Committee Opinion
May 8, 1990

LEGAL ETHICS OPINION 1343

ACQUIRING INTEREST IN CLIENT'S MATTER – BUSINESS TRANSACTION WITH CLIENT – PERSONAL INTEREST AFFECTING REPRESENTATION: CRIMINAL DEFENSE ATTORNEY/STOCKHOLDER OF BAIL BOND BUSINESS POSTING BOND FOR CLIENT.

You have requested that the Committee opine as to the propriety of an attorney, who owns stock in a professional bonding company, representing criminal defendants who engage that bonding company to post bail for them. You indicate that a potential problem arises in those circumstances when the client fails to appear in court and a forfeiture proceeding begins against the bonding company for the bond amount. At that point, the client advises the attorney of his whereabouts and the attorney is then faced with a conflict between his loyalty and duties to the client and his financial stake in the bonding company.

The appropriate and controlling disciplinary rules relevant to the issue you have raised are DR:5-101(A) which prohibits a lawyer from accepting employment if the exercise of his professional judgment on behalf of his client may be affected by his own financial, business, property, or personal interests, except with the consent of his client after full and adequate disclosure under the circumstances; DR:5-103(A) which precludes a lawyer from acquiring a proprietary interest in the litigation he is conducting for the client; and DR:5-104(A) which similarly prohibits a lawyer from entering into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client. Exceptions apply to this latter rule when the client has consented after full and adequate disclosure under the circumstances and *provided that the transaction was not unconscionable, unfair or inequitable when made*. (emphasis added)

The Committee has earlier opined that it is not *per se* improper for attorneys who practice criminal law to be stockholders in a corporation engaged in the bail bond business. That opinion, however, found that an attorney who is a stockholder in a bail bond business may not represent a criminal defendant for whom the bail bond business has written a bond. The Committee was of the opinion that it is not obvious that the lawyer could adequately represent the interest of each, as required by DR:5-105(C). (See LE Op. 1254) The Committee is presently of the opinion that a similar prohibition extends to an attorney's stockholder status in a bail bond business even where the attorney does not provide legal representation to the entity.

Furthermore, the Committee construes the status of a bail bondsman to be that of a guarantor. In that capacity, it is the Committee's opinion that the attorney, whose bail bond business bonds the same attorney's criminal defendant client, is engaging in the impermissible behavior of both acquiring a proprietary interest in the representation (as prohibited by DR:5-103(A)) and entering into a business transaction which could be

construed as unfair when made (as prohibited by DR:5-104(A)). Both disciplinary rules are concerned with the attorney's loyalty and independent judgment on behalf of a client being compromised by his interest in recouping his own or his bail bond entity's financial stake. The making of such a loan in the nature of a bail bond would create an improper adverse relationship between the lawyer as creditor and the client as debtor. (See LE Op. 1269, LE Op. 1155)

Finally, the Committee is concerned that the preservation of the secrets and confidences of the client are jeopardized by the dual loyalty situation. As you have indicated, the bail bond entity and the criminal defendant client do not have an identity of interests. Clearly, having accepted the role of advocate for the client, the lawyer is required to represent his client zealously and to avoid any possibility of prejudicing or damaging his client during the course of that relationship. It is the opinion of the Committee that, even where the lawyer is required to reveal his client's confidences or secrets, see DR:4-101(D)(1), such mandatory revelation must be based on the lawyer's duty as an officer of the court and not on his personal interest in the bail bond business.

The Committee believes that an attorney engaged in a criminal defense practice cannot ethically combine such practice with the business of a professional bondsman offering bail bonds to his own clients. This opinion is predicated upon the Committee's belief that no level of disclosure and subsequent consent will vitiate the improprieties arising from (a) divided loyalties between the lawyer's financial and business interests; (b) the lawyer's acquisition of an interest in the matter through serving as a guarantor of the client; and (c) a business transaction with the client which is highly susceptible to being viewed as unconscionable, unfair or inequitable when made. Therefore, the Committee is of the opinion that, over and above any mandatory revelation, any such representation would be *per se* improper.