INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE

OPINION NO. 1 OF 1985

Facts

Attorney "A" represents an Amish client who has a religious objection to filing a lawsuit. This client sold forty (40) acres of unimproved real estate on contract to an individual who has filed bankruptcy. The contract buyer has remained in possession of the real estate and has refused to make payments. Attorney "A" has been hired to pursue litigation. Client, as a result of his religious beliefs, would like to deed real estate to Attorney "A" so client would not be the plaintiff in the foreclosure action. Attorney "A" would be paid for his services in handling the foreclosure litigation.

Inquiry

Is it permissible for an attorney to undertake to become a plaintiff in a cause of action for which he is also acting as counsel of record? Alternatively, could attorney solicit a third party on client's behalf to serve as a trustee of a land trust for purpose of bringing the cause of action in client's behalf?

Response

If a deed is given by a client to an attorney to advance prospective litigation, this would suggest on its face that the lawyer has an interest in the outcome of the litigation. Canon 5 prohibits this situation except as an attorney may have a lien for fees. DR 5-103 provides that:

> (A) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client, except that he may:
>
> (1) Acquire a lien granted by law to secure his fee or expenses.
>
> (2) Contract with a client for a reasonable contingent fee in a civil case.

(See also EC 5-1, EC 5-2 and EC 5-3.)

However, Attorney "A" has also suggested that a land trust be created for the purpose of bringing the foreclosure action. The committee believes that the attorney may serve as trustee of a land trust created for the purpose of maintaining the foreclosure action. Obviously, the attorney is responsible for

disclosing the implications of this arrangement to his client, and must comply with his fiduciary duties as trustee.

The only problem the committee envisions with this arrangement is the possibility that the attorney may become a witness in the litigation. Therefore, the attorney should be guided by the provisions contained in DR 5-101 and DR 5-102. Under the facts recited in this opinion, the committee believes it is not obvious that the attorney would become a witness, but at such time as the attorney knows, or it becomes obvious he may be called as a witness, DR 5-102 should be consulted.

Conclusion

It is this committee's considered opinion that the attorney's conduct, should he acquire an interest in the real estate which is the subject of litigation and file a lawsuit in his own name, would place the attorney squarely within the prohibitions listed in DR 5-101, DR 5-102 and DR 5-103. Furthermore, the attorney may serve as trustee of the land trust with the caveat that he not run afoul of the attorney as witness provisions of DR 5-102.

INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE

OPINION NO. 2 OF 1985

The Committee has been presented with the question of whether an advertisement from the South Bend telephone directory is ethical.

Assuming the representations are accurate, e.g., that divorces are furnished by the persons listed and that they are all licensed lawyers, the advertisement would appear to fit squarely within DR 2-101 and EC 2-9 and 2-10.

Therefore, the Committee sees no problem with the advertisement.

Res Gestae - June, 1986

INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE

OPINION NO. 3 OF 1985

A non-profit, national association of Christian attorneys (the "Association") proposes to establish a lawyer referral service for the benefit of mission agencies, missionaries, and their dependents throughout the United States. The existence of this lawyer referral service will be publicized throughout the relevant missionary community. Participating attorneys will be drawn from the members of the Association who indicate a willingness to become involved. There is no fee charged by the Association in order to be a participating attorney. Upon being contacted, the Association will provide the inquirer with the names, addresses, and telephone numbers of the participating attorneys in the relevant geographic area. When a potential client contacts a participating attorney, it is expected that any initial consultation by the participating attorney will be undertaken on a non-fee basis. Thereafter, the charges for any legal services provided would be as negotiated between the individual attorney and the client.

The regular membership of the Association is limited to attorneys, judges and law students. There is a special associate membership category for lay persons. Associate membership entitles the associate member to receive Association publications and other information regarding Association activities, but does not entitle the associate member to participate in the governance of the Association.

The question presented here is whether participation by attorneys in the proposed lawyer referral service is proper as coming within the scope of DR 2-103(C). DR 2-103(C) of the Code of Professional Responsibility provides:

> A lawyer or his partner or associate or any other lawyer affiliated with him or his firm may request referrals from a lawyer referral service operated, sponsored, or approved by a bar association or cooperate with any other qualified legal assistance organization.

Clearly, if the lawyer referral service is "operated, sponsored, or approved by a bar association," then participation is proper. This depends upon whether or not the Association qualifies as a bar association. The definition of a bar association found at the end of the Code of Professional Responsibility provides no guidance.

