

LEGAL ETHICS COMMITTEE OPINIONS FOR 1964

OPINION NO. 1 OF 1964

In view of Burns Ind. Ann. Stat. §§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 §3-1212 provides that the prosecuting attorney "shall appear and resist" all undefended divorce actions. Burns §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 law office associate of a prosecuting attorney also may not represent parties in divorce cases within the judicial circuit. The term "law office associate" refers to an attorney sharing law offices with the prosecuting attorney on either a salary or percentage basis, but who has not been made a partner. A prosecutor's deputy may not appear and defend a divorce case in which the deputy's law partner or law office associate represents a party to the divorce action.

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.

—SEE CLARIFIED OPINION

OPINION NO. 2 OF 1964

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 law office associates to participate in any way in the defense of a criminal case. The term "law office associate" refers to an attorney sharing law offices with the prosecuting attorney (or the deputy prosecuting attorney, as the case may be) on either

a salary or percentage basis, but who has not been made a partner.

This Opinion does not refer to attorneys who on occasion serve as prosecuting attorneys pro-tempore, i.e., an attorney appointed by the prosecutor to handle a specific case or appointed for a short period of time to act while the prosecutor is on vacation, or unable to act because of illness or other indisposition; provided, however, that this Opinion applies to prosecuting attorneys pro-tempore while serving in that capacity.

OPINION NO. 1 CLARIFIED

The Legal Ethics Committee has learned that confusion apparently exists in the minds of prosecutors, deputy prosecutors and certain judges concerning Legal Ethics Committee Opinion No. 1 of 1964 pertaining to the representation of parties in divorce cases by prosecutors, their deputies, partners and law office associates.

The law of Indiana is clear and unequivocal that the prosecuting attorney must, as part of his sworn duty, appear and defend all uncontested divorce cases and all divorce cases in which collusion is suspected. Opinion No. 1 of 1964 cited Burns Ind. Ann. Stat. §3-1212 and §3-1215. In addition, the Indiana Supreme Court discussed this duty in at least two decisions.

In Scott v. Scott, 17 Ind. 309 (1861), the Court stated that "not only the parties to the record, plaintiff and defendant, but also a third party, the government, was so far interested in such proceedings as to guard against divorces by collusion, even when they both appear and confess the matter upon which a sentence of divorce was to pass." The Court specifically rejected the argument that marriage was merely a civil contract, by referring to the statute requiring the prosecuting attorney to appear and resist such divorce petitions, in the following language:

"If the theory that the government has some interest in, and something to do with, the status of the citizen, does not prevail, we are not informed of the necessity of this latter statute. (The Court here refers to the statute requiring prosecuting attorneys to represent the State in divorce matters. Burns Ind. Ann. Stat. §§3-1212 and 3-1215.) Where such a suit remains undefended, a government officer, one who stands as the representative of the government in bringing offenders against the criminal laws to justice, is thus commanded to resist such petition. Why is this? Is it not because persons not before the Court will be affected by its action in the premises? Is it not because public policy requires that government shall exercise some control in reference to this relation in life? If government can not, or should not, exercise this control, why pass laws at all to regulate marriage and divorce? (Emphasis added.) Why not leave the husband, as of old, to write his

wife a bill of divorcement and give it to her in her hand, and send her out of his house. Deut. xxiv, 1-4.

"The marriage relation is more sacred; the obligations imposed thereby, it appears to us, somewhat different from those resting upon parties in a mere contract for the purchase of a mule or a hog."

In State v. Brinneman, 120 Ind. 357 (1889), the Indiana Supreme Court stated:

"Recognizing the interest which the State has in maintaining the family relation, and in preventing the dissolution of the marriage tie by collusion, the statute makes it the duty of the prosecuting attorney, whenever any petition for divorce remains undefended, to appear and resist the petition.

"Public policy requires that the marital relation shall not be severed for inadequate causes; that families shall not be broken up and disrupted from unworthy motives, and that reconciliation shall be effected if practicable or possible. The prosecuting attorney has a public duty to perform, and it is his right to perform that duty without unreasonable embarrassment....

