

Nebraska Ethics Advisory Opinion for Lawyers  
No. 74-8

A LAWYER MAY HAVE DISTRIBUTED IN A LAY PUBLICATION, A DISSERTATION ON A LEGAL SUBJECT OF GENERAL INTEREST. WHILE HIS NAME AND THE FACT THAT HE IS A LAWYER MAY BE SHOWN, HIS OFFICE ADDRESS, HOWEVER, SHOULD NOT BE; NOR SHOULD HE MAKE HIMSELF AVAILABLE, EITHER DIRECTLY OR INDIRECTLY, TO ANSWER SPECIFIC QUESTIONS OF INDIVIDUALS OR ACCEPT EMPLOYMENT SHORTLY THEREAFTER WITH REFERENCE TO THE GENERAL SUBJECT MATTER COVERED BUT, ON THE OTHER HAND, SHOULD URGE THE READERS TO AVAIL THEMSELVES OF THEIR OWN COUNSEL. AND, UNDER SUCH CIRCUMSTANCES, THE ARTICLE MAY EVEN BE PERMISSIBLY CO-AUTHORED WITH A LAYMAN.

FACTUAL SITUATION

A Nebraska lawyer from a specified Nebraska city is a co-author with a layman of a 43 page booklet on "Estate Planning." The layman is an extension economist at the University of Nebraska. The Nebraska Farmer, a lay publication, is planning to publish the article. This lawyer is concerned about the propriety of his being named as a co-author with this extension economist, should the Nebraska Farmer wish to publish the article.

QUESTIONS PRESENTED

- (1) Would the publication of this legal article, prepared by a lawyer and layman, working together, constitute the unauthorized practice of law?
- (2) Since distribution of this article would be made to the lay public, may the name of the lawyer be shown and if so, to what extent?

DISCUSSION

Canon 3 of the Code of Professional Responsibility states

that "A lawyer should assist in preventing the unauthorized practice of law" and DR-301(A) states that "A lawyer shall not aid a non-lawyer in the unauthorized practice of law." Also, DR 3-103(A) states that "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." The basic question, therefore, is whether or not the publication of a legal article constitutes "the practice of law." The old Canons of Professional Ethics (35 & 47) forbade a lawyer to allow a layman or a lay organization to exploit him by using him to engage in unauthorized practice for a profit and Canon 47 especially was a prohibition against such conduct (See Formal Opinions 8, 31, 35, 41, 68, 98, 122, 269, 297 and 305). It seems that what constitutes unauthorized practice is a matter for the Courts in each jurisdiction to decide. It is submitted that the mere publication of a legal article, where no specific questions are answered or where no clients are involved, would not constitute the practice of law. However, if the attorney involved were to answer specific questions or obtain clients as a result of the publication, he then would be improperly involved with a layman in the practice of law and this indubitably would constitute the unauthorized practice of law. Hence, the mere publication of this article on "Estate Planning" by this lawyer and layman, nothing more shown, should not be deemed to be a violation of Canon 3 of the Code of Professional Responsibility.

The more difficult question is posed by reason of the fact that, at the Introduction, reference is made by a "1" to the name of the economist and at the bottom, his position at the University, and by a "2" to the name AND ADDRESS of the lawyer.

DR 2-101(A) states that "A lawyer shall not prepare, cause to be prepared use, or participate in the use of, any form of public communication that contains self-laudatory statements calculated to attract lay clients; as used herein, 'publication communication' includes, but is not limited to, communication by means of television, radio, motion picture, newspaper, magazine, or book."

Formal Opinion 290 (1956) states that "The question is

always ... whether under the circumstances, the furtherance of the professional employment of the lawyer is the primary purpose of the advertisement, or is merely a necessary incident of a proper and legitimate objective of the client which does not have the effect of unduly advertising him." See, also, Formal Opinion 285.

The New York Court (1963) stated that "There can be no justification for the participation and acquiescence by an attorney in the development and publication of an article which, on its face, plainly amounts to a self-interest and unethical presentation of his achievements and capabilities." Matter of Connelly, 18 App. Div. (2nd) 466, 468, 240 N.Y.S. (2nd) 126, 138.

Accordingly, it is clear that where the primary purpose or object is to aid the lawyer in securing professional employment in private practice by advertising his professional experience, attainments and ability, we find a violation of DR-2-101(A). See, also, Formal Opinions 140, 184, and 285.

