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Bar Briefs

OPINION NO. 11
OF THE ETHICS COMMITTEE OF THE COLORADO BAR
ASSOCIATION
ADOPTED JANUARY 11, 1960

1. A person admitted to the Bar of this State may not disclose, nor permit others to disclose, the fact that he is a lawyer, if the manner of such disclosure would be in violation of Canon 27, if done by a practicing lawyer, and if such person is engaged in a business or occupation which, if performed by a lawyer, would constitute, at least in part, the practice of law.
2. A lawyer engaged in the occupation of selling life insurance may not give legal advice to his customers or clients.
3. A lawyer associated with an insurance corporation may not give legal advice on behalf of the corporation to its customers or clients.

FACTS

John Doe is a life insurance agent or salesman associated with the X Life Insurance Co. He is also a lawyer licensed to practice in the State of Colorado, but his livelihood is derived through the sale of life insurance. He uses various means to advertise and promote his insurance business, among which are the following:

1. The mailing and distribution of desk calendars upon which appears:

John Doe, LL.B.
Tax-Planned Insurance

2. The mailing and distribution of a folder prepared by X Insurance Co. containing Mr. Doe's picture and the following biographical data:

Mr. Doe received his LL.B. from Law School in He is a member of the and Bars. He has appeared frequently as a lecturer and has written various law review articles.

3. The use of stationery and envelopes upon which appears Mr. Doe's name, followed by "L.L.B."
4. Participation in newspaper advertisements of the X Insurance Co. in which appears Mr. Doe's name, followed by "L.L.B."
5. The mailing of letters to potential buyers of life insurance, a sample of which is the following:

"Dear:
Recent changes made in the tax laws now give the opportunity to doctors alone to obtain a tax-free retirement income, in some cases as high as \$18,000.00 a year.

Just mail the enclosed card to receive complete information. No obligation, of course.

Sincerely,
John Doe, LL.B."

6. The mailing of a monthly four-page circular, prepared by the X Insurance Co., digesting recent cases in the field of tax, wills and estates, and trust law, and containing suggestions and addressees, and signed by "John Doe, LL.B."

OPINION

The Committee is of the opinion that Mr. Doe is in violation of the Canons of Professional Ethics.

A difficult aspect of this case is the fact that Mr. Doe is not practicing law in the sense of earning his living therefrom. He is an insurance salesman who is using his legal education, degree and license as an aid to, and in promotion of, his insurance business. If he were a practicing lawyer, or if he prepared any legal instruments for a fee in connection with his insurance business, his advertising and promotional activities enumerated above would constitute a clear violation of Canon 27. Assuming that this is not the case, we must resolve the more perplexing problem of how far a lawyer not engaged in active practice may go in using his legal degree and license to promote another business.

The Committee is of the opinion that a person admitted to the Bar of this State may not disclose, nor permit others to disclose, the fact that he is a lawyer, if the manner of such disclosure would be in violation of Canon 27, if done by a practicing lawyer, and if such person is engaged in a business or occupation which, if performed by a lawyer, would constitute, at least in part, the practice of law.

This conclusion by the Committee would preclude Mr. Doe from using the initials "LL.B." after his name in each of the six instances set out in the facts above.

We believe that the facts show that Mr. Doe's activities would in some measure constitute the practice of law. While the selling of life insurance is not the practice of law *per se*, Mr. Doe purports to offer a so-called "estate planning" service and to give advice as to the federal tax laws and other laws affecting the ownership, transfer, and devolution of property. This advice, if given by a lawyer, would be the practice of law.

We are not unmindful of the fact that the Canons of Professional Ethics are generally regarded as applying to the legal *profession* as such and are meant to provide a standard of conduct among *lawyers* which will merit the respect and confidence of the

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profession, the courts and the public. We, nevertheless, feel that a person licensed to practice law, but engaged in another occupation, subjects himself to the Canons of Professional Ethics when he holds himself out as a lawyer in connection with such other occupation.

It may be argued that, in any event, the prohibition against advertising contained in Canon 27 does not apply to Mr. Doe since the Canon refers to professional employment, meaning employment *as a lawyer*, and Mr. Doe is not seeking such employment. Nevertheless, the only purpose which the disclosure that Mr. Doe is an attorney would serve would be to convey the impression to potential buyers of insurance that Mr. Doe is educated and qualified to advise with regard to legal and tax problems which might arise in the planning of an estate. Certainly the fact that Mr. Doe is a lawyer has nothing to do with his business as an insurance salesman, if in fact he does nothing other than sell insurance. If, on the other hand, he uses his legal knowledge as an aid in selling insurance, and at the same time holds himself out to the public as a lawyer, he subjects himself to the provisions of the Canons. We hold that the activities of Mr. Doe constitute the soliciting of professional employment within the meaning of Canon 27.