"In the interest of the State, it would doubtless be the duty of the prosecutor, notwithstanding the appearance and answer of the defendant, to appear and resist the petition, and take all proper steps to defeat the obtaining of a divorce by collusion, in case there appeared reasonable ground to believe that the appearance and defense were merely colorable."

There can be no doubt in anyone's mind that, upon taking his oath as prosecuting attorney or deputy prosecuting attorney, a lawyer willingly and in return for remuneration, contracts with the people of the State of Indiana to represent the interests of the State in certain designated areas. He cannot while holding such office represent interests in conflict with the governmental interests which he has sworn to uphold. Therefore, as stated in Opinions Nos. 1 and 2 of 1964 of the Legal Ethics Committee, he cannot handle criminal or divorce cases except pursuant to his duties as prosecuting attorney on behalf of the State of Indiana.

A lawyer cannot represent opposing sides in a lawsuit unless there has been "express consent of all concerned given after a full disclosure of the facts." The State cannot, and does not, give such consent.

It is axiomatic that a law partner or law office associate-of a prosecuting attorney or a deputy prosecuting attorney-cannot represent interests which are in conflict with those the prosecutor has sworn to uphold.

Certain Deputies May Handle Divorce Cases

A prosecuting attorney, in selecting and hiring deputies, may, at the time of their appointment, limit their duties. For example, a deputy may be appointed solely to prosecute traffic offenses. If the deputy is thus limited in his powers and duties, if these limited duties are not subject to change, and if the limitation is made known to the public, a deputy prosecuting attorney whose duties are not connected in any way with the domestic relations obligations of the prosecuting attorney is free to represent private parties in divorce cases. Law partners and law office associates of such deputy prosecuting attorney also ethically may handle divorce cases.

The limitation of Opinion No. 1 therefore applies only to the prosecuting attorney himself, deputy prosecuting attorneys whose duties involve domestic relations matters, and law partners and law office associates of the prosecuting attorney or such deputies.

OPINION NO. 3 OF 1964

An Indiana attorney has asked the Legal Ethics and Unauthorized Practice of Law Committees for an Opinion pertaining to a mechanic's lien notice serving organization he desires to establish. Since the mechanic's lien law now requires that a notice in writing be delivered to the owner of real estate within five days of delivery of the first material as a condition precedent to the subsequent recording of notice of intention to hold a mechanic's lien, several attorneys wish to organize a corporation whose employees would prepare and serve such notices. The employees would obtain the information statutorily required to be included in the notice, prepare the notice and cause it to be served.

The Committee on Unauthorized Practice of Law has advised the Legal Ethics Committee that the preparation of such notices for third persons constitutes the practice of law. However, the delivery of notices prepared by attorneys, or prepared by the supplier or sub-contractor himself, does not constitute the unauthorized practice of law.

The Legal Ethics Committee, in view of the opinion of the UPL Committee, is of the opinion that the plan as proposed would be unethical. Canon of Professional Ethics 47 states: "No lawyer shall permit his professional services, or his name, to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate." Since the corporation would be free to advertise its services, the plan would be in violation of Canon 27 which prohibits the solicitation of legal business. Canon 35, which condemns the practice of law through intermediaries, also may be applicable.

The Legal Ethics Committee concurs in the Opinion of the UPL Committee that the mere delivery of the notices by such a corporation as proposed would not be unethical so long as the corporation is distinct and separate from any law office and is not a subterfuge for feeding law business to any lawyer or law firm.

OPINION NO. 4 OF 1964

In Opinion No. 4 of 1964, the Legal Ethics Committee of the Indiana State Bar Association held that a lawyer may not engage in the business of selling insurance in any way which may result in his insurance activities being used to feed his law practice.

The question presented to the Committee was:

Besides practicing law, attorney X also sells life insurance, primarily to businesses and corporations. Attorney X asked whether he could make known the fact that he is an attorney and whether he might properly indicate on his insurance letterheads that he is an attorney. Finally, he asked whether he ethically could perform legal work in conjunction with insurance that he sells. Could he, for example, draft a trust agreement setting up a corporation pension plan?

The Legal Ethics Committee determined that it would be unethical to combine the practice of law with the business of selling life insurance. Therefore, an attorney may not make known the fact he is an attorney while selling insurance, may not note on an insurance letterhead that he is an attorney or on an attorney at law letterhead that he sells insurance, and may not perform legal work in connection with any insurance he might sell or solicit.

