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# LEGAL ETHICS

*Craft is the vice, not the spirit, of the profession. Trick is professional prostitution. Falsehood is professional apostasy. The strength of a lawyer is in thorough knowledge of legal truth, in thorough devotion to legal right.*—EDWARD G. RYAN.

## A COMMENTARY ON THE ETHICS OF THE LEGAL PROFESSION IN THE '50's

BRADFORD WILES

PERHAPS THE MOST significant development in the field of Legal Ethics is the greatly increased interest in the subject by lawyers generally, together with the enormously increased availability of material for the ethical guidance of the profession. The William Nelson Cromwell Foundation, founded in 1930, and generously endowed after Mr. Cromwell's death in 1948, has as one of its purposes:

Cultivation of the highest standards of ethics, honor, and conduct in the practice of Law and the preparation and dissemination of rules, codes, treatises and literature upon said subjects.<sup>1</sup>

The Cromwell Foundation in 1953 sponsored publication of *LEGAL ETHICS* by Henry S. Drinker, the first definitive treatise in the field since 1914. In 1956, it sponsored publication of *WILLIAM NELSON CROMWELL FOUNDATION LEGAL STUDIES, OPINIONS ON PROFESSIONAL ETHICS*, which consists of the Ethics Opinions of the Association of the Bar of the City of New York and of the New York County Lawyers Association.

In 1949 the American Casebook Series added *CASES AND MATERIALS ON THE STANDARDS OF THE LEGAL PROFESSION*, by Professor Maynard E. Pirsig of the University of Minnesota, and this volume was revised in 1957. It is the first new case book in the field since 1938. In 1954 appeared *BAR ASSOCIATIONS, ATTORNEYS AND JUDGES, ORGANIZATION, ETHICS AND DISCIPLINE* by George E. Brand, and this was supplemented in 1959. An edition of 2,000 copies of the *OPINIONS OF THE ABA'S STANDING COMMITTEE ON PROFESSIONAL ETHICS AND GRIEV-*

<sup>1</sup> DRINKER, *LEGAL ETHICS* vii (1953).

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ANCES, published in 1947, was exhausted in about ten years. The same number of the 1957 revision of that book was sold out in about one year! What more evidence is needed of heightened interest of the bar in the ethics of the profession?

But the increased interest in ethical problems has not led to any material change in the nature of the problems confronting the Ethics Committee of the Chicago Bar Association. Only the guise in which the problems are presented seems to vary.

#### MOST FREQUENTLY VIOLATED CANONS

The canons which are most frequently violated and which produce the most requests for opinions include: canon 6—Adverse Influences and Conflicting Interests; canon 20—Newspaper Discussion of Pending Litigation; canon 27—Advertising, Direct or Indirect; canon 29—Upholding the Honor of the Profession; canon 33—Partnerships (dealing in part with the prohibition against partnerships between lawyers and laymen); canon 34—Division of Fees; canon 35—Intermediaries; canon 37—Confidences of a Client; canon 40—Publication of Articles on the Law; and canon 47—Aiding the Unauthorized Practice of Law.

#### A DIFFICULT AREA—SERVICES PERFORMABLE BY BOTH LAWYERS AND LAYMEN

The cases which cause some of the greatest difficulty, both practical and philosophical, and which tend to give rise to the most sweeping violations of the canons, are those involving lawyers who are engaged in multiple occupations, or who are in the specialized fields where properly qualified laymen may lawfully perform services which, if performed by a lawyer would constitute the practice of law. Many such cases inherently involve possible violations of canons 27, 33, 34, 35, 37, and 47; and in certain situations canons 6 and 29 as well.

It is a shocking idea to many lawyers, and to most laymen, that there are various services which are legal work if done by a lawyer, but which properly qualified laymen may perform without engaging in the unauthorized practice of law, and yet two examples show the soundness of the concept.

A lawyer who prepares a federal income tax return is performing legal services, but many persons may lawfully prepare such returns; and any duly enrolled "agent" may engage in practice before the Internal Revenue Service to the same extent as an enrolled attorney.

But the regulations specifically deny an agent the right to draft instruments conveying title to property for the purpose of affecting federal taxes, or the right to advise a client as to the legal sufficiency of such an instrument or its legal effect on the client's federal taxes; and it is specifically provided that "nothing in the regulations in this part shall be construed as authorizing persons not members of the bar to practice law."<sup>2</sup> The difficulties in determining what constitutes the practice of law in this field will be discussed hereinafter.

