



Committee on Professional Ethics

Opinion #527 - 12/30/80 (59-80)

Topic: Appearance of impropriety; pro se litigation maintained by law firm; soliciting contributions

Digest: Law firm may not solicit financial contributions for litigation which it has brought on its own behalf.

Code: DR 5-107(A), (B);
EC 5-21, 5-22, 5-23,
7-8.

QUESTION

May a law firm which is the plaintiff in a damages suit of potentially broad commercial significance accept or seek contributions for fees and expenses from persons who have an interest in the issue being litigated?

OPINION

A client in litigation plainly may gather others to share in the payment of legal fees and expenses. In proper circumstances, there is no ethical impropriety in an attorney rendering services to his client which are paid for by another, or by others, solicited by the client. DR 5-107(A), (B); EC 5-21, EC 5-22 and EC 5-23. See also, ABA Inf. 679 (1963); N.Y. City 113 (1928-29); Virginia State Bar 104 (1959), indexed at 4458, O. Maru, Digest of Bar Association Ethics Opinions (1970).

By the same token, "when the interest of a client will be served by enlisting the cooperation of others similarly situated, an attorney may solicit or participate in soliciting such cooperation, provided his motive is not to benefit himself." N.Y. State 499 (1978); see also, N.Y. State 449 (1976). "Such solicitation is ... tolerated only in the interests of a client and not in a lawyer's own interest." N.Y. City 717 (1948).

By no means does the attorney have unfettered license in this regard. There is a recognized potential for abuse. "Real interests" must be involved; the persons approached must have a legitimate interest in the outcome of the suit. N.Y. City 717 (1948). In N.Y. State 499 (1978), we pointed out that a lawyer proposing to contact potential class members bears an exceedingly heavy burden of complying with all applicable rules of law. "And, consonant with those rules of law, the ethics of our profession will not tolerate such communications for the purpose of generating a clientele."

A common element in the foregoing situations is that, in each, there is both a lawyer and a client. The lawyer has legal and ethical responsibilities to the client. It is the client, not the lawyer or any financial contributors, who controls the litigation. "In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself." EC 7-8.

Of course lawyers are as free as anyone else to pursue legal remedies for injuries to them, and they are not obligated by the Code to retain other counsel in such pursuits. The lawyer clearly may serve as his own client. But the absence of a client, exercising separate judgment and independent control over its litigation, is a critical distinction from cases where voluntary contributions from others, and solicitation of contributions from others, are permitted.

While we have found no ethics opinions on point, we are persuaded by the logic of the numerous court decisions holding that class action plaintiffs, in litigation which would result in court-awarded attorneys' fees, cannot represent themselves pro se because of an appearance of impropriety under Canon 9 of the Code. See, e.g., Lowenschuss v. Bludhorn, 613 F.2d 18, 20 (2d Cir. 1980). As the Court observed in the seminal case of Kramer v. Scientific Control Corp., 534 F.2d 1085 (3rd Cir.), cert. denied, 429 U.S. 830 (1976):

Historically, members of this nation's bar both have formed cutting edges and have wielded shields in zealous efforts to vindicate and protect interests of all kinds -- individual, public, and social; economic, political, cultural, and personal. As private attorneys general and frequently in class action contexts, they have guided litigation insisting that legislative mandates be obeyed, administrative regulations respected, and constitutional guarantees observed. Often their intense advocacy has generated controversy in both the private and public sectors. Often issues they probe are sensitive, provocative and disputatious. Recently, however, critics have challenged the altruism of some class action lawyers and charged that the paramount motivation for such litigation was counsel's desire to generate substantial fees. The cynic's argument may have a certain validity.

For the reasons stated, the question posed is answered in the negative.
