

FORMAL OPINION 1-1973

LEGAL ETHICS SUB-COMMITTEE OF THE
INDIANA STATE BAR ASSOCIATION

The Disciplinary Commission of the Supreme Court of the State of Indiana has submitted the following two questions and has asked an opinion of this Committee as to whether or not the conduct described would be in violation of the Code of Judicial Conduct and Ethics, adopted by the Indiana Supreme Court:

1. "Being a candidate, either in a party primary or in a general election for a nonjudicial office while holding judicial office."
2. "Serving as a delegate to a state political party while holding judicial office."

Although this Committee would not and does not presume to express a legal opinion as to whether or not certain activities would be in violation of the Code of Judicial Conduct, the Committee believes it is appropriate to issue an advisory opinion of this nature when expressly requested to do so by the Disciplinary Commission.

Section 1 of the Code of Judicial Conduct and Ethics reads as follows:

"A judge's official conduct should be free from impropriety and the appearance of impropriety; he should avoid infractions of law; and in his personal behavior, not only upon the bench and in the performance of judicial duties, but also in his everyday life, should strive to be beyond reproach."

Section 17 reads as follows:

"A judge is a private citizen and as such is entitled to have and express his personal opinions on political questions.

Ideally a judge should refrain from partisan political activity, including assessments or contributions, thus avoiding any appearance of political bias; however, where it is necessary for judges to be nominated and elected as candidates of a political party, a judge may engage in such political activity as he deems reasonably necessary for his own election. Nevertheless, in his political activity, as in all other activity, he shall exhibit a standard of professional conduct which endeavors to reach the ideal."

We believe it is clear from the above that the general guideline for the conduct of a judge, both in his official duties and in

his personal behavior, should be the avoidance of any "appearance of impropriety". This would appear to render inappropriate any activity which might tend to confuse the public and cause the public to question whether or not the conduct of the judge is in conflict with or may influence the judge in the performance of his official judicial duties. Furthermore, Section 17 clearly states that "a judge should refrain from partisan political activity . . ." except in connection with pursuing his own nomination or election as a judge.

The American Bar Association has several times issued formal opinions on similar subjects. For example, Formal Opinion 193 has in it the following statement:

"Canon 28 prohibits a judge from making political speeches, publicly endorsing candidates for political office, accepting or retaining a place on a party committee, acting as a party leader, and engaging, generally, in partisan politics.

A judge who is a candidate for a nonjudicial office should resign from his judicial office."

In Formal Opinion 195, the following language is found:

"No incumbent of a judicial office may properly become a candidate for an elective nonjudicial office without resigning his judicial office."

More recently, in interpreting the Code of Judicial Ethics, Formal Opinion 312 was issued. In that opinion the American Bar Association Committee listed a number of activities which it regarded as prohibited for a judge. Some of these are as follows:

1. He should avoid making political speeches;
2. He should avoid making payment of assessments or contributions to party funds or appearing or participating in fund raising dinners and other affairs;
3. He should avoid soliciting payment of assessments or contributions to party funds;
4. He should avoid public endorsement of candidates for political office;
5. He should avoid participation in party conventions unless he must be nominated by such party convention;
6. He should not, while holding his judicial position, become an active candidate for either party at a primary or general election for an office other than a judicial office.

The same opinion states that the judge may .

" . . . in states where it is necessary to be nominated or elected as a candidate of a political party, make contributions to the campaign funds of the party whose nomination he seeks or which seeks his election or re-election only during the campaign for such nomination or election."

While we are not bound by the opinions of the American Bar Association, we find the portions of the Formal Opinions above cited as extremely persuasive.

Based on our review of the Code of Judicial Conduct and Ethics and upon the Formal Opinions of the American Bar Association cited above, it is our opinion that it would be improper for a judge to be a candidate, either in a party primary or in a general election, for a nonjudicial office while holding judicial office and that it would be improper for a judge to serve as a delegate to a state political convention while holding judicial office. While we recognize that both of these practices have been common for many years in Indiana, we believe it is incumbent upon the judges of the courts in Indiana, as well as upon the Bar, to adhere to the Code of Ethics and, at all times, to examine their conduct to be certain that there can be no appearance of impropriety.

