PRACTICE OF LAW: Before State Boards; Blue Sky Commissioner, etc.

October 1, 1937. 10/2

FILED 56

Honorable Russell Maloney,
Commissioner of Securities,
Secretary of State's Office,
Jefferson City, Missouri.

Dear Mr. Maloney:

We have your request of February 25, 1937, for an opinion of this office, reading as follows:

> "This department is desirous of obtaining from you an opinion regarding the practice before this commission by persons not licensed as Missouri lawyers. Of course, it is understood that any person may appear in his own behalf and this office does not intend to restrict that privilege in any way and your opinion is sought only as to persons appearing in a representative capacity.
>
> "If you will permit me I would like to offer the following which will give you some idea of our attitude in the matter. We are frequently confronted with a problem of having a stock deal brought here for registration where the issuing corporation is a foreign corporation, the assets behind the securities are in another state, the underwriters and the brokers are residents of other states and the attorneys representing the corporation are not licensed to practice in Missouri and not residents of this state. In such a case it is our personal feeling that none of these parties owe to this commission or to the state of Missouri any moral obligation from any standpoint nor are they subject

control or regulations by us other than for violation of some part or provision of the securities law.

"It would be much to our liking if every issue coming to this department could at least be presented to us by a resident lawyer of Missouri. We would like to have your opinion cover the following points.

FIRST: Practice before the Commissioner of Securities constitute the practice of law, and is restricted to attorneys.

SECOND: The restriction of practice before this commission to members of the Missouri Bar holding the Bar enrollment receipt from the circuit clerk of their county as is otherwise required of all lawyers in this state.

THIRD: The Commissioner of Securities may by rule require the certificate of a reputable lawyer licensed to practice in Missouri."

For the purpose of this opinion we shall treat each of the foregoing divisions separately.

I.

Practice before the Commissioner of Securities constitutes the practice of law, and is restricted to attorneys.

An examination of the statutory law os Missouri reveals that securities may or may not be exempt from "the Missouri Securities Act." If not exempt they may be registered

either by (1) notification, or (2) qualification. Both methods of registration require the preparation of statements and applications in conformity with state law and the rules of the commissioner of Securities. Sections 7728, 7729 and 7730 R. S. Missouri, 1929. When securities are registered by qualification, one of the rules of the Commissioner of Securities is as follows:

> "Form Q is to be used for all applications for registration by qualification, except investment corporations. This includes manufactiring corporations, mining, oil royalties and drilling, real estate and cemetery promotions where bonds, stocks or debentures are involved, installment investment certificates not supported by a portfolio of stocks (portfolio issues must use Investment Trust form), breweries and distilleries, sale of oil ahead of the drill, etc. We require the certificate of a reputable lawyer that the issue is valid a and legal, and the corporation, express trust or association has been legally formed and is in good standing. Mining and oil deals must furnish geological report signed by Dr. H. A.Buehler, State Geologist of Missouri, Rolla, Mo. See that every exhibit required by Form Q is filed, each exhibit signed by the president and secretary of the applicant. Avoid riders on Form Q, and use additional exhibits instead of riders. Actual balance sheet and pro forma balance sheet must be signed by the accounting concern, and in addition to the firm name, the name of the resident partner should be signed."

The application of dealers and salesmen must be in writing. Section 7744 R. S. Missouri 1929. Even though forms are provided for all the necessary steps in the registration of securities, and all that is required is the filling out of such forms, yet such practice calls for legal skill and training and is the preparation of written instruments within the practice of law. In re: Matthews (Idaho 1936) 62 Pac. 578.

The commissioner is required to hold hearings, Sections 7729, 7736, 7737, 7743, 7745, R. S. Missouri 1929, and appeals from the final order of the commissioner are authorized, 7729, 7743 R. S. Mo. 1929. Witnesses may be subpoenaed by either the party or the commissioner of securities, and may be compelled to testify under oath. Depositions may be taken as in civil cases. 7737 R. S. Mo. 1929.

These powers are similar to those delegated to and exercised by the Public Service Commission of Missouri. There hearings may be held, witnesses examined and questions of law and of fact passed upon and the decision of the Public Service Commission reviewed by the Courts. Sections 5232, 5233, 5234 R. S. Mo. 1929.

