

ADVISORY ETHICS OPINION 92-01

SYNOPSIS:

An attorney who is an officer in the trust department of a bank may not represent customers or potential customers of the bank by which he or she is employed in the preparation of wills, trust agreements and other legal instruments pertaining to trusts, estates and related trust department business, whether or not the client pays for these services to the bank or to the individual officer/lawyer, and whether or not the bank is named as a fiduciary.

QUESTIONS PRESENTED:

Is there any impediment to the preparation by an officer of the trust department of a Vermont bank who is a member of the Vermont bar in good standing of wills, trust agreements and other legal instruments for customers or potential customers of the bank by which he or she is employed:

- (a) as a part of the bank's trust services and without charge to the individual concerned, or
- (b) under a separate written arrangement between the officer/lawyer and the customer or prospective customer for which the officer/lawyer would charge a fee which
 - (i) he or she would turn over to the bank, or
 - (ii) he or she would retain for his or her own account?

Instruments to be drawn mayor may not name the bank as a fiduciary.

ETHICAL CONSIDERATIONS:

Canon 5 of the Code of Professional Responsibility governs the answer to the above question, and in particular Ethical Considerations 5-1, 5-2, 5-14, and Disciplinary Rules 5-105 and 5-107.

Canon 5 of the Code of Professional Responsibility states:

A lawyer should exercise independent professional judgment on behalf of a client.

The Ethical Considerations cited are as follows:

EC 5-1 The professional judgment of a lawyer should be exercised within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

Interests of a Lawyer That May Affect His Judgment

EC 5-2 A lawyer should not accept proffered employment if his personal interests or desires will, or there is a reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client. After accepting employment, a lawyer carefully should refrain from acquiring a property right or assuming a position that would tend to make his judgment less protective of the interests of his client.

Interests of Multiple Clients

EC 5-14 Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.

The Disciplinary Rules cited are as follows:

DR 5-105 Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.

- (A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105 (C).

- (B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105 (C).
- (C) In the situations covered by DR 5-105 (A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.
- (D) If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment.

DR 5-107 Avoiding Influence by Others Than the Client.

- (A) Except with the consent of his client after full disclosure, a lawyer shall not:
 - (1) Accept compensation for his legal services from one other than his client.
 - (2) Accept from one other than his client anything of value related to his representation of or his employment by his client.
- (B) A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.
- (C) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:
 - (1) A nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
 - (2) A nonlawyer is a corporate director or officer thereof; or
 - (3) A nonlawyer has the right to direct or control the professional judgment of a lawyer .

DISCUSSION:

The attorney under these facts is employed by a bank and is an officer of that bank. As such, he or she owes a fiduciary duty of loyalty to the bank and has an obligation to protect the bank's interests. From the bank's point of view, the lawyer's professional qualification as an attorney is probably one of the significant reasons for employing him or her in that he or she is able to protect the bank's interest from a legal point of view, and in particular in the form of documentation. The attorney also derives a regular income from the employment by the bank. Within this context, then, is it possible for an attorney asked to draft trust and estate planning documents for a customer or potential customer of the bank to do so as required by EC 5-1, "solely for the benefit of his client and free of compromising influences and loyalties."

It is difficult to imagine that an attorney, in drafting a trust agreement for a potential customer of the bank, could avoid the conflict problems inherent in selecting, including, rejecting, minimizing, or embellishing a variety of provisions that would have the effect of protecting one party or another to a greater or lesser degree. For example, it is not uncommon for some trust departments to require that before it will accept real estate as an asset of a trust, a trust document must include a provision that a complete environmental assessment is required and shall be paid for by the grantor. Trust departments at other banks do not require this. An attorney who is ostensibly working for an individual but simultaneously the bank's attorney/officer/lawyer is less likely to clarify the different options available to a customer/client, and more likely to minimize this requirement or characterize it as "standard procedure." Similarly, trust departments at banks typically require specific language protecting the bank's entitlement to compensation, or absolving the bank of responsibility for continuing to hold investments delivered to it by the grantor, even though they may not be of the type the trust department would recommend. This type of provision may not be in a client's best interest.

Although this type of conflict does not appear to be of an outrageous nature, the cumulative impact of the subtle conflicts created by the lawyer/officer's loyalty to the bank is such that the lawyer/officer would not be able to exercise professional judgment "solely for the benefit of his client and free of compromising influences and loyalties." Because of the wide range of choices possible in the selection of trust agreement and other document language, there is a reasonable probability that the personal interest of the lawyer/officer in protecting his or her job and future career with the bank will adversely affect the advice or services given to the prospective client, resulting in impermissible conduct under EC 5-2. EC 5-14 specifically precludes a lawyer from accepting or continuing employment that will adversely affect his or her judgment on behalf of or dilute his or her loyalty to a client. Under the facts presented, the lawyer would be putting himself or herself in the position of serving two masters with potentially conflicting or discordant interests. The bank customer or potential customer would be the one who most likely would not have the full loyalty of the attorney.

The existence of a conflict is not altered by the fee arrangement. If services are provided as part of the bank's trust services or without charge to the individual, the conflict is exacerbated because the likelihood that the interests of the bank, which is paying the piper, will supercede the individual's interests is greatly increased. The lawyer thus runs afoul of EC 5-2. In

addition, DR 5-107 provides that the attorney could not be paid by the bank for services to the individual without full disclosure and the individual's consent, but the temptation of having legal services paid for by the bank is likely to cloud the individual's judgment in providing consent, particularly since the individual may not be in a position to evaluate or appreciate the subtle ways in which the lawyer could favor the bank's interests over those of the individual.

Even if the customer pays the lawyer/officer a fee for the separate account of the lawyer/officer under a separate written arrangement, the potential conflict still exists as described above because of the underlying employment of the lawyer/officer by the bank and his or her abiding fiduciary duty to the bank.

At first blush, it would seem that the problem may not exist if the instruments drawn do not name the bank as a fiduciary. This ignores the reality that even if the bank is not formally named as a fiduciary, its interests might well be promoted by the overall process of estate and trust planning in which the bank's attorney is purporting to act for the individual. The bank is likely to be seeking the customer's or potential customer's business under some other arrangement, such as an agency or custodial account, even if not as a fiduciary or successor fiduciary, so that it can be positioned to be responsible for the customer's assets in any event. Since the attorney/officer's career at the bank may be partially a function of success in attracting business, the potential for the attorney/officer to be influenced by the employment arrangement with the bank in connection with any advice or services provided to the individual clients still exists.

DR 5-105 (C) does provide for situations in which a lawyer "may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each Consents to the representation after full disclosure of the possible effects of such representation on the exercise of his independent professional judgment on behalf of each." The analysis above indicates that it would not be possible for the attorney/officer to adequately represent the interests of each in the first place, So disclosure and Consent is moot. In addition, the customer or potential customer of the bank is likely to not clearly understand the nature of the conflict or potential conflict between the attorney's representation of the customer and the attorney's duty to the bank. Particularly in a non-adversarial situation such as financial planning, the lay person often does not appreciate the potential for conflict, and thus might be induced to consent to representation after disclosure without fully understanding the significance of the disclosure. This is a particular risk in connection with customers or potential customers of a bank trust department, who may be elderly or widowed persons seeking assistance with the protection of their life-time assets.

As this committee has pointed out previously in Opinion Nos. 90-8 and 91-8, the customer/client of a bank official may not be able to knowingly, voluntarily and intelligently consent to multiple roles of a bank officer also serving as an attorney.