LEGAL ETHICS COMMITTEE OPINIONS FOR 1963

OPINION NO. 1 OF 1963

The Committee was asked for its opinion concerning the filing of motions for a change of venue for purposes of delay.

The Committee adopts American Bar Association Professional Ethics Committee Opinion 557, which held that it is a violation of Canons 15 and 22 to file a motion for change of venue containing statements which are untrue and which are filed solely for purposes of inconvenience and delay.

Canon 15 provides in part:

> "The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane."

Canon 22 provides:

> "The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness.... It is unprofessional and dishonorable to deal other than candidly with the facts in taking the statements of witnesses, in drawing affidavits and other documents, and in the presentation of causes."

OPINION NO. 2 OF 1963

The Committee was asked for its opinion by an attorney who now is a sole practitioner but who formerly was an associate in a law firm located in the same city, as to whether he properly may represent a client in a matter in which the law firm represents the other side, and which matter was pending in the office of the law firm while the lawyer was still employed as an associate.

The Committee learned that there was some dispute about the nature of the claim which was pending in the law firm at the time of the lawyer's employment as an associate, and whether the former associate had had any connection with the case during the course of such employment. However, the Opinion of the committee makes the discrepancies of fact immaterial.

It is the Opinion of the committee that the intent of Canon 6 of the Canons of Professional Ethics is to make certain to a client that the confidential information he gives his attorney will not be divulged and will never fall into the hands of an opposing interest. Canon 6 states:

> "The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed."

It is the opinion of the committee, that, regardless of whether an associate (or partner) of a law firm actively participated in the representation, or even was aware of it, it would be improper for the associate (or partner), upon leaving the firm, to represent the opposing party. It is, of course, axiomatic that it would be improper for different members of the same law firm to represent opposing sides of a controversy.

OPINION NO. 3 OF 1963

An attorney belonging to an association which publishes a list of all its members, together with a designation of the member's occupation, asked the committee for an opinion concerning the propriety of his name being listed as "John Doe, Attorney".

While Canon of Professional Ethics No. 27 prohibits advertising, either directly or indirectly, the American Bar Association's Professional Ethics Committee has held, in its Opinion 285, that "the Canon does not require a lawyer to condemn or prevent every allusion to him where the purpose of the statement is not to advertise the lawyer but is obviously and primarily in the interest of the party making it, or of those to whom it is directed, even though some incidental advantage to the lawyer may possibly result."

Therefore, the committee holds that the contemplated inclusion in the association list would be proper.

OPINION NO. 4 OF 1963

In informal Opinion No. 4, the Legal Ethics Committee of this Association reiterated the stand previously taken by it and by the Professional Ethics Committee of the American Bar Association that cards announcing the opening of a law office or the resumption of law practice must be simple and dignified.

Canons 27 and 46 of the Canons of Professional Ethics, and Opinion 251 of the American Bar Association's Committee, permit an announcement stating:

> "Mr. John Doe formerly an attorney for the Federal Bureau of....., (or: formerly located at 111 Main Street) announces the opening of his office for the practice of law at 999 First National Bank Building, Hometown, Indiana."

An announcement card listing in detail all of the attorney's previous experience, employment, education, degrees, social and fraternal clubs, previous clients, etc., is improper. Announcements in reputable law lists may, of course, include brief biographical and informative data.

OPINION NO. 5 OF 1963

The Legal Ethics Committee, in informal Opinion No. 5 of 1963, reiterated the position previously taken by it and by the American Bar Association that:

> The listing of a lawyer's name in distinctive type in a telephone or city directory is condemned, even where placed in the non-classified section. See Opinions 284 and 286 of the American Bar Association's Professional Ethics Committee.

OPINION NO. 6 OF 1963

In Opinion No. 6 of 1963, the Legal Ethics Committee held that it is unethical for a lawyer to prepare for publication in a newspaper, stories concerning cases he defends or prosecutes, whether or not he slants the articles in a manner most favorable to his side of the controversy.

OPINION NO. 7 OF 1963

In a related matter, the Committee held in Opinion No. 7 of 1963, that it was improper for a lawyer to conduct or to participate in radio programs concerning court cases in which he or his firm was involved.

Such actions by an attorney violate Canon 27 of the Canons of Professional Ethics. Similar conduct was condemned by the American Bar Association's Committee on Professional Ethics in its Opinion 140, which stated "It is professionally improper for an attorney to furnish, inspire or acquiesce in newspaper (or radio, television, etc.) comments about causes in which the attorney is or has been engaged."

OPINION NO. 8 OF 1963

In Opinion No. 8 of 1963, the Legal Ethics Committee held that it is a violation of Canon 27 for a lawyer to publish his professional card in a newspaper or magazine. The Indiana Legal Ethics Committee adheres to, and reaffirms Opinions Nos. 69, 182, 203, 251, 260 and 276 of the American Bar Association's Professional Ethics Committee, namely that "the first sentence of Canon 27, providing that 'the customary use of simple professional cards is permissible,' does not permit the publication of such cards except in approved law lists."