Legal Ethics Committee Holds Attorneys "Not Obligated To Adhere To Minimum Fee Schedule"

The Legal Ethics Sub-Committee of the Indiana State Bar Association Standing Committee on Professional Responsibility, under date of April 17, 1973, adopted and issued for publication the committee's Formal Opinion No. 2, of 1973, relating to Minimum Fee Schedules, as follows:

FORMAL OPINION NO. 2-1973
April 17, 1973

Local bar associations have expressed concern regarding the ethical rules surrounding minimum fee schedules and the Legal Ethics Sub-Committee has been asked its opinion as to whether or not a lawyer is in violation of any of the disciplinary rules of the Indiana Code of Professional Responsibility if he fails to adhere to a suggested or minimum fee schedule published by his local bar association.

In our opinion the answer is no. The criteria for setting fees are contained in DR 2-106 (B) of the Code of Professional Responsibility. "The fee customarily charged in the locality for similar legal services" is only one of eight criteria to be used in setting a fee. Ethical Consideration E-C 2-18 states "suggested fee schedules and economic reports of state and local bar associations provide

some guidance on the subject of reasonable fees." (Emphasis Added.)

It is in the public interest that an adequate fee be charged by lawyers. Unless adequate financial rewards are available, the practice of law will not attract persons of high ability. It is incumbent upon each practicing lawyer to keep time and financial records such that he will be aware of his profitability.

Disciplinary Rule DR 2-106 specifically prohibits excessive fees and a contingent fee arrangement in criminal cases. However, there is presently no basis in the Code of Professional Responsibility for disciplining a lawyer solely because he consistently charges low fees. Unless it can be demonstrated that low fees are charged in such a manner as to constitute the solicitation of business, the charging of low fees is not unethical, in our opinion.

In our opinion, excessive fees which take advantage of the privileged relationship between lawyer and client are unethical, but failure to follow a suggested or minimum fee schedule by consistently charging less than the minimum fee, by itself, is not unethical.

George P. Osborn, Chairman,
Legal Ethics Sub-Committee,
April 17, 1973

MINIMUM FEE SCHEDULE EXPOSES BAR TO DANGER OF ANTITRUST ACTIONS

Many local bar associations have expressed concern over the minimum fee schedules that they may have in existence. Concern is created by the case of *Goldfarb v. Virginia State Bar and Fairfax Bar*, Civil Action No. 75-72-A in the United States District Court of Virginia.

In this action Goldfarb sued under the Sherman Act for antitrust violations in connection with a real estate closing. He contacted numerous lawyers in the Arlington, Virginia area concerning the cost of a real estate closing and he was quoted the same fee by each lawyer. The lawyers relied upon the minimum fee schedule for the State Bar of Virginia, a unified bar.

The Court held that the existence of a price-fixing agreement is a violation of the Sherman Antitrust Act and the Court further held that the mere existence of a minimum fee schedule is per se an agreement to fix prices. The Court further relied on the fact that it was potentially possible for a lawyer in the State of Virginia to be disciplined for failure to follow a minimum fee schedule.

Opinion 2-1973 of the Indiana State Bar Association Ethics Subcommittee makes it clear that no attorney in Indiana can be disciplined for failure to follow a minimum fee schedule. The ethics opinion does not remedy the principal problem in the Goldfarb case which is an antitrust problem and not an ethics problem.

The Goldfarb case is still subject to appeal and its holding may change, but for the present, the mere existence of a fee schedule adopted by a bar association exposes that association to antitrust litigation.

up by keeping his clients informed on all matters.

¹ Ethics in the Practice, RES GESTAE, Vol. 16, No. 8, August 1972, p. 11.

