INTRODUCTORY SOLICITATION - ADVANCING MONEY TO CLIENT

Advancing money to clients can be condemned in Texas only if there is some solicitation of employment. An advance to a prospective client for the purpose of obtaining employment is improper. Advancement of money after employment is unethical only if it occurs with such publicity, frequency or notoriety as to constitute indirect solicitation of employment in other matters. It is immaterial that repayment is to be from proceeds of a claim.

Canon 24.

QUESTION

Opinion 106 provides that it is improper for an attorney to advance or lend money to a client for the purpose of obtaining or holding employment. Assuming that it is not for the purpose of obtaining or holding employment, is it improper for an attorney, directly or indirectly, to advance or lend money to, endorse a note of, or guarantee the extension of credit to a person whose claim or litigation the attorney is investigating or handling, where as a practical matter reimbursement to the attorney or the relief of the attorney from liability as an endorser or guarantor is dependent on the outcome of the claim or litigation? Is the answer different if such reimbursement or relief from liability was not dependent on the outcome of the claim or litigation?

OPINION

Apparently the inquiry relates to an attorney agreeing to loan money and/or credit to a claimant (1) before employment, while the attorney is "investigating" the claim, or (2) after employment, while the attorney is "handling" the claim, and also where repayment either (3) would or (4) would not come from proceeds of the claim or litigation. In answering the four questions involved the committee will assume, as did the inquirer, that the attorney did not have the purpose of obtaining or holding employment. However, the mere conduct of making the loan or extending credit while negotiating for employment seems to be alone sufficient to raise a fact issue whether this was done for the purpose of soliciting or obtaining employment.

Canon 24 prohibits the solicitation of legal business by any means, whether by making a loan, extending credit, promising to do either, or by some other method. It is unethical simply because it is solicitation. Opinion 106 is correct in concluding that it violates Canon 24 to advance money to obtain employment.

Section 2 of the Canons provides that they are cumulative of the laws of Texas. Article 430, Penal Code, the Texas barratry statute, regulates some forms of solicitation by making it a crime for an attorney to loan or promise to give money or other valuable thing BEFORE employment for the purpose of seeking or obtaining employment. The elements of both time and purpose must concur before such conduct constitutes barratry under the statute. See M. K. & T. Ry. v. Bacon, 80 S. W. 572 (1904).

The holding in Opinion 106 that it is unethical to advance money (or credit) for the purpose of obtaining employment can be justified on the basis of Art. 430. It is both unethical and illegal to violate the statute.
However, the distinctions under Art. 430 become very fine. Apparently the assignment of an interest in the subject matter of the litigation does not violate the statute, even if the attorney is to sue at his own expense, but an agreement before employment to pay all expenses of the litigation, made to induce employment, violates the statute. See Ft. Worth & D. C. Ry. Co. v. Carlock & Gillespie, 75 S. W. 931 (1903), and Thompson & Tucker v. Platt, 154 S. W. 268 (1913). Compare Broadway v. Miller, 288 S. W. 627 (Text Civ. App. 1926, error ref'd).

Opinion 106 also held it to be unethical to lend money (or credit) to a client for the purpose of holding employment already established. This does not violate Article 430 because it would not occur before employment for the purpose of inducing employment. Moreover, the language of Canon 24 speaks of solicitation to procure employment. The reasoning of the committee in reaching this result does not appear in Opinion 106.

ABA Canon No. 10 (not adopted in Texas) and the statutes of many states regarding champerty (unlike the Texas barratry statute) prohibit the acquisition by the attorney of any interest in the subject matter of the litigation. The effect of these statutes and Canon is to prohibit the attorney from bargaining or bartering for the right to bring or continue the litigation; hence it is unethical for an attorney at any time to advance expenses (apparently without regard to whether the advancement was necessary in order to retain employment). See Matter of Gilman, 251 N. Y. 265, and ABA Opinion 246. But in Texas we cannot conclude that the conduct is unethical merely because the money was advanced in connection with litigation.

ABA Canon No. 42 provides, "A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience, but subject to reimbursement." Nothing similar appears in the Texas canons. Where ABA Canons have been adopted the problem is whether the loan was an advance of expenses made in good faith as a matter of convenience and to be reimbursed. ABA Opinions have held that living expenses are not expenses of litigation and thus are not within the "matter of convenience" proviso but constitute the acquisition of an interest in the subject matter in situations where same can be expected to be repaid only out of the claim, and thereby fall within the prohibition of ABA Canon No. 10. (See ABA Opinion 288.) Since we have no counterpart in Texas to ABA Canon No. 10 this reasoning cannot apply in Texas.

ABA Opinion 288 thought the loan payable out of the claim also violated Canon No. 6 (conflicting interest) because the interest of the attorney in the litigation necessarily conflicts with the interest of the client. This reason cannot apply to Texas because it is here proper for an attorney to acquire an interest in the litigation, irrespective of some necessary conflicts of interest.

A third reason was given by ABA Opinion 288, viz, "... the practice, if publicized, constitutes a holding out by the lawyer of an improper inducement to clients to employ him ..." This seems to be the only reason applicable in Texas.

Therefore, in Texas any solicitation to procure employment is unethical, in violation of Texas Canon 24 and Article 430. Advancement of money AFTER employment is unethical only if it occurs with such publicity, frequency, or notoriety as to constitute indirect solicitation of employment in other matters; otherwise it is proper. Thus Opinion 106 extends too far in holding that it is always unethical to advance money to a client, after employment, in order to hold employment. In Broadway v. Miller, supra, the loans were made after employment.
In all four questions involved in this inquiry the conduct is ethical, assuming that there was no purpose of doing so to obtain employment. However, such conduct would become unethical if it occurred with such frequency, publicity, or notoriety as to constitute indirect solicitation in the matters.

In Texas we can condemn loans to clients only if there is some solicitation of employment. Therefore, it makes no difference if repayment is from the claim. (7-0.)