Opinion 289
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18 Baylor L. Rev. 356 (1966)

SOLICITATION - ADVERTISEMENTS - CLASSIFIED TELEPHONE OR CITY DIRECTORY - LISTING AS SPECIALIST - PATENT ATTORNEY

A registered U. S. Patent Attorney may list himself as a Patent Attorney in the classified or city directory or in any other manner permitted by pertinent patent regulations, if he limits his practice to the scope of his license from the U. S. Patent Office; out the Registered U. S. Patent Attorney who also practices law under or by reason of his Texas license may not list himself or his qualifications on letterheads or in a telephone directory or in any other way forbidden to other Texas lawyers. Except as provided in Canons 59 and 42 and the pertinent interpretative opinions, the fact that the scope of one's practice is influenced by the existence of a limited-license from another source such as the U. S. Patent Office is immaterial and may not be used as the basis of any direct or indirect solicitation or advertisement.

Canons 24, 39, 41, 42.

QUESTION

In the case of *Free v. Bland*, 92 S.Ct. 1089, 369 U.S. 663, which arose from Texas courts, the Supreme Court of the United States wrote that ". . . a state's acknowledged power, which interferes with or is contrary to federal law, must yield," citing *Gibbons v. Ogden*, 9 Wheat 1, and concluded that a federal administrative regulation promulgated pursuant to statute "is a federal law which must prevail if it conflicts with state law."

In *Sperry v. Florida*, 83 S. Ct 1322 (1963), *Gibbons v. Ogden* was again cited by the United States Supreme Court and it was noted that "Congress has provided that Commissioner of Patents 'may prescribe regulations governing the recognition and conduct of agents, attorneys, or other persons representing applicants or other parties before the Patent Office'."

Patent Office Rule 345 was promulgated in August, 1957 (22 F.R. 6898) pursuant to statutory authority granted the Commissioner of Patents under Title 35 of the United States Code, and although Rule 345(a) prohibits advertising and solicitation, Rule 345(b) specifically states for those registered to practice before the United States Patent Office, such as Patent Attorney, that:

"(b) The use of simple professional letterheads, calling cards, or office signs, simple announcements necessitated by opening of office change of association, or change of address; distributed to clients and friends, and insertion of listings in common form (not display) in classified telephone or city directory and listings of professional cards with biographical data in standard professional directories shall not be considered a violation of this rule."

(1) The question is raised whether Registered U. S. Patent Attorneys who are members of the Texas bar may also list themselves as Patent Attorneys in the classified telephone or city directory; especially as Opinion No. 127 of March, 1956 (issued prior to these decisions), seems to permit a choice of a single listing in the classified directories, and to deprive a listing under Attorney would seem to be an exactment of condition contrary to the spirit of the Free decision.

(2) The other question raised is whether the specialized profession of Registered Patent

Attorney may be indicated on letterheads, calling cards and office signs to indicate that attorney's federally recognized and permitted notice of specialization, such seems to be consistent with Opinion 52 of May, 1952.

Therefore, it would appear that opinions interpreting or modifying the Texas canons to the extent that these canons are in no way intended to contravene the decisions of the United States Supreme Court or to interfere with or be contrary to federal regulations, seem appropriate and it would be appreciated if the Texas Professional Ethics Committee could clarify these areas.

OPINION

The basic pattern of regulation of law practice is one of state license permitting one generally to practice law. The States exact, as a condition to practice of law, a showing by an applicant for a license that he is of good moral character and possessed of a sufficient minimum knowledge and understanding of a broad range of legal principles. This control of law practice is not for the purpose of creating a specially privileged and protected class but rather it is for the purpose of affording protection to the legal rights of all persons by assuring that they will receive legal advice and legal representation only from those proven to be generally qualified.

All attempts to define the practice of law (or the unauthorized practice of law) solely with regard to whether legal principles are known or used, are predestined for failure; for today every businessman must know and use some law, and some businessmen (e.g., title abstractors, insurance agents, insurance adjustors, tax accountants, labor negotiators) must have and use a rather specialized knowledge of certain limited areas of law. Where one not licensed as a lawyer is performing for another work requiring knowledge of some area of law he usually will be regulated by the state to the extent necessary to protect the public. If his work is of such nature that he should have a firm grasp of legal principles, or if his work is such that it should be done for another only by one who is held to the ethical standards of a lawyer, no regulation satisfactorily protects the public except the requirement that this work be done only by a licensed lawyer, and in those situations it usually will be held to be the unauthorized or illegal practice of law for one not so licensed to do the work, and this is particularly true if lawyers are regularly available to do the work at reasonable prices.

