

DELAWARE STATE BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS

OPINION 1983 - 1

The Committee has been asked to provide an opinion and guidelines on professional ethics for a member of the Delaware Bar on a question concerning his proposed participation in a separate business or profession.

The lawyer who requested this opinion is presently a practicing attorney in the State of Delaware. He plans to commence a new career with a local financial planning company. His duties will include the sale of life insurance and other financial planning packages. In this regard, the financial planning will primarily involve estate planning and necessarily will require consideration of estate, gift and income tax considerations. In his new employment, he will actively solicit business.

While not intending to provide "legal services," the lawyer recognizes the fine line between providing legal services and simply selling estate planning. Sensitive to his ethical obligations, the lawyer has asked for guidelines which would enable him to pursue his new career without engaging in conduct prohibited by the Delaware Lawyers Code of Professional Responsibility (the "Code").

OPINION

For a lawyer to undertake employment with a financial planning firm and perform duties incident to the sale of life

insurance and estate planning packages without violating his professional ethical obligations under the Code, the lawyer should withdraw from the active practice of law and in his new occupation, refrain from holding himself out as a lawyer for the customers of the financial planning firm or engaging in activities constituting the practice of law. Under those circumstances, and if otherwise qualified, he may engage in all the activities in which other insurance or financial planning salesmen may lawfully engage.

DISCUSSION

At the outset the Committee notes that its opinion concerns only the ethical considerations raised in the lawyer's inquiry. It does not address the question of what activities falling within the rubric estate planning comprise the "practice of law" as this issue is beyond the purview of the Committee.

It is well settled that a lawyer may engage in a business or profession separate from the practice of law. See, e.g., A.B.A. Formal Opinion 305 (March 22, 1962); Drinker, Legal Ethics, 221-224 (Columbia Univ. Press 1953); Wise, Legal Ethics, 64-72 (Matthew Bender & Co. 1966). However, the ability of a lawyer to undertake an independent business without violating the constraints imposed upon him by the legal profession is difficult and has been the subject of numerous and sometimes conflicting opinions.

The general rule which has evolved is that where the services provided by the independent business are so related to the practice of law as to lead, or be apt to lead, to the necessity for legal services, the lawyer must choose between the two professions,

deciding to practice one to the exclusion of the other. Wise, supra at 71-72; A.B.A. Formal Opinion 305 (March 22, 1962).*

Second occupations which have fallen into this category include claims adjustment, collections, organizing corporations, obtaining income tax refunds, servicing mortgages, selling life insurance, investment counselling and estate planning. Wise, supra at 65.

The generally expressed concern in each case has been advertising (identification of oneself as a lawyer in connection with the second occupation) and solicitation (second occupation becomes a feeder to the lawyer's practice). A.B.A. Formal Opinion 57 (March 19, 1932); DR2-103, 104.

In addition to the foregoing concerns, when a lawyer engages in the second occupation with a person, corporation or association not authorized to practice law, ethical prohibitions against the division of fees with non-lawyers and aiding the unauthorized practice of law are also implicated. See, e.g., A.B.A. Formal Opinion 234 (February 21, 1942) and A.B.A. Informal Opinion 1241 (February 27, 1973). Canon 3 provides that "a lawyer should assist in preventing the unauthorized practice of law." In furtherance of this object, the Disciplinary rules direct that:

"A lawyer shall not aid a non-lawyer in the unauthorized practice of law.

DR3-101(A)

* Nothing contained in this opinion is intended to foreclose a lawyer from employment as an in-house corporation counsel and rendering legal advice to such corporation. It is the provision of legal services to third parties, that is to persons other than the corporate client, which is addressed. 7 Am.Jur.2d Attorneys at Law, § 109.

A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law."

DR3-103(A)

While the form of ownership of the financial planning firm the lawyer intends to join is unclear, it is clear that it is not a partnership or professional association comprised of individuals authorized to practice law. Thus, it would be improper for the lawyer to render legal advice to third persons incident to his employment with the lay firm. As such he would be aiding the firm in the unauthorized practice of law.

One of the central concerns of Canon 3 is with preservation of the personal, fiduciary relationship between the lawyer and client from interference by unregulated laymen. Achievement of this goal is jeopardized when one trained in the law purports to render legal advice in connection with his employment with a financial planning firm to promote the sale of life insurance. A client is entitled to know in receiving legal advice that the advice is rendered by the attorney with only the client's best interests in mind and without regard for the attorney's own interest or his employer's interest in selling the product. Compare, DR5-101(A), DR5-107.

In summary, the lawyer may carry on another occupation as an employee of the financial planning firm, even though it involves some legal skills. The second occupation will not constitute the practice of law if he does not simultaneously hold

himself out as a lawyer for the customers of the financial planning firm unless, of course, the activities of the firm constitute the unauthorized practice of law, a question which, as noted above, is beyond the scope of this committee.

Dated: July 7, 1983