INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE

OPINION NO. 1 OF 1980

The Legal Ethics Committee of the Indiana State Bar Association has been presented with the following question:

> "Can a law firm which has a member that is a county attorney have other members of the firm represent persons before the Area Plan Commission or the County Board of Zoning Appeals?"

Specifically this becomes a question due to the fact that County Commissioners are the final authority as to all zoning matters in the county if and when it is decided that a change of the zoning ordinances may be appropriate.

As stated before in previous opinions of the Committee, questions involving conflict of interest are always very difficult. The difficulty sometimes arises because the conflict is difficult to perceive and sometimes because the recognition of the conflict requires the attorney to decline employment.

Canon 4 of the Code of Professional Responsibility reads as follows:

> "A lawyer should preserve the confidences and secrets of a client."

Disciplinary Rule 4-101 requires the same thing and goes on to explain this in more detail.

Canon 5 requires a lawyer to exercise independent professional judgment on behalf of a client.

Lastly, Canon 9 requires that a lawyer should avoid even the appearance of professional impropriety.

These Canons impose a strict course of conduct and in our opinion require that if there is any doubt as to whether or not there is a conflict the problem should be resolved by the attorney declining to accept the employment. (Legal Ethics Opinion No. 5 of 1975)

In the case at hand, we have members of a firm who represent parties before two forums, the Board of Zoning Appeals and the Zoning Commission or Planning Commission.

There is a potential area of conflict.

For instance, if a party would fail with the Zoning Commission and the Board

of Zoning Appeals, assuming there is no legal recourse in the courts, the last alternative would be to attempt to change the Zoning Ordinance.

This is where the conflict becomes obvious: the attorney is bound to do the best for his client and it might very well require that he attempt to change the ordinance.

Thus we would then have an attorney in the unenviable position of having his firm represent two different sides of the question. The County Attorney in his attempt to advise the County Commissioners should and must be impartial with his advice and input. This would be impossible if a member of his firm were representing the party who was a client of his firm in an attempt to change the zoning ordinance. We feel this would be an obvious conflict of interest.

Lastly, there would be an appearance of impropriety because the general public might very well imply that this law firm had special influence upon the Zoning Appeals Board or the Planning Commission by virtue of having a member representing the County Commissioners.

The County Attorney does exert influence upon the County Commissioners. He does have input to the County Commissioners on legal questions and it is obvious that if this firm would be representing a client's interest that it could be implied that a County Attorney would color his thinking to the advantage of the client. Thus there would be the appearance of impropriety also in this situation.

Accordingly, we take the position that applying the above standards to the factual situation before us, it would be improper for the law firm to represent clients before the Planning Commission or the Board of Zoning Appeals so long as a member of that firm is the County Attorney. It could easily be implied that the County Attorney is in a position to influence the Board of Zoning Appeals, the Planning Commission, and the County Commissioners.

INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE

OPINION NO. 2 OF 1980

The Committee has been asked whether an improper conflict exists when a lawyer who has filed a tort lawsuit against a city on behalf of a client is elected to the office of city councilman.

Disciplinary Rule 9-101(B) states that "a lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee" (emphasis added). The facts stated in the inquiry indicate that the lawyer will have substantial responsibility for the matter as a public employee, namely, a city councilman, when the lawyer takes office. The Committee infers from the inquiry that the lawyer as city councilman may be required to vote whether to compromise the claim, appeal from a judgment, and the like. Certainly this is a "substantial responsibility" within the meaning of this Disciplinary Rule.

The reason for that Rule is stated in Ethical Consideration 9-3 which provides "After a lawyer leaves judicial office or other public employment, he should not accept employment in connection with any matter in which he had substantial responsibility prior to his leaving, since to accept employment would give the appearance of impropriety even if none exists." In the opinion of the Committee the reason for the rule applies to the facts stated in the inquiry even though the lawyer has not yet had substantial responsibility in the matter but instead will have such responsibility when the lawyer takes office.

Even if this Rule does not apply to the facts stated in the inquiry, Ethical Consideration 9-2 states that "When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession." This Ethical Consideration is one of the bases of Canon 9 which states "A lawyer should avoid even the appearance of professional impropriety."

It is the opinion of the Committee that the lawyer should either withdraw from the prosecution of the tort claim or refuse to take office as city councilman.

INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE

OPINION NO. 3 OF 1980

The Legal Ethics Committee has been supplied the following inquiry, viz:

> "Our firm hereby requests an informal opinion from the Legal Ethics Committee concerning a booklet being considered for use by our firm. We are considering publishing a booklet, in a format similar to the booklet enclosed herewith, which will identify the members of the firm, give a brief biographical description of each member, and will generally describe the areas of practice of the firm. We have found that even long-standing clients lack a full understanding of the nature of our practice and feel the booklet would help remedy that situation.
>
> "The firm contemplates such a booklet would be distributed to existing major clients of the firm, new clients of the firm, and potential clients of the firm who have contacted us regarding representation or are considering retaining us as their counsel. Such a booklet would not be distributed to the general public, but would be placed in our reception area.
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> "We request your opinion as to whether the use of such a booklet in the manner above described would be consistent with the existing ethical standards of our profession."

The submission of an eight-page, black-and-white brochure describing a CPA firm contains 7 photographs and one map. The text notes:

> " . . . The partners' experience with National CPA firms and our qualified staff enable us to provide professional service that goes beyond the typical auditing and preparation of financial statements and income tax returns . . . In addition to our experience in auditing, we have experience in servicing new businesses and advising them on important tax elections and decisions affecting their future . . . Our experience in managerial accounting is useful in offering advice to clients and assisting them with long-range planning . . . ."

The following questions arise from the inquiry, viz:

1) Is the present suggested format of the proposed booklet proper?

2) Is the proposed distribution method for the booklet proper?

With respect to the first question, the Committee feels that the decision of the N. Y. State Bar Association, Committee on Professional Ethics, Opinion No. 316 (Dec. 18, 1973) adequately explains the reason for the rejection of such a booklet in the following language:

> "A brochure describing the activities of a law firm and the qualifications and experience of its members tend to unduly emphasize the importance of the firm and the competence of its partners, including very possibly their expertise in various branches of the law. Distributions by lawyers of such material to clients and prospective clients would constitute a form of advertising clearly proscribed by the Code. DR 2-101(A) and (B); DR 2-105(A); cf. DR 2-102 (A)(2).
>
> "The apparent purpose of the brochure would be the indirect solicitation of legal business in violation of the traditional ban against such conduct. EC 2-9. The mere appearance of such impropriety should be avoided. Canon 9.
>
> "For these reasons the issuance of the brochure is disapproved. See Matter of Connelly, 18 A.D. 2d 466, 479, 240 N.Y.S. 2d 126, 139 (1st Dept. 1963); ABA Inf. 530 (1962); N.Y. City 615 (1942).
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> "This opinion does not prohibit appropriate answers to unsolicited inquiries concerning the firm."

The authorities have reached a similar conclusion with respect to written brochures; e.g. ABA Informal Opinion 1436 (Aug. 12, 1979) - commercial collection; ABA Informal Opinion 1365 (June 4, 1976) - Virgin Island Divorce Law; ABA Informal Opinion 998 (August 26, 1967) - written material furnished clients indicating that client "bring his future problems to this office"; ABA Formal Opinion 213 (March 15, 1941) "Patent Law News Bulletin," ABA Formal Opinion 120 (Dec. 14, 1934) - Mexican Divorce Law; ABA Formal Opinion 73 (May 5, 1932) - Liberal Divorce Law; N. J. Supreme Court Advisory Committee on Professional Ethics Opinion No. 134 - 100 Questions & Answers on Workmen's Compensation Laws; N. J. Supreme Court Advisory Committee on Professional Ethics Opinion No. 245 - client book for negligence cases; The Association of the Bar of the City of New York, Opinion No. 338 (April 2, 1935) - collections.

In addition the submitted example unduly utilizes the word "experienced." Inasmuch as neither our Supreme Court nor Bar Association has adopted a specialization certification, the reasoning set forth by Illinois State Bar Association Opinion No. 669 (1/23/80) would appear to be applicable - that a:

> " . . . lawyer clearly cannot advertise that he is an 'expert' in a given field. It would constitute a 'representation . . . regarding the quality of legal services' in violation of DR 2-101(B)(8) and a suggestion of speciality in violation of DR 2-105.
>
> "Even a representation that the lawyer is 'experienced' in a given field raises the same kind of problems as a statement of expertise. The term 'experienced' has no recognized or common meaning in the context of lawyer advertising, and if it has any connotation at all, that connotation is an implication that lawyers 'experienced' (here experienced in real estate closings) are novel or superior to most. Absent a system of specialization which would give some content to terms such as 'experienced' or 'expert,' such representations are inherently inconsistent with the Code."