In discussing an inquiry precisely like the instant one, the Standing Committee on Ethics and Professional Responsibility of the American Bar Association has concluded, without discussion, that a referral service like that described here is not "operated, sponsored, or approved by a bar association."

Informal Opinion 85-1512. With recent concerns related to the antitrust implications of professional association activities, Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982); Wilk v. American Medical Association, 719 F.2d 207 (7th Cir. 1983), it is questionable whether the term "bar association" can be restricted to long-established, majority bar associations like the American Bar Association and the Indiana State Bar Association. Inasmuch as this inquiry can be resolved on other grounds, the definitional parameters of a "bar association" need not detain us.

The next question is whether participation in the referral service meets the criteria for cooperating with "any other qualified legal assistance organization" under DR 2-103(C). The existing Code of Professional Responsibility is silent regarding what constitutes a "qualified legal assistance organization." Prior to the January 14, 1985 revisions, the Code provided much more detail in identifying those organizations coming within the scope of a "qualified legal assistance organization," with whose legal activities a lawyer could ethically cooperate. DR 2-103(D)(1) through (4), in effect between January 1, 1978 and January 13, 1984, described the organization's constituting "qualified legal assistance organizations."

It is our opinion that the brief reference in the current DR 2-103(C) to "qualified legal assistance organizations" was not intended to disapprove of the listing of organizations in the old DR 2-103(D) as being, at least, exemplary of "qualified legal assistance organizations." Rather, old DR 2-103(D) may be examined to provide some guidance as to the types of organizations falling within the category of "qualified legal assistance organizations."

The instant Association is not within the scope of old DR 2-103(D)(1) through (3). However, it appears that the Association comes within the scope of organizations described in old DR 2-103(D)(4):

> Any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries provided the following conditions are satisfied:
>
> (a) such organization, including any affiliate, is so organized and operated that no profit is derived by it from the rendition of legal services by lawyers, and that, if the organization is organized for profit, the legal services are not rendered by lawyers employed, directed, supervised or selected by it except in connection with matters where such organization bears ultimate liability of its member or beneficiary.

DR 2-103(D)(4)(a) (as in effect between January 1, 1978 and January 13, 1984)

In its recent Informal Opinion 85-1512, the Standing Committee on Ethics and Professional Responsibility of the ABA has concluded that a lawyer referral

service operated by a similarly described organization would not violate DR 2-103(D)(4)(a) of the Model Code of Professional Responsibility, provided the other requirements of DR 2-103(D)(4) are met. We concur. Old DR 2-103(D)(4) of the Indiana Code of Professional Responsibility is similar to DR 2-103(D)(4) of the Model Code. We, too, find that the instant Association meets the description of old DR 2-103(D)(4)(a), as long as it also satisfies the other requirements of old DR 2-103(D)(4)(b) through (g):

> (b) Neither the lawyer, nor his partner, nor associate, nor any other lawyer affiliated with him or his firm, nor any non-lawyer, shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate or affiliated lawyer.
>
> (c) Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization.
>
> (d) The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter.
>
> (e) Any member or beneficiary who is entitled to have legal services furnished or paid for by the organization may, if such member or beneficiary so desires, select counsel other than that furnished, selected or approved by the organization for the particular matter involved; and the legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved would be unethical, improper or inadequate under the circumstances of the matter involved and the plan provides an appropriate procedure for seeking such relief.
>
> (f) The lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court and other legal requirements that govern its legal service operations.
>
> (g) Such organization has filed with the Disciplinary Commission of the Supreme Court of Indiana at least annually a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel, and financial results of its legal service

> activities, or, if it has failed to do so, the lawyer does not know or have cause to know of such failure.

It is further our opinion that, in this instance, meeting the requirements of old DR 2-103(D)(4) establishes the organization as a "qualified legal assistance organization" under new DR 2-103(C). Thus, cooperation with the organization's activities, including its lawyer referral service, would not constitute a violation of the Code of Professional Responsibility.

We note in passing that under old DR 2-103(D)(4)(g), an organization described in DR 2-103(D)(4) must have filed periodic reports of appropriate information with the Disciplinary Commission of the Supreme Court of Indiana. No such filing provision appears in the present version of the Code of Professional Responsibility. However, Admission and Discipline Rule 26 requires any group legal services plan to develop a written plan and file the plan and periodic written reports with the Clerk of the Supreme Court and Court of Appeals. It appears to this committee that the instant Association's lawyer referral service meets the definition of a "group legal services plan" as set out in Admission and Discipline Rule 26, and that therefore compliance with the reporting requirements of that rule should be met.

INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE

OPINION NO. 4 OF 1985

The Committee has been presented with a question involving the following fact situation:

A law firm represented a woman who was principal stockholder, director, and an officer in a newspaper contesting certain management decisions then made by the chief executive officer of the company. As a result of that action, she became more involved in the management and received certain bonuses.

Subsequently, her children, who were minority stockholders, requested that the same firm represent them in a derivative action against the chief executive officer concerning the bonuses. If the litigation is successful, it will reduce the bonus of the chief executive officer and the woman who originally contacted the firm.

The woman, whose children now attempt to employ the firm, has been notified by the firm that if successful, amounts paid to her as a shareholder would be reduced. She has fully consented to the representation of her children and expressed an opinion that, in fact, she is in support of their position.

The firm has no pending matter in behalf of the woman, the previous representation being complete.

Issue

The issue has been raised whether the representation is contrary to DR 5-105, and/or whether it is contrary to DR 4-101(C).

Response

It is clear that the representation would violate both DR 4-101(C) and DR 5-105 if there is not sufficient disclosure and waiver.

In this situation there is a conflict, although the first client, the mother, is asserting her belief that in the long run she will gain more financially if the litigation contemplated by her children is successful. Obviously this is an opinion which to some degree is affected by advice from the attorneys.

Nevertheless, if the disclosure has fully and completely been made to both the first client and to her children, and if they both consent to the representation, then the firm could proceed. This is a very close issue since the informed consent itself is somewhat dependent upon the firm with the apparent conflict. However, assuming that the disclosure has been comprehensive and the consent obtained is meaningful, then the firm could represent the children.

INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE

OPINION NO. 5 OF 1985

The Legal Ethics Committee has been asked to render an opinion whether or not there exists a conflict of interest or an appearance of impropriety when a law firm, which has among its members, a deputy prosecuting attorney, accepts representation of a juvenile and his parents against a corporate defendant and one of its employees in a civil cause of action arising out of a set of circumstances which conceivably could result in criminal charges being brought against the corporate defendant by the office of the prosecuting attorney of which the member is a deputy.

It is the opinion of the Legal Ethics Committee that there does exist a conflict of interest and an appearance of impropriety.

In reviewing the past opinions of the Legal Ethics Committee, it appears that if the law firm represents the juvenile and his parents in a civil action against the corporate employer and the employee, it is in a conflict of interest because one of its members is a deputy prosecuting attorney. The basis for this conclusion is that the corporate employer is potentially subject to criminal prosecution pursuant to IND. CODE 35-41-2-3. The fact that criminal prosecution is possible has been a significant factor in past Legal Ethics Committee opinions when deciding whether there is a conflict of interest. (See DR 7-105.) For example, in Opinion No. 7 of 1981, the Committee found that there would be a violation of DR 9-101(B) where a part-time prosecuting attorney or his part-time deputy, in his capacity as a private attorney, handled cases involving the collection of child support. DR 9-101(B) prohibits a lawyer from accepting private employment in a matter in which he has substantial responsibility while serving as a public employee.

The committee has concluded that DR 9-101(B) is violated because the support actions could potentially have collateral criminal proceedings. The committee has further indicated that if the action involved merely the modification of a support order, there would be no conflict of interest as the modification was exclusively a civil proceeding without potential criminal action.

In the committee's most recent opinion on conflict of interest relating to a deputy prosecuting attorney, Unpublished Opinion No. U3 of 1984, the committee again found a conflict of interest when a deputy prosecutor in his private capacity gets involved in a child support action. Such conflict of interest arises regardless of whether the deputy prosecutor represents the plaintiff or defendant in the civil action.

Consistent with the committee's opinions are the recent Indiana Supreme Court decisions addressing the duties and responsibilities of a prosecuting attorney as a public employee. The Court in In the Matter of Lantz, 420 N.E. 2d 1236 (1981), publicly reprimanded a part-time prosecutor for filing civil actions involving bad checks because of his responsibility for enforcing the criminal

because the set of facts leading to the civil action filed by the deputy prosecutor's law firm potentially could also result in a collateral criminal action which in turn could result in the deputy prosecutor being involved, there is a conflict of interest and an appearance of impropriety. Accordingly, it would appear the law firm must resign from the employment.