In Opinion No. 4 of 1963, the Indiana Legal Ethics Committee held that simple, dignified newspaper announcements of the opening of a law office, the resumption of a law practice after extended absence, or the removal of a law office to a new location, was proper. Such dignified announcements may appear three days in succession in a daily newspaper or three weeks in succession in a weekly newspaper. Repetitive insertions of such an announcement, either over a lengthy period of time or on several pages of the same day's newspaper, constitute advertising in violation of Canon 27.

OPINION NO. 9 OF 1963

In Opinion No. 9 of 1963, the Legal Ethics Committee reiterated the position taken by it in 1959 that it is improper for an attorney to be listed in the telephone directory of a community in which he neither resides nor has an office. Dual listings are appropriate if the attorney has offices in two communities or resides in one and maintains his office in another. The committee also felt that County Bar Associations should determine whether, as a service to the citizens of a small town within the county having no lawyers but having an independent telephone directory, the telephone numbers of the lawyers in the county should be listed in said directory.

OPINION NO. 10 OF 1963

In Opinion No. 10 of 1963, the Legal Ethics Committee reaffirmed Opinion No. 2 of 1961, which appeared in the Spring, 1961 issue of Res Gestae. The Legal Ethics Committee is republishing that Opinion because it is concerned about the frequent violations of that Opinion and in order to make certain that all Indiana Lawyers will be cognizant of it:

> "Opinion No. 2, June 2, 1961. The Legal Ethics Committee was asked for its opinion on the following question:

Does an attorney who has been retained by an insurance company to assert the insurance company's subrogation rights, usually for property damage arising out of an automobile accident, violate the Canons of Ethics in writing a letter to the named assured who he then nominally represents offering to represent such named insured in a claim for personal injuries arising out of the same accident?

It is the opinion of the Committee on Legal Ethics that such offer, either by letter or verbally, is a breach of Canons 27 and 28 of the Canons of Professional Ethics. Such conduct constitutes the solicitation of professional employment. /s/ Thomas M. Scanlon, Chairman, Committee on Legal Ethics."

OPINION NO. 11 OF 1963

In view of Burns Ind. Stat. Ann. Secs. 3-1212 and 3-1215, the Legal Ethics Committee adheres to and adopts Opinion No. 261 of the American Bar Association's Ethics Committee which specifically states that neither the prosecuting attorney nor his deputies can ethically represent a private party in a divorce case if his state imposes statutory obligations upon the prosecuting attorney in divorce cases. Burns Sec. 3-1212 provides that the prosecuting attorney "shall appear and resist" all undefended divorce actions. Burns Sec. 3-1215 provides that, even where each side is represented by counsel, it is the duty of the prosecuting attorney to appear and defend a divorce petition whenever "it shall appear to the judge that an attempt is being made to secure the granting of said divorce by collusion of the parties." Furthermore, the facts of a divorce case may involve crimes which the prosecuting attorney has a duty to prosecute. Therefore, the committee holds that it would be a violation of Canon 6 for a prosecuting attorney or a deputy prosecuting attorney to represent a plaintiff or defendant in a divorce case within his judicial circuit. The committee further holds that it naturally follows that a partner or associate of either a prosecuting attorney or his deputy, also may not represent parties in divorce cases within the judicial circuit.

The committee also holds that the above restrictions apply as well to divorce cases originally filed in other circuits which have been venued to the circuit in which the prosecuting attorney in question holds office.

OPINION NO. 12 OF 1963

After reviewing Canon No. 6 and American Bar Association Ethics Committee Opinions Nos. 16, 30, 77, 142 and 242, the Legal Ethics Committee holds that a deputy prosecuting attorney who prosecutes City Court cases cannot appear as defense counsel in criminal cases in Circuit Court even though he never participates in prosecutions in Circuit Court. The situation of a prosecuting attorney who has his deputies defending a criminal case is akin to two partners appearing on opposite sides of the same lawsuit. It therefore is unethical for a prosecuting attorney or any of his deputies, law partners or associates to participate in any way in the defense of a criminal case within the prosecutor's judicial circuit. Furthermore, in view of the necessity that the prosecuting attorney be held by the public to be above all reproach, the committee concludes that it also would be improper for any of the above persons to represent a criminal case defendant in an adjoining circuit, in a federal court, or before the Supreme Court of Indiana.

OPINION NO. 13 OF 1963

The Committee was asked by a deputy prosecuting attorney in Northern Indiana whether it was ethically proper for him to file a civil action arising out of the same automobile accident which also is the basis for a criminal action he is prosecuting.