Canon 27 of the Canons of Professional Ethics states that:

"It is unprofessional to solicit professional employment by advertisements, touters or by personal communications or interviews not warranted by personal relations. Indirect advertisements for professional employment..., and all other like self-laudation, offend the traditions and lower the tone of our profession and are reprehensible."

Opinion No. 297 of the American Bar Association's Professional Ethics Committee held that:

"When a person becomes a lawyer he takes on a mantle that he cannot thereafter take on or off as he pleases. Conduct in which he engages which involves the practice of law when engaged in by lawyers must be in accordance with the ethical standards of the profession if he is to retain his professional status. Even though a particular activity may be open to a layman, if such activity is the practice of law when engaged in by a lawyer, one who is a lawyer cannot free himself of the ethical restraints of the profession in carrying on such activity merely by announcing he is to be regarded as a layman for this particular purpose...."

"The person who is qualified as both a lawyer and an

accountant must choose between holding himself out as a lawyer and holding himself out as an accountant. Dual holding out is self-touting and a violation of Canon 27. If he elects to hold himself out as an accountant, he must not practice law or he will violate Canon 27 in that he will be using his activity as an accountant to feed his law practice."

The ABA Professional Ethics Committee also has held repeatedly that it was unethical for a lawyer to list any specialty or occupation on his letterhead. See ABA Opinions 159, 183, 297.

In Opinion 225, the ABA Committee held that, while it is not unethical for a practicing lawyer to own or have a financial interest in a collection agency, it is unethical for him to participate in the conduct of that business in any manner, nor may he allow his name to be used in the business nor may anything be done to create the impression that the agency enjoys the benefit of the lawyer's advice and professional responsibility.

The Indiana State Bar Association Legal Ethics Committee concluded, in view of the foregoing, that a lawyer may not engage in any practice which may constitute either a direct or indirect solicitation of law business. It is unethical for an attorney to make known the fact he is a lawyer while selling insurance. It also is unethical to list legal qualifications on an insurance letterhead. Furthermore, it is unethical for an attorney to perform legal work in conjunction with his insurance business. All of these practices come within the language of Canon 27.

Finally, the Legal Ethics Committee considered whether it is ethical for an attorney to engage in the dual roles of attorney and insurance agent, even if the two occupations are kept separate and are conducted from different offices and with different letterheads, etc. The American Bar Association determined, in Opinion 297, above, that a person could not be both an accountant and a lawyer. This same consideration would apply even more to the occupation of selling insurance along with the practice of law, since solicitation is a fundamental part of insurance salesmanship.

However, the ABA Professional Ethics Committee held, in Opinion 304, that a lawyer, after he has been engaged by a client, may recommend title insurance to the client and may sell that title insurance, but only upon the provision that the lawyer make full disclosure to the client of the lawyer's financial interest in the transaction, i.e., that the lawyer will receive a commission. Under such circumstances selling of insurance by a lawyer to a regular client, as an incident to the client's legal problem, is not unethical.

Therefore, it is permissible for an attorney to sell a life insurance policy to one of his law clients, after the client has become his client without solicitation, and upon full disclosure of the attorney's financial interest in the sale.

... may, even if improper, be shown to avoid the appearance of impropriety. The investigation of the facts of the matter involved by the prosecutor was conducted in the exercise of official authority; information was obtained from persons, who may have felt under a sense of coercion or respect for actual or supposed state power. Therefore, the American Bar Association's Professional Ethics Committee, in Opinion 135, held that a public prosecutor cannot represent any person, whether victim or defendant in the criminal case, in a civil action arising out of substantially the same facts involved in the criminal case. We adhere to that opinion.

OPINION NO. 6 OF 1964

~~An~~ Indiana attorney asked the ~~committee~~ for its opinion concerning whether he could represent a woman in her divorce case after having been visited by, and having counseled with, both the husband and the wife in an effort to save the marriage. The facts presented were that the husband approached the attorney originally, and that both husband and wife disclosed their marital difficulties to the attorney in order to assist him in counseling them.

Canon 6 of the Canons of Professional Ethics states:

"It is unprofessional to represent conflicting interests, except by express consent of all concerned,

