

Nebraska Ethics Advisory Opinion for Lawyers  
No. 72-8

THIS INQUIRY RAISES THE FOLLOWING QUESTIONS:

FIRST: May a practicing attorney ethically sell his income tax business to another attorney?

SECOND: May a practicing attorney ethically inform his income tax clients that his income tax business has been sold to another attorney?

THIRD: May the attorney-buyer of the income tax business ethically notify the income tax clients of the attorney-seller that he has acquired the latter's income tax business?

FOURTH: May a practicing attorney ethically sell his income tax business to a layman?

FIFTH: May the attorney-buyer of the income tax business employ the secretary of the attorney-seller and give her a percentage of the income from the income tax business?

For the reasons hereinafter stated, all questions are answered in the negative.

#### INTRODUCTION

The following observations are applicable to all questions raised:

When an attorney engages in the practice of law, he necessarily holds himself out as an attorney, and if his

practice consists, among other things, of doing income tax work, a distinction between his professional practice and his income tax business is not a permissible distinction. Under such circumstances, he cannot occupy the dual positions of a lawyer and a layman. Thus in Formal Opinion No. 305, ABA, March 22, 1962, it was recognized that a person who is a lawyer cannot free himself of the ethical restraints of the profession in carrying on an activity which constitutes the practice of law merely by claiming that he is to be regarded as a layman for a particular purpose. And in *State ex rel. Nebraska State Bar Association v. Butterfield*, 172 Neb. 645, the court held that the preparation of income tax returns by an attorney, during the time of his suspension, constituted the practice of law "whether or not it might under some circumstances be properly performed by others not admitted to the bar". The court said (p. 649):

The respondent admits that he prepared . . . income tax returns during the period of his suspension. Admittedly respondent performed such work prior to his suspension . . . It seems clear to us that the doing of such work is within the province of a lawyer to do. It is properly identified as the practice of law, whether or not it might under some circumstances be properly performed by others not admitted to the bar.

FIRST: If a practicing lawyer sells his income tax business, he sells a part of his professional practice, not a nonprofessional business. Formal Opinion 266, ABA, June 2, 1945, says:

The good will of the practice of a lawyer is not, however, of itself an asset, which either he or his estate can sell. As said by the Committee on Professional Ethics of the New York County Lawyer's Association in its Opinion 109 (October 6, 1943):

Clients are not merchandise. Lawyers are not tradesmen. They have nothing to sell but personal service. An attempt, therefore.

to barter in clients, would appear to be inconsistent with the best concepts of our professional status.

SECOND: Notification of sale is not ethically permissible because there is nothing to sell.

THIRD: Notification of acquisition is not permissible because there is nothing to sell.

FOURTH: A practicing attorney cannot sell a part of his professional practice to a layman, or to a lawyer.

FIFTH: The fifth question requires a negative answer because fee splitting with a layman is not permissible. (It is assumed that the secretary is not a lawyer.) DR 3-102, Code of Professional Responsibility, provides:

(a) A lawyer or law firm shall not share legal fees with a non-lawyer . . . .

The sale of a lawyer's practice ordinarily would require the transfer of at least some of the files. If an income tax practice were sold, it would be necessary, for example, that the buyer have knowledge of depreciation schedules. It is readily apparent that the sale of a professional practice probably would result in a wholesale violation of the confidences of clients, Canon 4, Code of Professional Responsibility.

Generally speaking, the attorney-client relationship is a consensual relationship which is preceded by the exercise of the selective process by the client. The sale of a lawyer's professional practice contains neither of the two essential ingredients.