E-82-11 Dual business practice

Question

An opinion has been requested of the State Bar Professional Ethics Committee concerning the propriety of ownership of 100 percent of the outstanding shares of a licensed collection agency by two practicing attorneys.

Facts

The collection agency is housed in an office completely separate from the law office of the principal shareholders. There are separate phone and directory listings. Day-to-day management of the respective offices is entirely separate. However, the law office of the shareholders does receive a large number of referrals from the agency, which it also received prior to its acquisition.

Opinion

There is no disciplinary rule under the existing ABA Code of Professional Responsibility, nor under the Wisconsin Supreme Court Rules, that prohibits a lawyer from engaging, simultaneously with the practice of law, in another business, profession, or endeavor.

DR 2-102(E) imposed certain restrictions on the type of advertising permitted during engagement in dual occupations, and states:

''A lawyer who is engaged both in the practice of law and another profession or business shall not so indicate on his letterhead, office sign, or professional card, nor shall he identify himself as a lawyer in any publication in connection with his other profession or business.''

The equivalent Wisconsin Supreme Curt Rule is SCR 20.08(5).

ABA Formal Opinion 328 is the most recent comprehensive interpretation and discussion of DR 2-102(E) and the issue of the dual practitioner. As that opinion states, historically, a primary objection to a dual practice was that the second occupation constituted ''indirect solicitation.'' *See* ABA Formal Opinion 297; ABA Informal Opinions 431 and 501; State Bar Opinion E-60-1. Note that

these opinions all predate the adoption in 1969 of the Code of Professional Responsibility. The opinions cited certain practices as being so inherently solicitous as to constitute ''feeders'' per se, and accordingly, those activities were prohibited by the opinion, though not expressly prohibited by the ABA Code or State Rules. For example, State Bar Opinion E-60-1 prohibits the practice of an advertised collection agency, of advertised income tax services, or of life insurance sales.

In 1969 the concept of indirect solicitation and a ''feeder practice'' were omitted entirely from the ABA Code as being overly broad and vague. Alternatively, what were perceived as the underlying evils of dual practice were handled by the Code in Rules DR 1-201 through DR 2-105. Accordingly, the ABA Standing Committee does not condemn any activity on the basis of ''feeding,'' but rather will base any proscription upon specific violations of the Code. Therefore, there are no longer any activities which are expressly outlawed as inherent feeders by the ABA. In addition, the case of *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), and the consequent liberalization of lawyer advertising caused an extensive revision of Disciplinary Rules under Canon 2, and ultimately the deletion of DR 2-102(E) in 1980.

In summation, the current position of the ABA on dual practice is that there is no prohibition of such activity, be it directly or indirectly related to the practice of law. However, the lawyer continues to be barred from soliciting employment in violation of any statute or court rule, and a lawyer who has given advice to an individual to obtain counsel or take legal action cannot accept employment resulting from that advice. *See* DR 2-103(A) and DR 2-104(A) (SCR 20.09(1) and 20.10, respectively).

DR 2-103(A) provides that ''a lawyer shall not recommend employment, as a private practitioner of himself . . . to a non-lawyer who has not sought his advice regarding employment of a lawyer.'' The issue becomes whether the collection agency recommending employment of the owner's firm is tantamount to the lawyer making the recommendation. The collection agency employee is probably an agent or an employee of the shareholders and officers, who are also the principals of the law firm. While there may be facts and circumstances such that the corporate employees are so far removed from the attorney-shareholders that such a referral does not constitute solicitation, such circumstances would be rare indeed, and the likelihood that such a referral violates solicitation rules and state statutes prohibiting barratry is great.

In connection with practice from the same office, ABA Formal Opinion 328 provides that if the second occupation is so law-related that the work of the lawyer in such occupation will involve, inseparably, the practice of law, the lawyer is considered to be engaged in the practice of law and is bound by the Code of Professional Responsibility with regard to both occupations. Fees, advertising, confidentiality and fiduciary rules and restrictions apply to the second occupation as well as to the law practice.

The existing State Bar Opinion E-60-1 has never been amended to reflect the 1969 Code of Professional Responsibility and recent case law, and it retains the ''feeder'' concept, as well as a list of prohibited business endeavors. To the extent State Bar Opinion E-60-1 is inconsistent with ABA Formal Ethics Opinion 328, it is hereby overruled.

A lawyer may engage in a dual business activity, subject to the existing Supreme Court Rules and statutes governing solicitation, advertising, and barratry. In Wisconsin, this includes the restriction of SCR 20.08(5), [DR 2-102(E)] which has never been abolished in this state. When the second business is conducted from the same office, the likelihood of breach of disciplinary rules materially increases, but such practice is not prohibited per se. If the second occupation is so related as to be inseparable from the law practice, both practices are subject to the Code of Professional Responsibility, the Supreme Court Rules, and state statutes governing the legal professional.

Accordingly, the ownership of a collection agency is not prohibited by any disciplinary rule. Acceptance of referrals is governed by the existing solicitation and barratry rules and may quite often result in violation of solicitation prohibitions. (SCR 20.09(1) and 20.10; Wis. Stat. sec. 757.295.)