Not only may non-lawyers practice before the Internal Revenue Service, but they may also be admitted to practice before the Tax Court on special examination.<sup>3</sup>

The patent lawyer who renders an opinion on patentability of a device, or files and prosecutes a patent application, is certainly performing legal services. But the non-lawyer patent agent who has been admitted to practice in the United States Patent Office may lawfully perform the same services,<sup>4</sup> including prosecuting appeals to the Board of Appeals of the Patent Office after a patent application is finally rejected by the examining division.

In each case the right conferred on the non-lawyer is limited. *Chicago Bar Ass'n v. Kellogg*<sup>5</sup> enjoined a non-lawyer patent agent practicing in the State of Illinois from a wide range of activities. The case held that the Patent Office Rule, in the very limited field defined, merely permits qualified non-lawyers to represent applicants for patents, but does not extend to non-lawyers the right to practice law, within the meaning of the term "practice law," in any jurisdiction where such a non-lawyer practitioner is engaged in his occupation.

No doubt has ever been cast upon the right of a lawyer to carry on other gainful occupations concurrently with his practice of law, provided he does not so conduct his other occupation as to use it to build his law practice, or as an instrument to "tour" for him (canon 27),<sup>6</sup> or violate the canons in some other way, as by permitting his activities as a lawyer to be controlled by laymen with whom he is associated in the non-legal business (canon 35), or aiding such associates in the un-

<sup>2</sup> 31 C.F.R. § 10.39 (1959).

<sup>3</sup> T. Cr. R. 2 (d); 26 C.F.R. § 701.2 (d) (1960).

<sup>4</sup> 37 C.F.R. § 1.341 (b) (1960).

<sup>5</sup> 338 Ill. App. 618, 88 N.E.2d 512 (1949).

<sup>6</sup> *In re Miller*, 7 Ill.2d 443, 131 N.E.2d 91 (1955).

authorized practice of law (canon 47). But many lawyers fail to realize the true extent of canons 35 and 47.

Thus, a lawyer who formed a partnership with a C.P.A. and an engineer to operate a real estate agency, placed his name and "attorney-at-law" on the firm's window when he did not have his law office there (Advertising, in violation of canon 27), and permitted the firm to send out advertising circulars soliciting business for all three parties and professions involved, also violated canon 33 (prohibiting partnerships between lawyers and laymen when any part of the firm's employment consists of the practice of law), canon 35 (Division of Fees), and canon 47 (Aiding the Unauthorized Practice of Law).<sup>7</sup>

There are some occupations which are so closely related to the practice of law that the lawyer engaged in such an occupation must be confronted with situations which violate the letter or spirit of the canons, especially canon 27. Thus, if a lawyer operating a real estate agency uses it as a means of increasing his law practice, he violates canon 27, and if he acts as broker and attorney in the same transaction, he represents conflicting interests in violation of canon 6.<sup>8</sup> A lawyer who is also a licensed insurance broker must avoid soliciting legal business in the guise of insurance planning.<sup>9</sup>

The area producing some of the knottiest problems is that of federal taxation, where the lawyer and the accountant may both lawfully perform many of the same services. The question of what constitutes the unauthorized practice of law is not one of ethics, but is basic to any finding of a violation of canon 47.

In 1951, the American Bar Association and the American Institute of Accountants jointly agreed on principles to be observed by members of both professions in dividing their responsibilities to their clients;<sup>10</sup> but this did not terminate the ethical problems because some accounting firms hire lawyers to assist them in their clients' matters, and some lawyers are also C.P.A.'s, and are partners in accounting firms.

The Chicago Bar Association in 1954 published an opinion respecting the ethical position of lawyers who are employed by accounting

<sup>7</sup> CHICAGO BAR ASS'N, ETHICS OPINION 83 (1954). Unpublished.

<sup>8</sup> CBA, ETHICS OPINION 80 (1953). Unpublished.

<sup>9</sup> CBA, ETHICS OPINION 82 (1954). Unpublished.