The prosecution involves the charges of involuntary manslaughter and reckless homicide. The deputy prosecuting attorney, who, under Indiana law, is also entitled to engage in the private practice of law, has been asked by the victim's family to file a civil action for damages resulting from the death of the decedent, injury to another member of the family, and property damages, all allegedly caused by the defendant in the criminal case.

After reviewing Canons Nos. 6 and 36 and Opinions Nos. 39, 108 and 135 of the American Bar Association's Professional Ethics Committee, the Committee concluded that it would be unethical for a prosecuting attorney to act as counsel in a civil action which is based on substantially the same facts which he in his official capacity investigated and/or tried.

Investigation by the prosecutor is done pursuant to exercise of official authority. Information is given the prosecutor by people who feel a sense of coercion or respect for the state. The person later sued as a tort feasor may have disclosed facts inimical to his best interests in a civil action; he may even have submitted to interrogation by the prosecuting attorney. The Courts of several states have held that a prosecutor cannot prosecute a civil action by information gained in the course of performance of his duty as a public official. (See Aldridge v. Capps, 56 Okla. 678, 156 P. 624.)

Canon 36 prohibits a lawyer who has once been in public employ, accepting, after retirement, employment in connection with any matter which he had investigated or passed upon while in such office or employ. It follows that in a similar situation he cannot accept such employment before retirement.

By analogy, Canon of Judicial Ethics No. 31 applies to the present situation. Referring to part time judges who practice law, it is there said: "In such cases one who practices law is in a position of great delicacy and must be scrupulously careful to avoid conduct in his practice whereby he utilizes or seems to utilize his judicial position to further his professional success." This statement is equally applicable to prosecutors.

Canon 6 prohibits representation of conflicting interests. The decision to prosecute, or the conduct of the prosecution, cannot but help being affected by the prosecutor's desire to win a subsequent civil action. Sound public policy may dictate that the criminal charges be reduced, or even dismissed, but such decision is influenced by the fact that this would make the civil action more difficult. On the other hand, dismissal is followed by a civil action settlement. Public duty and fealty to private client involving subornation of the interest of one or the other, may embarrassingly challenge the conscience of the lawyer who attempts to serve both.

The Committee notes that the ethics committees of every other state in which this question has arisen has likewise deplored the practice.

OPINION NO. 14 OF 1963

The Legal Ethics Committee has been asked whether an attorney may write articles on legal subjects for magazines or newspapers and whether the attorney may be listed as author of the articles.

The Committee adheres to American Bar Association Ethics Opinion 162 and ISBA Ethics Opinion No. 1 of 1961. It is not unethical for an attorney to write articles on legal subjects for magazines or newspapers, and he may be listed as author of the articles.

However, it is a violation of Canon 40 for an attorney to write a newspaper column giving legal advice to inquirers in respect to their individual rights, it is a violation of Canon 35 for an attorney to accept employment from a newspaper to write a column giving legal advice to readers, and it is a violation of Canon 27 for an attorney to solicit the sale of such a column to a newspaper or magazine. It further would be a violation of Canons 27 and 35 for an attorney to allow his name to be carried in a publication as a free legal advisor for the subscribers to the publication.

OPINION NO. 15 OF 1963

A former Circuit Judge asked the Committee whether he ethically could represent a wife in an action to modify an order for support, which order he originally issued as judge.

Canon No. 36 of the Canons of Professional Ethics and Canon No. 31 of the Canons of Judicial Ethics specifically disapprove of such employment. Canon 36 states:

> "A lawyer should not accept employment as an advocate in any matter upon the merits of which he has previously acted in a judicial capacity."
>
> A lawyer, having once held public office or having been in the public employ, should not after his retirement accept employment in connection with any matter which he has investigated or passed upon while in such office or employ.

The Committee therefore holds that the contemplated representation would be unethical.

OPINION NO. 16 OF 1963

The Committee was asked by the United States Attorney for the Southern District of Indiana whether a lawyer representing an accused felon who has fled the jurisdiction and who is a fugitive from justice, may ethically refuse to disclose the whereabouts of his client to the U. S. District Court.

The Committee reviewed Canons of Professional Ethics Nos. 5, 29, 37, 41 and 44 and American Bar Association Ethics Opinions Nos. 23, 155 and 287. Although some conflict appears to exist between the lawyer's duty to the Court and his duty to his client, the Committee concluded that the lawyer's duty to protect the confidences of his client must not be whittled away.

The confidential relationship between attorney and client is fundamental in our common law system. A study of history discloses that this principle was won after a hard-fought struggle by those who cherished justice for all men. A person accused of the most heinous crime may be innocent but may have fled out of fear. He has as great a need for legal services as any other person, and must be free to consult legal counsel in confidence. To hold otherwise would seriously weaken our system of American Jurisprudence.