Recent Ethics Opinions

I. Advertising and Solicitation

The case of *Bates v. State Bar of Arizona*[1] established that lawyers may not be entirely precluded from advertising their professional services. The opinion, however, left the states with some authority to prevent advertising that is misleading and/or deceptive to the public. A number of attorneys have sought a determination by the state bar commissions of the propriety of certain advertising methods. The Illinois Bar Association Ethics Committee was asked to render an opinion concerning a written advertisement reading, "EXP. in REAL ESTATE CLOSINGS . . . WILLS as low as $35 . . . ."[2] The Committee, addressing first the propriety of the abbreviation "EXP.", found that the term was ambiguous and misleading. The abbreviation, most likely intended to mean "experienced," could be construed as a representation that the attorney was an "expert" in real estate matters; under the mandates of the Illinois Code of Professional Responsibility (ISBA Code), Disciplinary Rule 2-101(B)(8),[3] a representation that an attorney was an "expert" in a particular field of law would constitute "a representation . . . regarding the quality of legal services,"[4] a representation which the ISBA Code prohibits. The abbreviation further connotes a specialization in the field of real estate closings in violation of ISBA Code, Disciplinary Rule 2-105.[5] The Committee went on to state that the use of the word "experienced" would still imply a superior status in violation of the ban against statements of expertise. As for the advertisement of fees and rates, the words "as low as" were found to be deceptive because they failed to fully apprise the prospective client of the possible contingencies inher-

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1. 433 U.S. 350 (1977).

2. 68 ILL. B.J. 554 (1980).

3. The ILLINOIS CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter cited as ISBA CODE] differs in some respects from the form of the AMERICAN BAR ASSOCIATION CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter cited as ABA CODE]. Reference in this paragraph to any Code section is intended to indicate the ISBA CODE.

4. 68 ILL. B.J. at 554.

5. The provision in the ISBA CODE, Disciplinary Rule [hereinafter cited as DR] 2-105 is similar to the statement contained in the ABA CODE DR. 2-105.

ent in performing professional services. "A lawyer may state a fixed fee for a 'specific legal service' (ISBA Code, DR 2-101(B)(5)(b)), or a 'range of fees' if there is a 'reasonable disclosure of all relevant variables and considerations' (ISBA Code, DR 2-101(B)(5)(c))."[6]

The Wisconsin Bar Association Ethics Committee has approved an advertisement stating that the lawyer's practice is "limited to" a certain field of law.[7] In the Committee's opinion, such an advertisement constitutes a statement of professional qualification within the scope of advertising permitted by the Wisconsin Code of Professional Responsibility.[8] The advertisement cannot, however, be in any way deceptive or misleading.

The Chicago Bar Association Committee on Professional Responsibility was confronted with a novel question concerning the propriety of an "advertising program" consisting of prerecorded telephone messages providing information on certain state law issues.[9] Each message was followed by an invitation to the listener to first consult his own attorney about the matter, and then to contact the sponsoring law firm for a further discussion of the issue. The availability of the informational service was publicized through direct mail advertisements which included biographical data about the sponsoring firm. The Committee, citing Ethical Considerations (EC) 2-1, 2-2, and 2-5, concluded that the use of the prerecorded telephone messages was proper; the messages served a limited purpose in educating the public and faciliting the recognition of legal problems. The Committee warned, however, that "the primary purpose of the taped message must be educational,"[10] and the message must be worded so it will not mislead the public into believing that the message provided a general solution to any problem of that nature. The use of the direct mail advertising system was specifically permitted by the Chicago Bar Association Code of Professional Responsibility and did not constitute solicitation. The taped messages themselves did not run afoul of the general ban against solicitation; the listener had taken the initiative and made the call, resolving any question in that

6. 68 ILL. B.J. at 554.
7. 53 WIS. B. BULL. 32 (March 1980).
8. *See* ABA CODE, DR 2-101(B).
9. 61 CHI. B. REC. 312 (1980).
10. *Id.*

regard.