On the other hand, EC2-2 states that "The legal profession should assist laymen to recognize legal problems because such problems may not be self-revealing and often are not timely noticed. Therefore, lawyers acting under proper auspices should encourage and participate in educational and public relations programs concerning our legal system with particular reference to legal problems that frequently arise. Such educational programs should be motivated by a desire to benefit the public rather than to obtain publicity or employment for particular lawyers. Examples of permissible activities include preparation of institutional advertisements and professional articles for lay publications and participate in seminars, lectures, and civic programs. But a lawyer who participates in such activities should shun personal publicity"; and old Canon 40 did provide that "A lawyer may with propriety write articles for publication in which he gives information upon the law \*\*\*."

Formal Opinions 307 and 179 seem to indicate that there is no ethical or other valid reason why an attorney

may not write articles on legal subjects for magazines and newspapers. The fact that the publication is a trade journal or magazine, makes no difference as to the ethical question involved. But it is here emphasized that it would be unethical and contrary to the precepts of the Canons for the attorney to allow his name to be carried in the magazine or other publication AS A FREE LEGAL ADVISER for the subscribers to the publication. See Formal Opinions 31, 41, 42, 56, and 162.

Additionally, it was stated in Formal Opinion 273 that "In any case where a member might well apply the advice given in the opinion to his individual affairs, the lawyer rendering the opinion concerning problems common to members of an association and distributed to the members through a periodic bulletin should specifically state that this opinion should not be relied on by any member as a basis for handling his individual affairs, but that in every case he should consult his counsel. In the publication of the opinion the association should make a similar statement."

Wise in his Legal Ethics (Second Edition, 1970) comments on this situation at pages 155-161 as follows, to-wit:

" \*\*\* A lawyer either as a writer, or in person, as the preamble to the canons indicates, no code of rules can be framed which can be comprehensive of every particular. Like many questions of ethics, good taste and a genuine desire not to lower the dignity of the profession must be the principal guides. To this must be added a sincere desire on the part of the lawyer to render a service and not to advertise himself."

"So far as a lawyer can control his publisher, the lawyer-author should permit the advertisement of the book but not the advertisement of the lawyer."

"On the other hand, commercial publishers

employing or contracting with lawyers, as writers, have a right to advertise, and lawyers may permit their names to be shown, as attorneys, in advertisements of such publishers."

"A lawyer may contribute regular monthly articles to a lay publication provided the articles are on general and not specific legal questions and are written in a dignified way to give constructive treatment of the subject and not to advertise the lawyer."

"The principal factors to be guarded against when a lawyer writes, or makes contact with the general public in other ways, are the improper advertisement of the lawyer, the giving by him of specific advice on actual individual legal problems without the relationship of client and lawyer, and enabling the layman publisher, radio, or TV station or sponsor of a program to give legal advice."

"While writing articles on general legal subjects, as contracted to individual specific problems, or appearing on radio or TV in connection with the discussion of general legal topics, even for remuneration, is not improper, a lawyer may not answer, even anonymously, inquiries for advice on individual rights."

"When a lawyer appears on a radio or TV program, he may be introduced as a lawyer but no reference should be made to his office address or to his firm, if he is a member of one. There should be no laudatory comments as to his qualifications or accomplishments."

Hence, it would appear that this lawyer should be permitted to co-author and have published in the Nebraska Farmer the treatise on "Estate Planning" and

to have it published under their names. However, the following caveats and restrictions are in order, viz:

(1) While it is proper to refer to him as an "attorney-at-law", there is no reason why the address of his office should be given. Unless he expects to benefit personally and professionally by this publication, his office address is wholly irrelevant and, therefore, should be deleted.

(2) The lawyer should not attempt to answer individual specific questions. This is covered in the introduction to the article wherein the authors state: "The discussion is necessarily simplified since estate planning requires detailed knowledge of federal and state laws pertaining to inheritance, gifts and taxes. It is not a do-it-yourself type of job. Anyone thinking of developing an estate plan should seek the counsel of an attorney, trust officer of a bank, or someone skilled in estate planning."

(3) The lawyer must do nothing which would tend to indicate that he, himself, is "available" for this type of legal work.

#### CONCLUSION

Provided that the address of the lawyer is deleted and provided further that he does not attempt to answer detailed questions of individuals, even gratuitously or anonymously, or make himself available therefor, it would not be ethically improper for this lawyer to have this co-authored article on "Estate Planning" published in a lay magazine.