But we are not confined to Canon 27 as a basis for this opinion. If Mr. Doe is giving legal advice to customers or clients in connection with his association with the X Life Insurance Co., he is in violation of Canon 35, which provides that the professional services of a lawyer should not be controlled or exploited by any lay agency. A corporation may not practice law. Neither may an attorney practice law through or on behalf of a corporation which intervenes between him and his client. If the employees of a corporation are engaged in the activity of giving legal advice to third parties on behalf of the corporation, such constitutes the corporate practice of law and is prohibited.

If the X Life Insurance Co. is practicing law, Mr. Doe is also in violation of Canon 47, which prohibits a lawyer from permitting 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.

OPINION NO. 12 OF THE ETHICS COMMITTEE OF THE COLORADO BAR ASSOCIATION ADOPTED MARCH 26, 1960

Syllabus

A lawyer who is retained by a lending institution to render a title opinion on property on which the institution is making a loan may not sell, or acquiesce in the sale of, a copy of such opinion to the customer of the institution.

Facts

A lawyer represents a lending institution. For that client he renders a title opinion with respect to property on which the in-

stitution is making a loan. The client (the lending institution) makes a charge to its customer on the settlement sheet for the title opinion addressed to the lending institution. At the closing, and with the knowledge of the lawyer, the customer is offered a copy of that title opinion, for an additional charge. Is the lawyer in violation of the Canons of Professional Ethics?

Opinion

In the opinion of the Committee, the lawyer violated Canons 6, 27, and 35 of the Canons of Professional Ethics.

The lawyer, through his acquiescence in the sale of the title opinion to the customer of the lending institution, has caused the customer to believe he has purchased a title opinion upon which he can rely for his own purposes. Further, this arrangement may well discourage the customer from retaining his own counsel. It is the opinion of the Committee that an attorney-client relationship was established, in fact, between the lawyer and the customer of the lending institution by the furnishing of the opinion to the customer.

The attorney-client relationship was created through the solicitation of the lending institution, which was a violation of Canon 27. Canon 27 prohibits the solicitation of professional employment by a lawyer. It is equally unprofessional for a lawyer to permit such solicitation to be made on his behalf by a third party.

Canon 6 forbids a lawyer from representing conflicting interests, except in those situations where a full disclosure of the facts is made to the parties concerned. It can only be assumed that a complete disclosure of the conditions upon which the lawyer was retained by the lending institution and the limited scope and purpose of the title opinion was not personally made by the lawyer to the customer of the lending institution. The failure to disclose constituted a violation of Canon 6.

It is also assumed that all discussions with the customer relating to the copy of the title opinion to be sold were conducted solely by the lending institution. The action of the lawyer in permitting the lending institution to act in that matter on his behalf was a breach of Canon 35. That Canon, entitled "Intermediaries", provides in part as follows:

A lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediaries. A lawyer's relation to his client should be

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personal, and the responsibility should be direct to the client.

The Committee is also of the opinion that the same canons would be violated should the lawyer permit the lending institution to advise its customer that the fee to be charged the customer on the settlement sheet would automatically entitle the customer to a copy of the lawyer's title opinion. The lawyer may not circumvent the prohibitions of the Canons of Professional Ethics by making an arrangement with the lending institution to charge one fee that would be passed on in its entirety to the customer of the lending institution and entitle the customer to a copy of the title opinion.

The disposition of the fee charged by the lending institution of its customer is not stated in the fact situation presented. If all or any part of the fee was retained by the lending institution with the knowledge and consent of the lawyer, it is the opinion of the Committee that the lawyer would also be in violation of Canon 34. Canon 34, entitled "Division of Fees", states an absolute prohibition against a division of fees with a lay agency.

OPINION NO. 13 OF THE ETHICS COMMITTEE OF THE COLORADO BAR ASSOCIATION ADOPTED MARCH 26, 1960

Syllabus

It is improper for a municipal judge and a city attorney to share law office space to engage in private law practice in the same suite of offices.

Facts

Both the municipal judge and the city attorney are permitted to engage in the private practice of law, and are office associates. However, they do not share professional fees or their salaries from the municipality, and each maintains his own separate practice and individual books and records.

Opinion

This practice violates Canons 13, 17, and 31 of the Canons of Judicial Ethics, and Canons 3 and 15 of the Canons of Professional Ethics. It is improper for a municipal judge and a city attorney to share law office space to engage in private law practice in the same suite of offices. This relationship should be severed and separate offices established.

The arrangement is obviously fraught with peril. The danger is twofold: first, the inference that by reason of this extra-judicial relationship, the city attorney might enjoy unwarranted status in the eyes of the Court for economic reasons; secondly, the inference that, consciously or unconsciously, some legal point urged by the city attorney might assume extra weight on grounds informally voiced by the city attorney outside Court, and thus not be open to argument by defense counsel at the trial with both sides present.