The American Bar Association Committee on Ethics and Professional Responsibility has considered the propriety of the publication in a local newspaper of a "canned column" subscription service[11] The service would provide practicing attorneys with short law-related articles which could be placed by the attorney in the local newspaper as a public service message. The articles would be followed by the name of the attorney submitting the article for publication, his address, telephone number, and a small photograph; optional information would include the number of years the attorney had been practicing in the county, and an invitation to the reader for a free consultation with the attorney. The Committee resolved the question affirmatively, stating that the publication of the service did not violate any provisions of the ABA Code of Professional Responsibility. Traditionally, the Committee noted, the Code permitted an attorney to publish educational, law-related articles in local publications, although the Ethics Committee had advised against the inclusion of the attorney's name and address. However, the amendments to the Code following the *Bates*[12] case in 1977 now permit the attorney to designate his name and address in connection with such articles. The Committee was of the opinion that the lawyer could properly append his name, address, and related information to the published articles. The appended information, however, could not imply that the lawyer was the author of the article, when in fact the article was obtained from the "canned subscription" service. Such a statement would be misleading and in violation of DR 2-101(A).

The general prohibition against solicitation contained in the Code of Professional Responsibility places limitations upon the ability of an attorney to accept proffered employment when the attorney has voluntarily advised the prospective client to take legal action.[13] The ABA, in Informal Opinion 1439,[14] has nevertheless approved a form of solicitation by allowing a legal services lawyer to seek out additional members of a class involved in a class action suit and advise them of their legal rights. This permissiveness in

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11. ABA Committee on Professional Ethics, Informal Opinions (hereinafter cited as Informal Opinions), No. 1464 (1980).

12. Bates v. State Bar, 433 U.S. 350 (1977).

13. ABA Code, DR 2-104(A).

14. Informal Opinions, No. 1439 (1979).

legal services-type class action suits apparently does not run afoul of the prohibition contained in DR 2-104(A)(5).

II. Professional Practice

The growing incidence of the practice of law across state lines has promulgated a number of ethics opinions concerning the affiliation of two law firms located in different states. The Wisconsin Bar Association Ethics Committee, in a recent opinion, approved of an association between a Wisconsin firm and a firm located in the neighboring state of Michigan.[15] The firms involved in the situation maintained their own separate offices and identities; legal services were performed for the clients of the other firm on a referral basis. The fee for such services was charged, at the normal hourly rate, to the affiliated law firm, and that firm was responsible for the collection of the fee from the client himself. Each firm retained its own separate letterhead, with the other firm listed on the letterhead as the "Wisconsin office" or the "Michigan office." The jurisdiction in which each member of the firm was licensed to practice was designated. The Ethics Committee, relying on ABA Formal Opinion 316,[16] found that the affiliation between the two firms was not improper. In its opinion, as long as "the local [firm is] admitted in the state and [has] the ability to make, and be responsible for making decisions for the lawyer group,"[17] the interstate association is proper. The letterhead, designating the out-of-state firm as the "Michigan office," was determined to be potentially misleading since it implied an actual partnership and the authorization to practice law in the state. The notation of the particular jurisdiction in which each attorney was licensed to practice was, however, enough to bring the letterhead into compliance with the Code of Professional Responsibility.

The Kentucky Bar Association Ethics Committee addressed the more difficult issue of the nature of an association between a Kentucky lawyer and a New York law firm.[18] The Kentucky lawyer wished to enter into a partnership with the out-of-state firm for the purpose of accepting commercial accounts referred to the Ken-

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15. 53 WIS. B. BULL. 32 (March 1980).

16. ABA COMMITTEE ON PROFESSIONAL ETHICS, OPINIONS [hereinafter cited as ABA OPINIONS,] No. 105 (1967).

17. 53 WIS. B. BULL. at 32 (citing ABA OPINIONS, No. 316 (1973)).

18. 44 KY. BENCH & B. 42 (1980).

tucky lawyer by the firm. The lawyer agreed to pay the New York firm 3% of the money collected on the accounts, or 50% of all non-contingent fees. The Committee, citing DR 2-102(C) and a Kentucky Bar Association Opinion, found the association improper on the grounds that an arrangement involving only referred business was not in actuality a partnership. Under the ethical mandates of the Code, an attorney is subject to discipline if he "hold[s] himself as having a partnership with one or more other lawyers unless they are, in fact, partners."[19] With regard to the division of fees, the Committee relied on DR 2-107(A), requiring that a division of fees must be accomplished by allocating the portion of the fee in proportion to the services performed. The mere referral of business by the New York firm was insufficient to justify the agreed upon division of fees.