<sup>10</sup> *National Conference Adopts Code for Practice in Income Tax Field*, 37 A.B.A.J. 517 (1951).

firms, holding that, because their relationship with the client is controlled by the accounting firm they violate canon 35, Intermediaries; because they perform legal services for the firm's clients they aid the unauthorized practice of law in violation of canon 47; and because they obtain information from the client which is made available to the accountants in the firm they violate canon 37, Confidences of a Client.<sup>11</sup>

The lawyer who is also an accountant, even practicing alone, may not carry on an independent accounting practice without violating canon 27, Advertising, because his accounting necessarily leads to further legal work, and by publicly announcing that he is an accountant, he is representing that he is especially skilled in tax law. He may, of course, utilize his skill as an accountant in his law practice.<sup>12</sup> The New York County Lawyer's Association holds that a lawyer may operate a separate accounting business in the same office with his law practice.<sup>13</sup>

The problem of the lawyer who is a partner in an accounting firm is somewhat different, and is still under consideration by the Ethics Committee of the Chicago Bar Association. Nevertheless, certain guides have been established:

1. If the activities of the lawyer are in the area which constitutes the practice of law when undertaken by a practicing attorney, even though an accountant doing the same work is not engaged in the unauthorized practice of law, the lawyer partner violates canons 33, 34, and 47 *unless he withdraws from the active practice of law and no longer holds himself out as a practicing attorney.*

2. If the services which the lawyer performs are such as to constitute the unauthorized practice of law when rendered by a layman, the lawyer must be held to be actively engaged in the practice of law even though he professes to have withdrawn therefrom, and must comply in all ways with the Canons of Ethics.<sup>14</sup>

It is plain that the lawyer-partner in an accounting firm is confronted by an insoluble problem. He can not, as a practical matter,

<sup>11</sup> *Ethics Opinion 45, 37 CHI. B. REC. 411 (1956).*

<sup>12</sup> CBA, ETHICS OPINION 16 (1953). Unpublished. AMERICAN BAR ASS'N, COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES, Opinion 272 (1957). See DRINKER, LEGAL ETHICS 223-25 (1953).

<sup>13</sup> WILLIAM NELSON CROMWELL FOUNDATION LEGAL STUDIES, OPINIONS ON PROFESSIONAL ETHICS 775 (1956).

<sup>14</sup> CBA, ETHICS OPINION 16 (1953). Unpublished. ABA, COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES 272 (1957).

cease using his legal training and experience—he will inevitably get into matters in which he uses them beyond what is permissible for the non-lawyer C.P.A. The Illinois courts have not yet passed on what is unauthorized practice by an accountant; so the Illinois lawyer has no authoritative guide.<sup>15</sup> If he does go beyond what is permitted to the non-lawyer C.P.A. he must comply with the canons, which means terminating his partnership with the non-lawyer.

Accordingly, there may be merit to the suggestion made by Dean Griswold of Harvard Law School, in *A Further Look: Lawyers and Accountants*,<sup>16</sup> that a lawyer be permitted to have his membership in the bar suspended, so that he can practice accounting. He then runs the risk of getting into the unauthorized practice of law, but at least is not subject to disciplinary action by the bar, and may continue his partnership with the C.P.A. If he finds it impossible to conduct his professional activities solely as a C.P.A., he may be reinstated as a member of the bar on petition, after a proper interval. Query: What would be the effect on the lawyer's right to reinstatement if he were, in the meantime, charged with the unauthorized practice of law, and found guilty by a court?

It is the author's opinion, but not established policy of the Chicago Bar Association, that, until there is a wholly new approach to the inter-relationship between lawyers and accountants in federal tax practice, a lawyer who is a partner in an accounting firm necessarily violates canons 33, 34, and 47 unless he limits his practice to that which is open to a non-lawyer accountant, withdraws from the active practice of law, and no longer holds himself out as a practicing attorney. If he does the latter, he is still confronted by major practical problems, even if he suspends his bar membership, because of the absence of any reliable guides as to what constitutes the unauthorized practice of law in that field.

Under the CANONS OF PROFESSIONAL ETHICS as now applied, the lawyer-accountant's best course is to form a partnership with another or others having the same professional background, and rely for professional employment on "the establishment of a well-merited reputation for professional capacity and fidelity to trust" (canon 27). If no

<sup>15</sup> For various views on "unauthorized practice" by accountants see *In re Bercu*, 273 App. Div. 524, 78 N.Y.S.2d 209 (1948); *Gardner v. Conway*, 234 Minn. 468, 48 N.W.2d 788 (1951); *Agran v. Shapiro*, 127 Cal. App.2d 807, 273 P.2d 619 (1954).

<sup>16</sup> 41 A.B.A.J. 1113 (1955).

accounting firm had a lawyer on its staff or among the partners who handled the legal problems of the firm's clients, legal work in the tax field would naturally go to those lawyers who had achieved such a reputation, because the accountants would recommend them to the clients of the accounting firm. This is perfectly proper, provided the lawyer does not violate canon 27 to obtain such recommendations.