

FORMAL OPINION NO. 79*

The Board of Commissioners of the Idaho State Bar has requested an opinion from the Professional Ethics Committee based upon two similar, but distinct, complaints received. Each of the complaints deals with the presumably illicit sexual conduct of an attorney.

The factual situation of each complaint is quite complex, and a detailed recitation here is not only unnecessary but also runs the risk of identifying the attorneys involved. Each of the complaints has its origin in a divorce proceeding where the attorney represented the female party.

In the first instance, it is charged that the attorney became sexually intimate with his female client, thus destroying all chances of possible reconciliation between husband and wife. In the second instance, the attorney had represented both husband and wife in the past and then undertook to represent the wife in a divorce proceeding though, in fact, it was allegedly understood that the attorney would look after the interests of both. After the attorney became sexually involved with the wife, his client, it is alleged that he assumed an extremely partisan posture regarding the property settlement between the parties. In both cases, the question is whether the conduct of the attorney is in violation of the Code of Professional Responsibility.

The Committee on Professional Ethics has deliberated at length as to whether to entertain these questions. The attorneys' alleged conduct is, at first blush, outside the scope of his professional life and as such might be thought to be beyond the pale of scrutiny by the Bar. The danger in so doing has been recognized and, it must be said, the Committee on Professional Ethics does not cherish the role of guardian of the morals and moral standards of the members of the Bar.

As one member of the Committee has offered, the Committee skates on thin ice if it attempts to evaluate the morality or immorality of a man-woman relationship in the light of the Canons of Professional Ethics.

Considerable thought has also been given by the Committee on a procedural level as to the propriety and wisdom of expressing opinions upon the past conduct of attorneys in explicit situations. The Committee feels that it should adopt the lead of the American Bar Association Ethics Committee in refraining from passing judgment as to whether there should or should not be disciplinary proceedings initiated in a particular situation. We feel that this is more properly within the scope of the Grievance Committee. Accordingly, we intend no comment, nor should any be construed, as to the morality or culpability of the attorneys' conduct in these situations.

This is not to say, however, that the Professional Ethics Committee should refrain in expressing its opinions on professional responsibility. We do so only on an abstract basis and without regard to the explicit facts involved.

An answer to the abstract question involves the interpretation of DR 1-102 which states in part:

"Misconduct.

"(A) A lawyer shall not:

- (3) Engage in illegal conduct involving moral turpitude.
- (5) Engage in conduct that is prejudicial to the administration of justice.
- (6) Engage in any other conduct that adversely reflects on his fitness to practice law."

In addition, the Committee notes that EC 1-5 provides that:

"A lawyer should maintain high standards of professional conduct and should encourage fellow lawyers to do likewise. He should be temperate and dignified, and he should refrain from all illegal and morally reprehensible

conduct. Because of his position in society, even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession. Obedience to law exemplifies respect for law. To lawyers especially, respect for the law should be more than a platitude."

The Committee feels obliged to recognize that adultery, fornication and lewd cohabitation are each defined and prohibited by Idaho law. (Idaho Code §§ 18-6601, 18-6603 and 18-6604). The general enforcement or lack thereof of these statutes in an era of rapidly changing sexual mores is not germane to the instant question. Rather, their importance lies in connection with Section 3-301, Idaho Code, and Rule 153(b), (d) and (o) of the Rules of the Commissioners of the Idaho State Bar. See, e.g., In re Padgett, 95 Idaho 141, 504 P.2d 814 (1972).

It is the considered opinion of this Committee that the determination as to whether an attorney has violated any of the above sections of the Idaho Code, is first for the courts, and not a matter for any committee of the Idaho State Bar. Upon such conviction, each case can then be judged by a Grievance Committee proceeding and evaluated less on the basis of personal morality and more on the basis of professional duty and conduct in determining appropriate disciplinary action, if any. Frankly, the Committee can envision a number of situations where the conduct of the individual attorney may be deserving of censure or not, depending on the facts of the situation and the context in which they are placed. This determination can be made only after a full hearing on the merits.

The Committee endorses the 1928 decision of the Idaho Supreme Court, In re Dampier, 46 Idaho 195, 210, 211, as illustrative of the issues. There it was the opinion of the Court that:

"It is safe to say that it is not required that an attorney be free from every vice, and that a single act of immorality, not

affecting his professional integrity, is not sufficient to justify his disbarment. . .

"Dampier has practiced law in the state since 1909, and never before has any charge been made in this court concerning his conduct. The misconduct for which he was convicted has no relation whatever to the duties of an attorney or to the practice of law. It is not suggested that he is not a lawyer of ability, that he is not honest, that he embezzled his clients' money or that he ever betrayed a trust. The sole ground on which we are urged to pronounce his disbarment is that, as a man, outside of his profession, he sent obscene letters through the mail. . . . Courts owe a duty to the lawyer as well as to the public and they should be just as willing to refuse to disbar a lawyer when his conduct is not sufficiently grave to justify such severe action as to protect the public by an order of disbarment where it is justified by the lawyer's misconduct. . . ."

The second question presented above also suggests a very real conflict of interest situation which could lead to a breach of the professional ethics and responsibility of an attorney. As this Committee has formerly stated:

"(I)t seems obvious to the Committee that when there is a potential conflict of interest between husband and wife, representation of both should be avoided by the attorney. If, in the professional judgment of the attorney, he can adequately represent the interests of each of the parties to the divorce, and if each consents to the representation after full disclosure, the attorney should be able to proceed. The lawyer, however, leaves himself open to the possibility that as the matter develops a genuine conflict will arise and that he will have to forego his representation of both of the parties."

Under the circumstances of the second question, a violation of DR 5-105 may have occurred if the lawyer has allowed his independent professional judgment in behalf of a client to be adversely affected.

In this opinion, the Committee intends in no way to condone or justify the activities of the attorneys in question. However, it is recommended that the alleged activities be first proved and then set in their proper context before a determination is made as to whether the attorney's duties to his client, his brethren at the Bar, the courts and the public have been breached.

*This is an undated opinion believed to have been rendered in the latter part of 1974.