What becomes of the retired lawyer who moves from one state to another and continues to perform advisory services for his old firm while remaining "on call" to a new firm in the new state? The Illinois Bar Association Ethics Committee has advised that a retired lawyer may remain in association with two law firms in different states, subject to some general limitations.[20] First, the retired lawyer must be admitted to practice in each of the states in which he intends to perform legal services. Secondly, the letterhead of each firm with which the lawyer remains associated may designate the attorney as "Of Counsel" only. He may not be called an "associate," since that term implies one who is subject to the employing firm's policies; nor may he be referred to as an attorney "associated with" the firm, for such a phrase implies a "joint venture" kind of relationship, a closer relationship than in fact exists in this situation. The term "Of Counsel," defined in DR 2-102(A)(4), connotes a "continuing relationship" of some kind with the law firm. Finally, the number of law firms with which the retired attorney may be so associated is limited, in compliance with ABA Formal Opinion 330,[21] to two firms.

The propriety of a law partnership between attorneys, one of whom is a professional corporation, has been upheld by both the ABA and the Illinois Bar Association.[22] Originally, the ABA per-

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19. ABA Code, DR 2-102(C).
20. 68 Ill. B.J. 485 (1980).
21. ABA Opinions, No. 330 (1974).
22. 68 Ill. B.J. 485 (1980).

mitted only "traditional" partnership arrangements between individual attorneys. Any other type of arrangement was considered a "hybrid," and was improper under DR 2-102(C). The Illinois Ethics Committee noted that the ABA version of DR 2-102(C) was amended to provide for a partnership arrangement between an attorney and a professional corporation. Although the Illinois Code of Professional Responsibility had not been so amended, the Committee found nothing which prohibited a similar permissive attitude toward the partnership arrangement. The Committee did, however, place some limitations on the arrangement: the employees of the corporate partner must be under the control of the partnership itself, and the firm letterhead and other stationery must reflect the status of the partners.

III. Confidences

An attorney must be diligent in assuring that his employees and assistants in the firm understand and observe the ethical obligation not to disclose any client confidences or secrets which may come to their attention in the course of their employment.[23] The duty to protect against improper disclosure is especially important in the situation in which the spouse of an attorney in one law firm is employed in a different law firm in the same location. In a recent opinion,[24] the Illinois Bar Association Ethics Committee was faced with the following situation: L, a lawyer in law firm A, sues a corporation for non-payment of fees. The corporation employs law firm B for its defense. L's wife is a secretary in law firm B, and has access to L's notes of the case. The Committee found that it would not be improper for law firm B to continue to defend the corporation in the lawsuit. Interpreting EC 4-2 and 4-5, the Committee stated that employees and secretaries of a law firm are held to the same ethical duty not to disclose confidential communications as an attorney; the lawyer has the obligation of assuring the proper observance of that duty. According to the facts of the particular situation, there had been no disclosure of client confidences between the lawyer L and his spouse, and thus there was no need for law firm B to withdraw from the case. The corporate client should, however, be informed of the situation, and it should be free to select other counsel if it so desires.

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23. 55 CAL. ST. B.J. 206 (1980).
24. 68 ILL. B.J. 484 (1980).

A lawyer for the executor of the estate of a deceased may, without violating the duty to protect against betrayal of client confidences, inform a person named as a beneficiary in a joint will of the existence of such a will, especially when the lawyer had mistakenly denied the existence of the will in a prior communication with the beneficiary.[25] The Illinois Bar Association Ethics Committee felt that the fact of the existence of the will was not a "confidence" told by the client to the attorney, since it was not gleaned from a communication with the client, the executor. Although the fact fell "vaguely" within the definition of a "secret," the Committee justified its disclosure on the grounds that the information was not embarassing or of personal importance to the executor. Although a lawyer is generally under no obligation to trace nonclients to inform them of a given fact, he should, in the present situation, seek out those other individuals, since he had erroneously informed them of the fact at an earlier time.