Additionally the submitted example is improper because DR 2-101(B) permits publication of specified information in print media distributed in certain geographic areas if the material contains no photographs or other pictorial matter.

With respect to the second question, the Committee feels that the proposed distribution of self-laudatory statements and claims is contrary to DR 2-101(A). The fact that said booklets are portable and designed to travel outside the law office indicates that people with whom the attorney has no established professional relations could be solicited by the said distribution procedure.

The mass distribution of non-print-media advertising items, in an attempt to solicit business, is improper. See Illinois State Bar Association Opinion 265 (June 28, 1965) - pencils; Los Angeles County Bar Association Ethics Opinion No. 255 (Dec. 19, 1958) - waiting room distribution; North Carolina State Bar Opinion No. 846 (October 25, 1973) - valuable paper envelopes; N. J. Supreme Court Advisory Committee on Professional Ethics Opinion No. 245 - waiting room distribution; San Diego County Bar Association Opinion 1972-9 (May 15, 1972) - pencils; c.f. Matter of Crumpacker (Ind. 1978) 383 N.E. 2d 36 at p. 42 - direct mail solicitation.

It should further be noted State Bar Association or similar published pamphlets on popular legal subjects, which do not bear the name or address of the lawyer, are not affected by this opinion. See DR 2-104; ABA Informal Opinion 1365 (June 4, 1976); ABA Informal Opinion 846 (May 31, 1965); ABA Informal Opinion 631 (Feb. 6, 1963); ABA Informal Opinion 539 (May 31, 1962); ABA Informal Opinion 503 (March 22, 1962). The Committee also wishes to note that the principles stated in Opinion No. 3 of 1979 are still applicable to attorneys' advertisements in all media permitted by DR 2-101, et seq. The purpose for these rules is to give the public factual information concerning a lawyer and rendering of legal services relevant to the thoroughful selection of a lawyer, and is not to advance the economic interest of the

lawyer or to appeal to the emotions of the public. Accordingly any public communication or advertisement must support and maintain the ethics of our profession in order to promote and preserve justice and the clients' interest.

Although the submitted booklet fails to meet the requirements of the Code for the reasons stated above, it may be that different booklets could comply under DR 2-101.

INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE

OPINION NO. 4 OF 1980

The Committee has been asked about the propriety of a lawyer's conduct under these facts:

> The lawyer is "of counsel" to the "X Law Firm." The sole function of X is to advertise for the lawyer and other lawyers throughout the country who are also "of counsel" to X. X advertises through various media, including a television advertisement originating outside the state which goes into the state containing the lawyer's name and telephone number. X performs no legal services or other services for the client at all. The fee generated as a result of an employment brought about by the advertising is split twenty percent to X and eighty percent to the lawyer.

This arrangement violates several provisions of the Code of Professional Responsibility. First, any advertising using the name "X Law Firm" is misleading contrary to DR 2-101(A) because X Law Firm is in fact not a law firm and does not render legal services to the client. Second, although the television advertisement may or may not be ethically proper in the state where it originates, it is not permitted by DR 2-101(B) adopted by the Supreme Court of Indiana. Third, "X Law Firm" is a trade name contrary to DR 2-102 (B). Fourth, by virtue of the advertising, X implies that the lawyer is a partner in X contrary to DR 2-102(C). Fifth, the division of the fee between X and the lawyer is contrary to DR 2-103(B). If X were a law firm, the fee division would be contrary to DR 2-107(A)(2). See ABA Informal Opinion 1392.

II. PRELIMINARY DISCUSSION

The fact that Lawyer C was at one time a Deputy Prosecuting Attorney who, in fact, prosecuted A on earlier charges is of no consequence. The conviction and the arrest are two totally different situations. The fact that Lawyer Z was appointed rather than hired by the criminal defendant is also of no consequence. Finally, the fact that both C and X were at one time Deputy Prosecuting Attorneys does not in and of itself preclude either of them from representing A and X, respectively. None of these facts are relevant to the ethical issue presented.