These activities before the Public Service Commission have been held to constitute the practice of law, and laymen who engaged in such practices held guilty of contempt by the Supreme Court of this State in Clark vs. Austin, et al. 101 S.W.(2d) 977. In that opinion the Supreme Court, en banc, said, l.c. 982:

> " It would be difficult to give an all-inclusive definition of the practice of law, and we will not attempt to do so. It will be sufficient for present purposes to say that one is engaged in the practice of law when he, for a valuable consideration, engages in the business of advising persons, firms, associations or corporations as to their rights under the law or, appears in a representative capacity as an advocate in proceedings pending or prospective, before any court, commissioner, referee, board, body, committee or commission constituted by law or authorized to settle controversies, and there, in such representative capacity, performs any act or acts for the purpose of obtaining or defending the rights of their clients under the law. Otherwise stated, one who, in a representative capacity, engages in the business of advising clients as to their rights under the law, or while so engaged, performs any act or acts either in court or outside of court for that

purpose, is engaged in the practice of law. Rhode Island Bar Association et al. vs. Automobile Service Association, supra; People ex rel. Illinois Bar Association et al. v. Peoples Stock Yards State Bank, supra; Fitchette vs. Taylor (Minn.), 254 N.W. 910, 94 A.L.R. 336, In Re: Duncan, 83 S.C. 186, 65 S.E. 210, 24 L.R.A. (N.S.) 750; Boykin vs. Hopkins, 174 Ga. 511, 162 S.E. 796."

In the Austin case, supra, the three opinions of the Court are exhaustive of research, unanswerable and fundamentally sound in principle. There can no longer be any doubt that the practice before a state commission, such as outlined above, is the practice of law.

It is the opinion of this office that to practice as herein outlined before the Commissioner of Securities is limited to licensed attorneys.

II.

The restriction of practice before this commission to members of the Missouri Bar holding the Bar enrollment receipt from the circuit clerk of their county as is otherwise required of all lawyers in this state.

The answer to this question principally involves the right of non-resident attorneys to practice law in this state. No such right exists and the appearance of non-resident attorneys in this state for the purpose of practicing law is a bare and limited courtesy extended by this state to such non-residents. In Mason vs. Pilkes, 59 Pa. (2) 1087, l.c. 1097, an Idaho Court said:

"The privilege of appearing as counsel in our courts is granted to non-resident attorneys, not as a right, but as a courtesy* * *."

To the same effect is In re: Dobbs, 285 N.Y.S. 24. This same general rule is applicable to Missouri.

Considerable investigation has been made with reference to the treatment of this subject in other states. In some states little or no restriction is imposed on non-resident attorneys who wish to practice occasionally or frequently in that state. This is particularly true in the states of North Dakota, Nebraska, Oklahoma, Kentucky, Maine, Maryland, Utah, Ohio and Wisconsin. Other states permit non-resident attorneys having occasional business to be admitted pro hac vice (for this occasion) in the discretion of the Court before whom the non-resident attorney appears. This is the rule in New Jersey and Delaware. In a receivership sale of assets of a corporation one of the bidders appeared in Court in New Jersey by a New York attorney. ~~The New Jersey Court held that the New York attorney.~~ The New Jersey Court held that the New York attorney being in court alone, not having associated with him a New Jersey Solicitor, had no audience in the court and was not entitled to be introduced pro hac vice. In Re: New Jersey Refrigerating Company, 126 Atl. 174.

Other states have reciprocity provisions wherein non-resident attorneys are extended the same comity as their home state extends to resident attorneys from other states. This is the rule in Louisiana, North Carolina and Florida. In West Virginia non-resident attorneys may practice law by submitting to the court certain evidence of the attorney's authority to practice in his home state. Other states require non-resident attorneys who wish to appear occasionally in litigation to associate with them some resident counsel. This appears to be true in California, New York, New Mexico, Virginia, Washington, Idaho and is the general practice in South Dakota. Other states deny to non-resident attorneys the privilege of signing pleadings. This is true in Nevada, Minnesota and Pennsylvania. On this question the Supreme Court of Minnesota in Verry vs. Barnes, 191 N.Y. 589, 31 A.L.R. 707, l.c. 709, said:

> "But they have no authority to commence actions in courts of this state (Francis vs. Knerr, 149 Minn. 122, 182 N.W. 988), and hence the prevailing practice is to associate a resident attorney as the attorney of record."

The State of Oregon divides practitioners into two groups, (1) attorneys, (2) counselors. Attorneys must be resident practitioners of Oregon. Counselors are not permitted to sign pleadings, and consist chiefly of non-resident attorneys appearing occasionally in that State. Thus Oregon by such classification requires non-resident attorneys to associate with them resident attorneys of the State of Oregon in all matters wherein pleadings or writings are required.

In South Dakota it appears that only licensed members of the State Bar in good standing are permitted to engage in practice. In that State, Chapter 126, Laws 1933, the code section relating to attorneys' fees and non-resident attorneys, contains the following:

> "In all cases where the owner and holder of any mortgages is a non-resident of this state, the foreclosure of such mortgage must be conducted by a licensed attorney, resident of the State of South Dakota."