IV. Conflicts of Interest

A number of ethical questions have arisen concerning the dual representation of a husband and wife. The questions have concerned the conventional situation in which the lawyer represents both the husband and wife in an action by one against the other; the propriety of representation in more unconventional situations has also been of interest. The New York State Bar Association Committee on Professional Ethics dealt with the difficult question of the propriety of the dual representation of 1) a wife (A), suing her husband (B) for a divorce, and 2) the husband (C) of a woman (D), who had formed a meretricious relationship with husband (B), in a separate matrimonial proceeding.[26] Although at first the interests of the two prospective clients, A and C, appear to be in harmony, the Committee found that the number of issues on which the interests could differ was too great to justify the simultaneous representation of the two clients. The Committee cited DR 5-105(A), requiring an attorney to decline proffered employment "if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would likely involve him

25. 68 ILL. B.J. 750 (1980).
26. 52 N.Y. ST. B.J. 258 (1980).

in representing differing interests . . . ."[27] As for the possibility of the parties' consent to the representation, the Committee noted that the potential for conflicts of interest inherent in the matrimonial situation was so great that it precluded the possibility of knowledgeable, informed consent.

An attorney's proposal to provide "mediation services" for a husband and wife requesting a divorce has been rejected as improper on the grounds that the attorney would thereby be placed in an "unresolvable conflict position" in violation of Canon 5.[28] The attorney requesting the opinion of the Wisconsin State Bar Standing Committee on Professional Ethics intended to 1) apprise the husband and wife of their legal rights and obligations, 2) handle disputes over the proposed settlement agreements, and 3) prepare the necessary legal documents and separation agreement, and appear in court to process the paperwork. The attorney would not, however, undertake to represent either party in the event an actual dispute arose, and each party would be urged to obtain an independent legal opinion of the proposed settlement agreement. The Committee, citing EC 5-20, the provision allowing an attorney to act as a mediator, found that the proposed mediation service extended the lawyer's duties one step beyond the service intended by the ABA. The large number of possible conflicts would effectively preclude the attorney from performing such a service. Further, the lawyer would give the impression of performing the traditional advice-giving role presumably in the best interests of each party; he may therefore mislead the client into accepting the proffered advice blindly.

An interesting question was proposed to the Texas Bar Association Professional Ethics Committee concerning the simultaneous representation of a husband and wife, H and W, defendants in a lawsuit filed by A, and the executor E of the estate of B, A's deceased wife.[29] Although E, as executor, had not asserted any claim against H and W, the estate would have an interest in any money or other property recovered by A in the pending suit. The lawyer wanted to continue to represent the administrative details of the estate, but he had advised the executor to obtain other counsel for the completion of A's suit. The Texas Ethics Committee held that

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27. *Id.* (citing DR 5-105(A)).
28. 53 Wis. B. Bull. 61 (Jan., 1980).
29. 43 Tex. B.J. 832 (1980).

the dual representation would be improper under Canon 5. The mere possibility that B's estate could have an interest in the pending lawsuit between H and W and plaintiff A was sufficient to prohibit the representation.

It has been held that one member of a law firm, Lawyer A, may not draft a will for the spouse of his partner, Lawyer B, when B is the beneficiary of the will and would receive the entire estate to the exclusion of the children of B.[30] The Ethics Committee of the State Bar of Wisconsin relied on several state supreme court cases which held that a lawyer may be the scrivener of a will in which he is designated as a beneficiary only when he "stands in relationship to the testator as the natural object of the testator's bounty."[31] The partner or associate of that lawyer, according to a prior opinion of the Committee,[32] is precluded from drafting the will because of the same reasons. The partner or associate does not qualify as "independent counsel" as required by a recent Wisconsin case.[33]

The Wisconsin Ethics Committee apparently takes a permissive view toward the propriety of a husband and wife serving in capacities in which potential conflicts of interest could arise. The Committee found no impropriety in the employment of an attorney as the village counsel when his spouse served on the village board which possessed the power to appoint or remove the attorney.[34] As long as the attorney could maintain his "independent professional judgment," and the Village Board was apprised of the relationship, the attorney could ethically serve in that capacity.

