potential client his representation of all others with connected interests.

Furthermore, the Committee feels that an attorney is obliged to suggest to the potential client that he seek the services of his own regular counsel. The attorney is further obligated to obtain the consent of his existing clients and the potential client to the disclosure of information received from each to the other and in all judicial proceedings as may be necessary in the successful representation of the multiple clients.

Finally, the attorney may not accept employment which involves differing interests or potentially differ-

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ing interests without the consent of each of the multiple clients after a full disclosure of the possible effect on the exercise of his independent judgment on behalf of each.

It is recommended that an attorney who has accepted the representation of multiple clients document by letter or other writing the disclosures and consents necessary to establish complete compliance with the ethical requirements so as to avoid the appearance of impropriety.

Dated this 13th day of September, 1971.

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