The above law went into effect July 1, 1933. Hanson v. Federal Land Bank of Omaha, Nebraska, 262 N.W. 228.

Under Section 2330, Revised Code, South Dakota, 1919, a summons shall be subscribed by the plaintiff or his attorney and the defendant shall serve a copy of his answer on the person whose name issubscribed to the summons at a place within South Dakota. The Supreme Court of South Dakota in Jacobs v. Queen Insurance Company of America, 213 N.W. 14, at l.c. 15 said:

> "Manifestly, a summons signed only by a Minnesota attorney who has not been admitted to practice in the courts of this State, was not signed 'by the plaintiff or his attorney.' The so-called summons was a nullity and of no more force than if signed by a mere layman. Francis v. Kneer, 159 Minnesota 122, 182 N.W. 988."

This question of comity has not escaped the Federal Courts. The Circuit Court of Appeals, Ninth Circuit (1923)'

in Tuppela vs. Mathison, 291 Fed. 728, had before it a situation wherein the plaintiff, an attorney, was employed by the defendant in the State of Oregon for the purpose of recovering certain mining properties in Alaska. After the plaintiff had performed part of his services in preparing the case for trial in the Alaska Court, he was arbitrarily discharged by the defendant, and when this suit was instituted to recover attorneys' fees one of the defenses set up was that the plaintiff, an Oregon Attorney, was not admitted to practice in the Courts of Alaska. The Court of Appeals in passing upon the case, l.c. 730, said:

> "The plaintiff had been admitted to practice in the courts of Oregon, both State and Federal. He was a regularly licensed attorney at the place where the contract was made. In drafting the contract, he made special provision for the appointment of local counsel in Alaska if he should deem it advisable. To carry out his contractit was not necessary that he should have been licensed to practice in the territory of Alaska."

In State ex rel. Boynton v. Perkins, 28 Pacific(2d) 765, the Supreme Court of Kansas had for consideration the question of whether or not a Missouri attorney was entitled to practice law in Kansas without being admitted to the Bar of Kansas. The court held that he was not so entitled to practice law and he was enjoined from doing so.

In passing it may be observed that the right to practice law in the state courts is not a privilege or immunity within the meaning of Section 1 of the 14th Amendment of the Constitution of the United States. The power of the state to choose who shall practice at its Bar is beyond the reach of the 14th Amendment and the Supreme Court of the United States is without authority to inquire into the reasonableness or propriety of the rules prescribed by the State. Bradwell v. Illinois, 83 U.S. 644. It therefore follows that the practice of law is not and cannot be a property right.

Thus by comity -- reciprocity, a courtesy is awarded, allowed or extended. It bestows as a favor that which cannot be claimed as a right. It persuades but does not command, Its

goal a kind intercourse between the states. To brother attorneys from sister states it extends the gracious hand of the host. This comity is bottomed upon occasional as distinguished from regular appearances. Non-resident attorneys who regularly accept employment to "Blue Sky" securities in Missouri do not come within this comity privilege, but are to be treated as regularly engaged in the practice of law in this state and therefore must qualify as resident attorneys or associate with them as resident counsel.

It is therefore the opinion of this office that non-resident attorneys who regularly appear before your department are doing so in violation of the spirit and purpose underlying the regulation of the Bar and the doing of law business in Missouri.

III.

The Commissioner of Securities may by rule require the certificate of a reputable lawyer licensed to practice in Missouri.

Section 7724 R. S. Missouri 1929, in part provides:

> "Said commissioner, under the direction of the secretary of state, is hereby authorized to make all needful rules and regulations, and from time to time to amend and supplement the same, to carry this chapter into full force and effect."

This rule making power is similar to that vested in the Interstate Commerce Commission, U.S.C.A. T49, Section 17 (1). Under that rule the Interstate Commerce Commission has adopted rules with reference to hearings, personal appearances, permission to practice, oath of practitioners and disbarment of practitioners. Interstate Commerce Acts Annotated, Vol. 4, page 3437.

The inherent power to define and regulate the practice of law is vested in the courts. In re: Richards, 333 Mo. 907, 63 S.W. (2) 672. This includes the power to disbar. In re: Sparrow, 90 S.W. (2) 401.

Under the above statute the commissioner of securities would have authority to make any rules not inconsistent with the rules of the Supreme Court or judicial decisions interpreting those rules relative to the regulation and practice of law. Under this rule making power you are vested with authority to exclude any person from practicing law before your department who is not a licensed attorney as heretofore pointed out, and you have the power to make such rules, consistent with the Supreme Court rules, which are necessary for expediting the transaction of business and the practice of law before your department.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General.