The Illinois Bar Association Ethics Committee has recently addressed the issue of the husband and wife practicing law in the same community. The Committee was faced with the specific question of the proper course of conduct in a situation in which the husband is a state attorney in a particular county, and the wife practices law in the same locality.[35] The Committee found that it was ethically proper for the wife to represent clients in cases in which the husband was not involved; if the representation involved

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30. 53 WIS. B. BULL. 79 (Apr., 1980).

31. *Id.*

32. Wisc. State Bar Standing Committee on Professional Ethics, Informal Opinion 2-68, 52 WIS. B. BULL. 75 (June 1979).

33. State v. Beaudry, 53 Wis. 2d 148, 191 N.W.2d 842 (1972).

34. 53 WIS. B. BULL. 60 (July, 1980).

35. 69 ILL. B.J. 55 (1980).

a criminal violation in the county in which the husband was employed, however, the representation would violate the Code's prohibition against conflicts of interest. A cautionary note was added to the opinion: in situations of this kind, the husband and wife should be sure that DR 9-101(C), the provision prohibiting any implication of improper influence on a public official, was not violated. The Committee recognized the need for a reappraisal of the considerations involved in these husband and wife situations.

Outside of the problems of the husband and wife relationship, the Committee on Professional Ethics of the New York State Bar Association has found an inherent conflict of interest in the preparation and execution of a will for a client by an attorney employed on a full-time basis by a life insurance company.[36] The attorney in the situation was employed by the insurance company to prepare estate plans for the insurance company's customers. The lawyer at times attempted, upon the request of the customers not represented by other counsel, to draft wills and implement the abovementioned estate plans. The attorney would presumably have the best interests of his employer, the insurance company, in mind while performing his work; when he undertook to advise a customer of the best manner in which to dispose of his estate, he would become involved in the problem of "divided loyalties."[37] The attorney in the present situation was specifically prohibited from engaging in the dual representation.

V. Duty to Represent Client Competently

Disciplinary Rule 6-101(A)(2) states that a "lawyer shall not . . . [h]andle a legal matter without preparation adequate in the circumstances."[38] In the usual situation, the attorney may achieve the level of preparation he feels is necessary for the proper handling of the question posed by the client. If the client requests it, however, may the attorney render a "cursory opinion" on a legal matter entrusted to him? The Boston Bar Association Committee on Professional Responsibility has answered the question in the affirmative.[39] A client had requested an attorney to render a "cursory opinion" on a legal matter. The cost of a thorough and com-

36. 52 N.Y. St. B.J. 257 (1980).
37. *Id.* at 258.
38. ABA Code, DR 6-101(A)(2).
39. 24 B.B.B. 24 (May, 1980).

prehensive examination of the problem would be excessive, and the client had specifically instructed the attorney to avoid incurring that cost. The Committee found that rendering such an opinion was not violative of the attorney's duty, under Canon 6, to represent his client in a competent manner. Citing DR 6-101(A)(2), the Committee emphasized that the level of preparation necessary to properly serve the needs of the client was subject to the judgment of the lawyer. In making that determination, the attorney should consider such factors as the economic ability of the client, the necessity for quick resolution of the problem, and the subject matter of the legal problem. The lawyer should, of course, be sure that his client understands the nature and extent of the advice given by the attorney in such a situation. The Committee also noted that it would be ethically improper to utilize an exculpatory agreement to exonerate the attorney from any liability for the advice given.

Finally, an attorney may not neglect the services he is currently performing for a client in an effort to secure a favorable settlement of a dispute over salary and fringe benefits.[40] Such a compromise of the attorney's services would violate the Canon 6 duty of competence.

VI. Duty to Represent Client Zealously

Although it is usually illegal and unethical for an attorney or any other person to record a conversation with a third party without the consent of the parties involved, a lawyer may properly give advice to his client concerning the legal, moral and social ramifications of recording the conversation.[41] The New York State Bar Association Ethics Committee examined the duty of the lawyer to his client, as provided in Canon 7, and determined that the attorney should inform his client of all possible consequences of such an action. The instruction in EC 7-8 to insure that the client is fully apprised of the possible consequences of a course of action is not confined to purely law-related issues.