ETHICS IN THE PRACTICE

(Continued from page 26)

Duty Is To Inform Client

and being charged with crimes which required his defense. The mitigating circumstances were considered by the court but such circumstances do not excuse the delay. The attorney has a positive duty to inform his client of his inability to complete work at a scheduled time. If the time schedule can not be met, the attorney should so inform the client and work out other arrangements.

The above cases are representative of the type of case which frequently appears in the advance sheets. While ethics opinions are not available, the advance sheets indicate that neglect of client matters is a frequent problem before disciplinary bodies. It behooves each lawyer to carefully plan his own work schedule and establish a date-tickler file which will protect his clients. He should follow

Ethics Committee Cites Guides For Criminal Defense Lawyer's Relation to a Prosecutor

LEGAL ETHICS COMMITTEE FORMAL OPINION NO. 3-1973

In August, 1972, the entire Professional Responsibility Committee issued Formal Opinion No. 2-1972 (Res Gestae, August, 1972, p. 9). This Opinion was drafted in response to two specific fact situations presented to the Committee, which specific fact situations are stated in the Opinion. Both fact situations involved a prosecuting attorney, a deputy prosecuting attorney, or both, practicing with other lawyers. In each case, the prosecutor or deputy shared office space with other lawyers, used common stationery, had a common sign on the door, and in one of the fact situations share a common telephone listing. The question in each case is whether a lawyer, not a partner, or an associate of the prosecuting attorney or deputy prosecuting attorney, could ethically represent a person accused of a crime provided that the prosecutor or deputy prosecutor with whom he shared offices was not involved in that particular case.

In legal ethics Opinion No. 2-1972, the Committee decided that such representation under those facts would create a conflict of interest, and would thus be improper. We relied upon Canon 5, DR5-101 and DR5-105 and Canon 9, DR9-101 of the Code of Professional Responsibility.

Following the publication of this Opinion, the Committee was contacted by representatives of the prosecuting attorneys. There was considerable talk that if this Opinion were left standing, it would be impossible for various prosecuting attorneys to secure and maintain sufficient deputies to perform their duties. The prosecuting attorneys asked for a chance to be heard by the Committee, and the Committee was asked to reconsider legal ethics Opinion No. 2-1972.

The Committee has met with representatives of the prosecuting attorneys. It is our desire to be cognizant

of any problems involved in the application of any of the Committee's Opinions. We realize that professional responsibility is not a concept operating in a vacuum, and that it must be applied under factual everyday circumstances. In addition, we wish to consider any factors, any authorities, or any considerations which we might have overlooked in preparing Formal Opinion No. 2-1972. We felt that a meeting with representatives of the prosecuting attorneys could assist us in these respects.

On the other hand, the Committee does not feel that its Opinions should be modified simply because the application of its Opinions might create some hardships. It must be accepted that the adherence to standards of professional responsibility will at times be inconvenient, and will at times, work to the financial disadvantage of lawyers. The ultimate considerations of the Committee must always be those of maintaining professional responsibility. It cannot and will not ignore the Code of Professional Responsibility or modify the Code of Professional Responsibility.

With respect to the actual holdings of Opinion No. 2-1972, the Committee can find no basis to modify that Opinion. It remains absolutely clear to us that under the fact situations presented in that Opinion, the representation of a person accused of a criminal offense by any of the lawyers involved in those situations would create a conflict of interest and would be improper. However, we feel that certain aspects of Opinion No. 2-1972 can be greatly clarified. We also feel that part of the difficulty which the prosecuting attorneys have with respect to Opinion No. 2-1972, arises out of their misunderstanding of the holding of that Opinion. For these reasons, we deem it advisable to supplement that Opinion explaining in greater detail the factors involved.

