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Continuation of Practice After Entry into Armed Forces

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The fact that great numbers of lawyers have entered the armed forces has raised the question of the propriety of arrangements for the continuance of their practice, particularly in view of Canon 34 of the American Bar Association.[1] In an attempt to answer this question, a joint statement has recently been issued by the committees on professional ethics of the Association of the Bar of the City of New York, the New York County Lawyers' Association, the Queens County Bar Association, the Brooklyn Bar Association, the Richmond County Bar Association, the Bronx County Bar Association and the New York State Bar Association.

The joint statement accepts the view expressed by the committee on professional ethics and grievances of the American Bar Association in its Opinion No. 217, construing Canon 34. That opinion reads in part as follows:

> "The last clause of the Canon was aimed at the evil of compensating a lawyer who renders no service and assumes no responsibility, for forwarding or directing legal business to another lawyer. It was directed at what is commonly known in the professions as 'fee splitting.'
>
> "The question here presented arises not in the ordinary situation, but because of a national emergency. Many young lawyers will be called for military service. Lawyers who are not called should, and will, serve their country in other ways. The plan for conserving the practice of lawyers called for military service serves a commendable and desirable objective. A lawyer who takes over the practice of a lawyer called to the service does so, not for the purpose of obtaining professional employment, but to serve his profession and aid his brother lawyer who is called for military service. In so doing he indirectly serves his country during the national emergency. For him voluntarily to pay over to the lawyer called to service a larger portion of the fees realized than the service rendered and responsibility assumed by the latter would warrant, does not in our opinion violate Canon 34."

Further elaborating, the ethics committees of the seven associations are of the opinion that any of the following arrangements may properly be made for the handling of the practice of a lawyer entering government service as a part of the war effort, whether in a military or in a civilian capacity:

[1] "34. Division of Fees. No division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility."

"1. A lawyer entering service may continue to be a member of an existing partnership, and if his name is a part of the partnership name, it may be continued, and the lawyer may share in fees not only from pending business but also from new business.

"2. A lawyer entering service may enter into a new partnership, in which his name may or may not be included, to carry on his and the other partnership business.

"3. A firm may establish or continue an arrangement for sharing fees, with respect to new matters as well as old, with a lawyer on its staff who enters service.

"4. The practice of a lawyer entering service may be continued by a lawyer or lawyers designated by him, whether or not from a panel of lawyers created by a bar association for such purpose, provided the client in each case consents thereto. The practice of the lawyer entering service may properly be conducted in the name of the lawyer to whom the work is turned over. Provided there is no violation of law or rules of court,[2] the practice of the lawyer entering service may also properly be conducted:

"(a) In the name of the lawyer to whom the work is turned over, with additional language on pleadings and papers to indicate that he is acting in place of the lawyer in service; or

"(b) In the name of the lawyer who has entered service—excepting litigated matters.

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[2]Rule 11 of the federal Rules of Civil Procedure is, in part, as follows:

"Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. * * * The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay. * * *"

In addition the joint committee has particularly in mind §277 of the NEW YORK PENAL LAW and §479 of the NEW YORK JUDICIARY LAW. Those sections are as follows:

"§277. If an attorney knowingly permits any person, not being his general law partner or a clerk in his office, to sue out any process or to prosecute or defend any action in his name, except as authorized by this section [the exceptions are not pertinent], such attorney, and every person who shall so use his name, is guilty of a misdemeanor."

"§479. Action against attorney for lending his name in suits and against person using name.

"If an attorney knowingly permits a person not being his general law partner, or a clerk in his office, to sue out a mandate, or to prosecute or defend an action in his name, he, and the person who so uses his name, each forfeits to the party against whom the mandate has been sued out, or the action prosecuted or defended, the sum of fifty dollars, to be recovered in an action."

"Where there is no division of work or responsibility as between the two lawyers, if a portion of the fee will be paid to the lawyer who has gone into service, the client should be informed, since this fact might conceivably affect the client's decision to permit his work to be handled in the foregoing manner.

"5. A lawyer entering service may send an announcement to his clients or to others where warranted by personal relations, stating that his practice will be continued in his absence by the firm of which he has been a member or by a new firm of which he is a member, or by a specified lawyer or lawyers."

"All of the foregoing," continues the statement, "assumes, of course, that there will be a compliance with any applicable statutes or regulations of the service that may impose restrictions upon lawyers entering government service as regards their practice of law; also, that the professional ethics of the situation will be observed as regards the handling of legal matters in which the government may be directly or indirectly interested."[3]

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[3]In Opinion No. 47 of the Attorney General of the United States (Vol. 40), dated April 27, 1942, it is held that the federal law does not prohibit a public officer from carrying on a private business activity for compensation except when the private activity touches upon some interest of the government and falls within the statutes and principles of law aimed at improper conflicts of interest, or when the officer is subject to one of several statutes forbidding specified officers to engage in private business activities. Certain types of prohibitory statutes are referred to and discussed in the opinion.

Opinion No. 48 of the Attorney General of the United States, dated April 23, 1942, which is contained in the same volume, holds that it would not be a violation of federal law for a patent attorney commissioned as an officer in the army to receive part of the profits of his law firm so long as he took no part in the firm's activities and did not engage in any activities as an army officer in which the interests of the United States might conflict with his private interests. In the same opinion, it is said that the term "compensation" as used in Section 3 (f) of the SELECTIVE TRAINING AND SERVICE ACT of 1940 is broad enough to include a partner's share in the partnership profits derived from services performed by the other partners while he is absent on duty in the armed forces.

Section 3 (f) of the SELECTIVE TRAINING AND SERVICE ACT of 1940 is as follows:

"Nothing contained in this or any other Act shall be construed as forbidding the payment of compensation by any person, firm, or corporation to persons inducted into the land or naval forces of the United States for training and service under this Act, or to members of the reserve components of such forces now or hereafter on any type of active duty, who, prior to their induction or commencement of active duty, were receiving compensation from such person, firm, or corporation."