VII. Unauthorized Practice of Law

The requirement that legal services be performed by a quali-

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40. 55 CAL. ST. B.J. 208 (1980).
41. 52 N.Y. ST. B.J. 162 (1980).

fied attorney has been strictly followed by state bar associations. In a recent Wisconsin Bar Association opinion, the Standing Committee on Professional Ethics considered the propriety of the appearance at a real estate closing of a paralegal in place of an attorney.[42] The paralegal was also a licensed real estate broker, and the file had been prepared previously by a licensed attorney. The Committee, citing DR 3-101, nevertheless found the appearance of the paralegal at the real estate closing to be the unauthorized practice of law. The client, the opinion stated, had retained the attorney to represent him at the closing for the purpose of explaining the import of any legal documents that might be involved. Given the nature of the proceeding and the amount of money involved, legal questions are bound to arise, and the paralegal would be unqualified to answer them. The prohibition contained in DR 3-101 would effectively prevent the paralegal's representation.

An attorney employed by a business entity other than a law partnership or professional corporation must exercise restraint in respect to the type of services he renders to the firm's clients. The Wisconsin Bar Association Standing Committee on Professional Ethics has ruled that an attorney, withdrawn from the active practice of law, but employed by an accounting firm, may not indicate his status as an attorney on his business cards or on the firm's letterhead.[43] The indication of "J.D." or "attorney" on business stationery would induce the public to believe that the attorney was engaged in the practice of law. "[A]n attorney acting as house counsel and otherwise holding himself as a lawyer for an accounting firm, may not render any services to the firm which would be considered the practice of law if rendered directly to the firm's clients."[44] If the attorney does not hold himself out as a lawyer, then, according to the Committee, he may not render directly to the client such services as would be considered the practice of law if performed by an attorney engaged in the practice of law.

VIII. Judicial Ethics

The use of campaign slogans in a judicial election is limited by the Code of Judicial Conduct. Canon 7 provides that "[a] candidate [for judicial office] should not make pledges or promises of

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42. 53 Wis. B. Bull. 79 (Apr., 1980).
43. 53 Wis. B. Bull. 60 (July, 1980).
44. *Id.*

conduct in office other than the faithful performance of the duties of the office."[45] The Michigan Bar Association Ethics Committee was asked to render an opinion as to whether a campaign slogan, "A strict sentencing philosophy! A hard working man!"[46] constituted a "pledge" or "promise" prohibited by Canon 7, or merely a "statement of general philosophical attitude about which voters in a democratic society are entitled to know."[47] The Committee, relying on a prior Michigan Ethics opinion, found that the use of the slogan "A strict sentencing philosophy!" was improper. Regardless of whether the slogan fell within the specific definition of "pledge" or "promise," the phrase implied that the candidate would render his judicial decisions with bias and "without regard to individual mitigating circumstances."[48] The ABA Ethics Committee, in Informal Opinion 1448, addressed the same question, and added that the phrase "A hard working man!" did not violate any express provisions of Canon 7. The ABA Committee noted, however, that judicial campaign techniques should be dignified in accordance with the spirit of Canon 7.

The ABA Ethics Committee found no impropriety in the use by an incumbent judge of a photograph of the judge wearing his judicial robe in his campaign for re-election, as long as the photograph complied with other provisions of the Judicial Code and the judge usually wore the robe in his judicial capacity.[49]

Is it proper for a former judge to be addressed as "Judge" while representing clients before the same court over which he presided during his term of office? The ABA Ethics Committee concluded that such a practice would be "unseemly," and might assert an influence on the normally unbiased determination of issues.[50] The reference, according to the ABA, would appear to be "conduct calculated to gain special consideration,"[51] an action contrary to the intentions of the Code. Further, the Committee, citing EC 9-4, felt that such a practice would tend to imply that the former judge

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45. ABA Code of Judicial Conduct, Canon 7.
46. 59 Mich. B.J. 166 (Mar., 1980).
47. *Id.*
48. *Id.*
49. Informal Opinions, No. 1450 (1980).
50. Informal Opinions, No. 1448 (1979).
51. ABA Code, Ethical Consideration 7-36.

could circumvent the impartial procedure of deciding contested issues. A former judge should not be addressed by his former title in an adversary proceeding.