We would therefore like to point out the following propositions, which

we feel to be beyond substantial question:

1. A prosecuting attorney or a deputy prosecuting attorney cannot represent any person accused of a crime in any proceedings involving that accusation. See DR5-105.
2. A partner or an associate of a prosecuting attorney or a deputy prosecuting attorney cannot represent any person accused of a crime in any proceedings connected with that accusation. See DR5-105 (d). It is important to note that in all reference to the term "associate," we are defining an associate as a person in an employer-employee relationship.
3. A lawyer has a duty not to misrepresent his professional status. Under DR2-102 (c) a lawyer should not hold himself out as having a partnership with other lawyers unless they are in fact partners. The matter of lawyers who share office space but are not partners or associates is covered in EC2-13 as follows:

"In order to avoid the possibility of misleading persons with whom he deals, a lawyer should be scrupulous in the representation of his professional status. He should not hold himself out as a partner or associate of a law firm if he is not one in fact, and thus should not hold himself out as a partner or associate if he only shares offices with another lawyer."

One authority describes a similar ethical consideration in this manner:

"... where two or more individual lawyers are not partners and do not share liability or responsibility as a firm, although they practice from the same suite and share some expense, but each has his own

(Continued on page 23)

ETHICS OPINION NO. 3-1973

(Continued from page 22)

clients, it is improper to designate them as 'associates'. The joining of two or more names of lawyers under such circumstances in the firm name of "Smith and Jones" would be misleading. *Each lawyer should use his name separately on the letterheads, cards, announcements in law lists, and telephone directories.*" *Legal Ethics*, Wise (1970) p. 198. (Emphasis Added.)

The lawyers primary duty in this area is not to misrepresent his professional status. In the fact situations upon which we based Opinion No. 2-1972, we were of the opinion that the lawyers there by using common offices, using common stationary, using common signs, and in one case using a common telephone number and a name designating a partnership were clearly in violation of this duty.

4. If in fact a lawyer has incorrectly represented himself as being an associate or as a partner with other lawyers, he should then be bound by the same professional limits which he should have if he were in fact such an associate or partner. Under DR9-101, a lawyer has a duty to avoid even the appearance of impropriety. If he has conducted himself in such a manner as to give the impression that he is a partner or an associate of another lawyer, it would then definitely give the appearance of impropriety for him to accept employment which a partner or associate could not accept.

While this factor was alluded to in Opinion 2-1972, we now feel that we did not put enough emphasis on it. In the fact situations presented, the lawyers actually misrepresented their status which made their appearance of a partnership or

association. It was their misrepresentation of their status which made their appearance in criminal cases improper.

We do not interpret the Code of Professional Responsibility nor our Opinion No. 2-1972 as prohibiting the practice of criminal law by every attorney who "shares" office space with a deputy prosecutor. The important consideration, which can only be decided on a case by case basis, is whether or not the relationship of the attorneys who share office space is in any way *misleading* to the public.

If an attorney who shares office space with a deputy prosecutor does engage in the practice of criminal law, it should only be done under such circumstances that the public cannot be misled into believing that the relationship of the attorneys is a partnership or that of employer-employee ("associate"). As a *minimum*, the following tests should be applied.

- (1) There should be no sharing of liability, profits or responsibility;
- (2) Each attorney should use separate letterheads, cards and announcements containing his name only;
- (3) Each attorney should be listed separately in law lists and telephone directories;
- (4) Each attorney should have a separate office telephone number;
- (5) The building or office door should show no closer connection than "Law Offices, Fred Doe, Arthur Smith."

We assume, as do the prosecuting attorneys, themselves, that it would not be proper for any attorney to represent a client in any proceeding opposing a deputy prosecuting attorney with whom he shares offices.

The Committee is fully aware of the importance of the tasks which

must be performed by prosecuting attorneys. We trust that this Opinion will help to clarify any misunderstandings that may have existed and will assist all lawyers in discharging their professional responsibility.

ETHICS IN THE PRACTICE

(Continued from page 21)

the unrepresented party for signature.⁷ It is permissible for the lawyer to prepare a settlement agreement to be entered into between parties where such agreement will be reviewed by a court.⁸ In negotiating the agreement, the lawyer must be extremely careful not to advise the unrepresented party as to the law in the case.⁹

As a practical matter, it is most difficult to negotiate with an adverse party without giving an opinion as to the law. Where the adverse party is represented by knowledgeable counsel, such an opinion is a perfectly proper part of negotiations. Where the opposing party is not represented by counsel, the negotiations are far more difficult because the lawyer is prevented from advising the opposing party as to the law and the lawyer must be especially careful that an opposing party unrepresented by counsel does not in any way rely upon his advise when making a decision.