Ethical standards are imposed, largely by the Canons of Ethics, upon lawyers. They are imposed to protect the public; usually it can readily be seen that the canon's protection is direct, although sometimes it is also indirect as when a standard is imposed to increase the dignity of the profession so as to increase the public's respect for law and order and the courts (of which the lawyer is an important officer), or when it is imposed to protect the lawyer against the competition of an unlicensed person who should not be permitted to act for another in a certain area of work but against whom the lawyer cannot compete except by lowering the quality of his work or by misleading clients by giving unfounded bold assurances of success in order to secure the legal business or by violating other standards that were promulgated to protect the public.

The unusual pattern of regulation of law practice is that of a limited license to practice in a limited area of law. This is seldom found on a state level because the states tend to hold that the courts have inherent power to regulate the practice of law, and courts tend to look with disfavor on limited licenses because the complex interplay of legal principles is such that it is reasonable to think one cannot be well qualified even as a limited-class lawyer unless he is or has been a general practitioner or lawyer. The limited-license is a creature of the legislature and of the executive branch and indeed is rarely encountered except in the federal system. The license to

practice before the Patent Office creates a limited-lawyer of this sort; he is called a Patent Attorney if he coincidentally is a lawyer generally licensed by a state and a Patent Agent if he is not. There are dozens of limited-licensing agencies in the federal system. The Patent Office today appears to be trying to hold its limited licensees or "limited lawyers" to ethical standards generally prevailing in the state systems.

The limited-lawyer created by the Patent Office necessarily is permitted not only to perform the limited-area law practice he is licensed to do, but to hold himself out to the public as being authorized to perform these acts, and this is the gist of the *Sperry* decision. He cannot hold himself out as a general lawyer, for this is not the scope of his limited license, so he must and does hold himself out as a Patent Lawyer or under some similar designation which does not misrepresent the scope of his limited license.

It seems to follow that the holder of this limited license may hold himself out in whatever manner the Patent Office permits and which does not mislead the public as to the scope of his limited licenseXby use of letterheads, calling cards, office signs, announcement cards, telephone directory listings, etc.

For several reasons not necessary to reiterate now, Texas has seen fit (Canon 24) to prohibit all solicitation, direct or indirect, of legal business by holding one's self out as having special talents or qualifications of any sort (except as provided in Canons 39 and 42) . One reason is that Texas has not yet set up any licensing control over attempted specialization by its general-license practitioners. This does not mean that the limited-license, federal practitioner of one sort or another cannot carry on his limited practice and hold himself out as so doing to the extent permitted by his limited license; on the contrary, he can, without interference from the state.

Thus the one who holds both a limited license from a federal agency and a general license from the State of Texas has no problem if he limits his practice to the scope of his limited license. (He might be wise to indicate clearly on any letterheads, etc., that do not conform to state ethical requirements that he is limiting his practice to the scope of his limited incense.) But if he wishes to practice under his general state license, he must conform to state standards and this means that all "specialists" are handled as general practitioners (Canon 41) and that as a Texas lawyer he cannot hold himself out by means of letterheads, calling cards office sign, etc., as having any special talents or qualifications. (See Opinions 127, 190, 192, 198, 199, 200, 222 249 and 250.) This in no way intrudes upon his limited license, if because of his limited license he may perform acts which would also be the practice of law if performed by a generally licensed lawyer, he obviously may perform those acts while limiting his practice to the scope of his limited license, for the reason that those acts are within the scope of his limited license. And if the acts he desires to perform are not within the scope of his limited license but are within the scope of his general state license, the fact he has the limited federal license is immaterial and his limited license is not intruded upon by a requirement that he conform to the ethical standards required by his state license before he performs acts within the scope of his general state license and without the scope of his limited federal license. Any other view would necessarily open the gates to all state lawyers to make representations about various special talents and qualifications they might profess to have, which would lessen the protection now given the public because it would encourage the public to select lawyers on the basis (rather than of legal ability and skill) of imaginary qualifications or of real qualifications which were either immaterial to the matter at hand or were cleverly puffed up and exaggerated.

It follows that the questions are to be answered as follows: (1) A Registered U. S. Patent Attorney may list himself as a Patent Attorney in the classified or city directory or in any other manner permitted by pertinent patent regulations, if he limits his practice to the scope of his license from the U. S. Patent Office; but the Registered U. S. Patent Attorney who also practices law under or by reason of his Texas license may not list himself or his qualifications on letterheads or in a telephone directory or in any other way forbidden to other Texas lawyers. (2) Except as provided in Canons 39 and 42 and the pertinent interpretative opinions the fact that the scope of practice of a Texas lawyer is influenced by the existence of a limited-license from another source is immaterial and may not be used as the basis of any direct or indirect solicitation or advertisement. (8-1.)