

Dissolution of a Law Practice Upon The Death of a Lawyer

Ethics Committee Advisory Opinion

12/8/81

Reviewed by Board of Governors 12/17/81

Attorney A advises the Committee that he has established certain procedures for the orderly dissolution of his practice upon his death. These procedures include the transmittal of a letter to all current clients of A advising them of his decease, indicating that Attorney B has been designated as Executor of A's will and has been authorized by A to continue serving clients of his office, and inviting the client to indicate his wishes as to further representation, either by B or another attorney of the client's choosing.

Attorney A also advises the Committee that his will has been structured in such fashion that Attorney B could "acquire" A's practice, in whole or in part. Although A's correspondence to the Committee does not explicitly so state, it seems clear that what is contemplated is the acquisition by Attorney B, for consideration paid, of the goodwill of A's practice as a going concern, and not merely the tangible assets (building, books, office equipment, etc.) thereof.

Attorney A requests "clarification" of the Committee's prior Ethics Opinion (Formal Ethical Opinion, pursuant to Rule 1) concerning matters attendant to the sale or dissolution of a law practice, which was published at 8 NHLW 37 on July 29, 1981, with particular reference to the proposed course of conduct outlined above.

Initially, it should be noted that the prior Opinion cited above is essentially dispositive of the present case. However, Attorney A's attention is drawn to certain points raised in that Opinion which are of particular applicability to his situation.

First, the Committee does not find the proposed letter to clients of A or the attendant procedures for the orderly transfer of client matters to Attorney B or to other counsel of the client's choosing to be ethically improper per se. As the Committee's prior Opinion makes clear "in some instances it would be proper for the attorney to arrange with another competent attorney to do what is essential in order to protect the client's rights, even without prior approval of the client." 8 NHLW 39. However, caution should be used to protect the client's confidences and the client should be fully advised of his right to seek new counsel of his choosing. Attorney A's letter and the attendant procedures seem acceptable and appropriate in this regard, as long as Attorney A or his estate are promised or receive no compensation or other consideration from Attorney B, his firm or related persons in connection with these arrangements.

As the Committee's prior Opinion notes, Ethical Considerations EC 2-8 and 4-6, and the other authorities cited in the Opinion, make clear that a lawyer is ethically prohibited from compensating another lawyer "for recommending him, for influencing a prospective client to employ him or encouraging future recommendations." 8 NHLW 37, quoting EC 2-8. Thus, it would be a breach of ethics for Attorney B or his firm to compensate Attorney A in any way in consideration of Attorney A's designation of B as his authorized successor upon his decease, in communications with A's former clients. Such prohibited compensation would include, for example, the performance by B or his firm of probate or estate administration or other legal services for A or his estate at no charge or at reduced rates, unless the same was done pursuant to an established policy of professional courtesy or the legal services involved were de minimis, either in absolute terms or relative to the size of the practices of the attorneys in question. Of course, it goes without saying that any direct payment by B or his firm to A or his estate which involves any attempt to acquire the goodwill of A's law practice as a going concern (as opposed to the tangible assets of that practice), is also ethically impermissible. However, neither this nor the prior Opinion prohibits the valuation of the goodwill of a law practice for income and estate tax and other purposes, if required. 8 NHLW 39.

The remainder of Attorney A's letter consists of general and specific arguments in favor of a change in the ethical standards enunciated by the Committee of its prior Opinion. The record indicates that this Opinion was based on the unanimous opinion of contemporary authority, including the Code of Professional Responsibility, ABA Formal Opinion 266, and Informal Decisions 507 and 550, as well as the reported case law in other jurisdictions. The Committee is unaware of any developments since the date of its prior Opinion which would warrant its modification, abandonment or reversal at this time. If Attorney A so desires he may request a formal rehearing and reconsideration of that Opinion pursuant to the Committee's rules of procedure.