¹ Formal Opinion No. 66, dated March 19, 1932, of the American Bar Association Committee on Professional Ethics.

² Formal Opinion No. 95, dated May 3, 1933, of the Committee.

³ Formal Opinion No. 108, dated March 10, 1934 and Formal Opinion No. 187, dated July 24, 1938, of the Committee.

⁴ Formal Opinion No. 117, dated August 27, 1934, of the Committee.

⁵ Informal Opinion No. 1194, dated September 14, 1971, of the Committee.

⁶ Informal Opinion No. 1140, dated January 20, 1970, of the Committee; also Informal Opinion No. 1269, dated May 22, 1973, of the Committee.

⁷ Informal Opinion No. 1255 dated December 15, 1972, of the Committee.

⁸ Formal Opinion No. 102, dated December 15, 1933, of the Committee.

⁹ Indiana Opinion No. 6-64. An attorney may not represent either party in a divorce action after counseling both during marital difficulties.

OPINIONS OF THE
LEGAL ETHICS COMMITTEE
INDIANA STATE
BAR ASSOCIATION

FORMAL OPINION NO. 4 of 1973—THE
PUBLIC DEFENDER—DECEMBER 13, 1973

1. Duty to conduct bond reduction hearing for pauper defendant requesting such hearing.
2. Ethical considerations of representing a defendant as his paid counsel, upon his request, after having first been appointed to represent defendant as a public defender.
3. Ethical considerations of pauper counsel referring defendant to a private attorney who in turn would pay the former pauper counsel a referral fee commensurate with the amount of work pauper counsel had performed in such case.

4. Duty of previously appointed pauper counsel to serve without fee even though defendant may make bond after counsel has been appointed.
5. Ethics of appointment of attorney who represented a convicted defendant at trial stage of proceedings to represent the same defendant in the appeal of his conviction.
6. Duty of trial counsel to advise convicted pauper defendant through decision on taking an appeal, and to represent him through appellate action.

Formal Opinion No. 4 of 1973

A member of the Bar has requested a formal opinion of the Legal Ethics Committee based upon the following facts:

The attorney is a public defender and receives an annual salary. The public defender is a political appointment, selected by the judge of the court in which he represents criminal defendants. From time to time the attorney is appointed to represent defendants charged with felonies who claim they have insufficient funds to hire a private attorney.

Based on these facts, we are presented with first questions:

1. Is it my duty and responsibility to conduct a bond reduction hearing for any pauper defendant who requests it whether or not he actually has the means or assets to make a lower bond if one is set?

We believe that the answer to this question is principally governed by Canon 7 which makes it clear that it is the duty of a lawyer to represent his client zealously within the law. Thus, it is our opinion that it would be the duty and responsibility for a pauper attorney to conduct a bond reduction hearing for any pauper defendant regardless of the means or assets of the pauper defendant if such a hearing appeared

to be in the proper interest of the defendant. In reaching this opinion, we caution that it is not appropriate for an attorney to permit his client to testify contrary to what the attorney knows to be the truth. In other words, it would be inappropriate for the attorney not to reveal the facts concerning the client's assets and means if such facts were known to the attorney. See *ABA Formal Opinion No. 150*.

2. What are the ethical considerations of my representing a defendant after I have been appointed to represent him as a public defender, if he requests that I represent him as a private attorney and he pay me a fee? If I accepted that case as a private attorney would that be a form of solicitation?

Any discussion of this question must start with the premise that it is unethical to solicit professional employment. *Ethical Consideration 27*. *Ethical Consideration 2-29* reads, in part, as follows:

"When a lawyer is appointed by a court or requested by a bar association to undertake representation of a person unable to obtain counsel, whether for financial or other reasons, he should not seek to be excused from undertaking the representation except for compelling reasons."