Your Committee is drawing upon the spirit of several Canons of Ethics—both judicial and professional.

Canon 13 of the Canons of Judicial Ethics states: "A judge . . . should not suffer his conduct to justify the impression that any person can improperly influence him . . ."

And Canon 31, "Private Law Practice," recites:

In many states the practice of law by one holding judicial position is forbidden. . . . In inferior courts in some states it is permitted because the county or municipality is not able to pay adequate living compensation for a competent judge. 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. . . .

Finally, Canon 17, "Ex Parte Communication" (particularly in the light of Canon 3 below) provides:

A judge should not permit private interviews, arguments or communications designed to influence his judicial action where interests to be affected thereby are not represented before him, except in cases where provision is made by law for *ex parte* application. . . .

In Opinion 104, the American Bar Association Committee held that an attorney who occupied law offices with a police magistrate, although not in actual partnership with him, should not accept employment by persons accused of crime who were arraigned before his office associate, either while the case was pending before the police magistrate or thereafter, stating unequivocally: "Lawyers should not conduct themselves in such a way as to impair the confidence which the community has in the administration of justice." Surely, the converse situation would involve like reasoning as to the lawyer for the prosecution.

And that same committee, in its Opinion 16, held that it was clearly unethical for one member of a law firm to act as defense counsel and another to serve as county prosecutor, because this would require one member of the firm to oppose the interests of the state while the other member represented those interests, categorizing those positions as "inherently antagonistic" irrespective of Canon 6 (Conflicting Interests).

COMPLIMENTS

of

SYMES BUILDING

Looking to the reciprocal principles in the Canons of Professional Ethics, Canon 3, "Attempts to Exert Personal Influence on the Court," among other matters, provides:

. . . A lawyer should not communicate or argue privately with the judge as to the merits of a pending cause, and he deserves rebuke and denunciation for any device or attempt to gain from a judge special consideration or favor. . . .

And Canon 15 states in part: ". . . No fear of judicial disfavor . . . should restrain him (the lawyer) from the full discharge of his duty. . . ."

It would require almost superhuman conduct for the two persons involved in this factual situation to refrain from conscious or unconscious reference to matters before the municipal court, where professional quarters outside the Court are so intimately shared. Furthermore, the financial entanglements of sharing overhead expenses in the law offices are apt to interfere with the attitude each must assume toward the other when one becomes the advocate and prosecutor for the municipality and the other sits as municipal judge, a task requiring impartiality and objectivity.

In view of the foregoing, we feel that the existing arrangement, if not an open invitation to impropriety, cannot help but seem suspect to the bar and the community and render the task of the municipal judge most difficult. The extra-judicial relationship ought to be severed.

OPINION NO. 14 OF THE ETHICS COMMITTEE OF THE COLORADO BAR ASSOCIATION ADOPTED MARCH 26, 1960

Syllabus

It is improper for an attorney who is also a city councilman to appear in behalf of defendants who are prosecuted for violation of city ordinances in the municipal court of that city.

Facts

An attorney is a member of a city council. The city council hires the municipal judge and fixes his salary. The attorney, while serving on the city council, continues to practice in the municipal court on behalf of defendants who are charged with violations of city ordinances.

Opinion

In the opinion of the Committee, this practice is improper. Canon 6 of the Canons of Professional Ethics reads, in part, as follows:

It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The Committee also relies upon the spirit of Canon 3 of the Canons of Professional Ethics, the heading of which is "Attempts to Exert Personal Influence on the Court."

The attorney in this fact situation, as a councilman, is one of those who have the authority to select the municipal judge before whom he practices. The temptation to exert influence on the judge through control of his tenure and salary, should the judge render decisions unfavorable to the attorney, seems obvious. The judge in this position might reasonably feel that influence is being exerted through this medium of council control even though such influence is not, in fact, exerted. Even if this possibility never occurred to either the attorney-councilman or the municipal judge, members of the community might conclude that improper influence was exerted upon the judge.

Moreover, the attorney must be mindful of appearances of improper conduct which might reasonably cause members of the community to conclude that persons charged with violation of city ordinances might find it to their advantage to retain an attorney-councilman to appear on their behalf.

The situation in the statement of facts above must also be disturbing in its implications to the municipal judge who is placed in his office by the city council. Canon 13 of the Canons of Judicial Ethics states, in part, that "a judge . . . should not suffer his conduct to justify the impression that any person can improperly influence him or unduly enjoy his favor, . . ."

As stated in Opinion No. 13, the Committee feels that this situation cannot help but seem suspect to the Bar and the community and thus have an adverse effect on the administration of justice and the public's approbation of it.

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