

NEW YORK STATE BAR ASSOCIATION
Professional Ethics Committee Opinion

EC 7-8 provides that a "lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. . . Advice of a lawyer to his client need not be confined to purely legal considerations."

A lawyer "is bound to form and tell his client his real opinion as to everything the client should know, and to advise him to do what he honestly believes to be in his best interest." Drinker, Legal Ethics 102-103 (1953).

Although a "lawyer is under no obligation to act as adviser or advocate for every person who may wish to become his client" (EC 2-26), his decision to withdraw once a matter has been undertaken "should be made only on the basis of compelling circumstances" (EC 2-32).

DR 2-110 (C) (1) (e) provides that a lawyer may in his discretion withdraw where his client insists, "in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer but not prohibited under the Disciplinary Rules."

Accordingly, in discharging his duty an attorney should advise his client about the reputation of a person or business entity with whom the client is about to enter into a business relationship.

This opinion is limited to the question of professional ethics involved and does not apply to any question of law.

Opinion #154 - 10/9/70 (2-70)

Topic: Solicitation of Clients
by Mail.

Digest: Impropriety of lawyer "as general counsel" to solicit subscriptions for and subscribers to a tax information service of which he is the general counsel.

Code*: DR 2-102 (E)

QUESTION

The Committee's opinion has been asked on the propriety of an attorney's operating in corporate form a "financial tax and legal information service" which would publish and distribute financial, tax and legal information to doctors. The attorney would write letters to doctors soliciting their subscriptions to the service. The soliciting letterhead would bear the corporate business name and address, the address being the same as that of the attorney, and the attorney would be listed as "general counsel". The letter would be signed by the attorney personally and would set forth his views as to the merits of the publication.

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OPINION

DR 2-102 (E) states:

"A lawyer who is engaged both in the practice of law and another profession or business shall not so indicate on his letterhead, office sign, or professional card, nor shall he identify himself as a lawyer in any publication in connection with his other profession or business."

See also ABA #57 which states:

"It is not necessarily improper for an attorney to engage in a business; but the impropriety arises when the business is of such a nature or is conducted in such a manner as to be inconsistent with the lawyer's duties as a member of the Bar. Such an inconsistency arises when the business is one that will readily lend itself as a means of procuring professional employment for him, is such that it can be used as a cloak for indirect solicitation on his behalf, or is of a nature that, if handled by a lawyer, would be regarded as the practice of law. To avoid such inconsistencies it is always desirable and usually necessary that the lawyer keep any business in which he is engaged entirely separate and apart from his practice of the law and he must, in any event, conduct it with due observance of the standards of conduct required of him as a lawyer.

"Some businesses in which laymen engage are so closely associated with the practice of law that their solicitation of business may readily become a means of indirect solicitation of business for any lawyer that is associated with them."

In Drinker's "Legal Ethics" it is stated at page 221:

"Where, however, the second occupation, although theoretically and professedly distinct, is one closely related to the practice of law, and one which normally involves the solution of what are essentially legal problems, it is inevitable that, in conducting it, the lawyer will be confronted with situations where, if not technically, at least in substance he will violate the spirit of the Canons, particularly that precluding advertising and solicitation. The likelihood of this is the greatest when the collateral business is one which, when engaged in by a lawyer, constitutes the practice of law, and when it is conducted from his law office. Thus there is apparently no doubt as to the impropriety of conducting, from the same office, a supposedly distinct and independent business of collection agent, stock broker, estate planning, insurance adjusters bureau, tax consultant, or mortgage service, or to organize and operate under a trade name, even though in an adjacent office, a corporation conducting servicing business--drafting charters and other corporate papers."

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In ABA Informal #775 it is stated:

"(1) If the separate business is clearly not necessarily the practice of law when conducted by a lawyer, and (2) if it can be conducted in accordance with and so as not to violate the Canons, and (3) if it is not used or engaged in in such a manner as to directly or indirectly advertise or solicit legal matters for the lawyer as a lawyer, and (4) if it will not "inevitably serve" as a feeder to his law practice, and (5) if it is not conducted in or from a lawyer's law office, except in cases where the volume of the law practice and business is so small that separate quarters for either is not economically feasible and where, even in such cases, there is no indication on the shingle, office, door, letterhead, or otherwise that the lawyer engages in any activity therein except the practice of law, it is not necessarily a violation of the Canons for a practicing lawyer to engage in such a business activity."

It is the opinion of the Committee the letter proposed to be used for soliciting subscriptions to the publication and references to the promoter as a lawyer in material used by the corporation would be improper.

Opinion #155 - 10/9/70 (39-70) Topic: Waiver of Defenses.
Digest: Client may direct lawyer to waive technical defenses.
Code*: EC 7-8

QUESTION

Is a lawyer bound by a client's instructions to defend all suits on the merits and to avoid the use of technical defenses?

OPINION

Once a client is fully informed as to the legal consequences of a waiver of a defense that may be available, the decision whether to forego a legal defense is ultimately for the client and not for the lawyer (EC 7-8). Accordingly, the lawyer is bound to follow the client's instructions.

Opinion #156 - 10/9/70 (45-70) Topic: Representation in Action Against Former Client.
Digest: Not proper to be attorney in action against former client who previously discussed matter with attorney.
Code*: EC 4-6
DR 5-105 (D)