Keeping in mind these two ethical requirements, which we regard as equally important, it is our opinion that it would generally be unethical for the public defender to accept a fee from the defendant while receiving an annual salary for performing the same service. In giving this opinion, however, we emphasize that this Committee is not authorized to render opinions in respect to questions of law. Thus, we believe that the final determination in respect to this question should be made by the court of appropriate jurisdiction in each instance. See *Informal Opinion No. 1062*. We are further of the opinion that any at-

(Continued on page 23)

ETHICS IN THE PRACTICE

(Continued from page 21)

tions. History has demonstrated that public confidence in the legal system is best preserved by strict, self-imposed controls over, rather than by unlimited, advertising.

¹ Informal Opinion No. 132, H. S. Drinker, Legal Ethics 283 (1st ed. 1953).

² Informal Opinion No. 131, H. S. Drinker, Legal Ethics 283 (1st ed. 1953).

³ Informal Opinion No. 133, H. S. Drinker, Legal Ethics 283 (1st ed. 1953).

⁴ Informal Opinion No. 134, H. S. Drinker, Legal Ethics 283 (1st ed. 1953).

⁵ Informal Opinion No. 749 dated March 31, 1964.

⁶ Informal Opinion No. 416 dated April 3, 1961.

⁷ Informal Opinion No. 868 dated October 15, 1965.

⁸ Informal Opinion No. 1107 dated July 21, 1969.

⁹ Informal Opinion No. 947, The American Bar Foundation, Opinions on Professional Ethics 100 (1st ed. 1967).

¹⁰ Informal Opinion No. 510 dated May 31, 1962.

¹¹ Informal Opinion No. 441 dated June 23, 1961.

¹² Informal Opinion No. 531 dated May 31, 1962.

¹³ Informal Opinion No. 800 dated October 27, 1964.

¹⁴ Informal Opinion No. 890 dated September 15, 1965.

¹⁵ Informal Opinion No. 1214 dated February 9, 1972.

commensurate with the amount of work I had performed in that case?

If the court having appropriate jurisdiction would prohibit the receipt of a fee indicated by Question No. 2, then it would, in our opinion, be unethical for the public defender to refer the matter to another attorney who, in turn, would pay the public defender a referred fee. On the other hand, if the court having jurisdiction over the matter would permit the public defender to undertake the employment of the defendant on a fee basis, then this question would seem to be academic as there normally would be no occasion under those circumstances to refer the defense to another attorney.

If a defendant is able to make his bond after I have already

two widely and well known judges in Indiana are destined to become chairmen of two of the five judicial conferences of the Judicial Administration Division of the American Bar Association in August, 1974, according to Alice L. O'Donnell, Director of the Division of Inter-Judicial Affairs and Information Services at the Federal Judicial Center in Washington, D.C.

The Hoosier judges to be so honored are Hon. George N. Beamer, of South Bend, Judge of the U. S. District Court, Northern Indiana District, who automatically moves up to the chairmanship of the National Conference of Federal Trial Judges, and Hon. James K. Richards, of Hammond, Judge of Lake Superior Court, Room 5, who automatically moves up to the chairmanship of the National Conference of State Trial Judges.

Both Judge Beamer and Judge

Richards currently hold the office of chairman-elect of their respective conferences.

Judge John T. Reardon, of the Illinois Circuit Court, at Quincy, is the present chairman-elect of the ABA Judicial Administration Division and will move up to the chairmanship at the same time Judge Beamer and Judge Richards are so honored.

The Judicial Administration Division has approximately 8,000 members, including more than 4,200 judges, about 3,700 lawyers and some 150 judicial associates.

The Bar and the Judiciary of Indiana are proud of the honors earned by Judges Beamer and Richards. There are only five judicial conferences in the Judicial Administration Division and for one state to hold two of the five chairmanships at the same time is most unusual.