

63**LAWYER'S RELATIONSHIP WITH A TRAFFIC CLINIC**

Adopted February 19, 1983.

Addendum issued 1995.

Syllabus

A lawyer may not ethically be employed by a traffic clinic owned and operated by nonlawyers because he would be aiding and abetting the unauthorized practice of law by a corporation and there would be an impermissible division of fees with nonlawyers.

Facts

This opinion sets forth two principal ethical problems created by the employment of lawyers in traffic clinics owned and controlled by nonlawyers. The employment relationship may also create other potential ethical problems.

Attorney X inquired whether he could ethically enter into an employment relationship with Traffic Clinic Y. He states that he responded to an advertisement in the classified section of the newspaper, and subsequently met with one of the nonlawyer owners of the clinic, who outlined the following proposal:

- (1) The clinic would provide all advertising services, standardized office forms, answering service for the operation of a "clinic-type" legal practice for the handling, *through disposition only*, of traffic offenses;
- (2) There would be a fee schedule provided by the clinic based, at least in part, on the alleged traffic offender's driving record, the violation(s) charged, and the court in which the matter was pending;
- (3) Trial of any offense which could not be handled by disposition would be by the clinic referral to the handling attorney for a separate written fee agreement with the client. These fees would be over and above those set forth in the clinic fee schedule;
- (4) The clinic attorney would receive a flat monthly "retainer" (to be negotiated), and any trial fees. All additional funds would accrue to the corporate clinic;
- (5) Monies retained by the clinic would be for overhead costs.

None of the owners of the clinic are lawyers. The Articles of Incorporation on file with the Secretary of State reveal that the corporation is not designated as a non-profit corporation. Presumably, the non-lawyer owners of the clinic expect a monetary profit from the clinic's operation. The owners verbally advised Attorney X that they would exercise no control over the handling of any traffic case and would make no attempt to interfere with the attorney-client relationship.

Discussion

There are two principal ethical problems created by a lawyer's relationship with a traffic clinic as outlined above:

- (1) Whether the lawyer is aiding and abetting the unauthorized practice of law by a corporation; and
- (2) Whether the fee arrangement, at the disposition stage, between lawyer and clinic amounts to an impermissible division of fees between a lawyer and a nonlawyer.

Other potential ethical problems could come into existence by virtue of the particular arrangement herein. The discussion and opinion do not purport to define the unauthorized practice of law, but enumerate the pitfalls for a lawyer employed by a nonlawyer-owned traffic clinic.

A. Aiding and Abetting the Unauthorized Practice of Law

The services offered by the clinic are legal services, i.e., the defense of penal traffic charges. The Supreme Court of Florida has held that conduct of a corporation, by having nonlawyer officers of the cor-

poration control attorney employees who provided legal services for a fee, with the provision that those legal services are the only means of producing income for the corporation, was the unauthorized practice of law by the corporation. The Court noted that such practice could be constitutionally proscribed without violating First Amendment associational rights. *The Florida Bar v. Consolidated Bus., Etc.*, 386 S.2d 797 (Fla. 1980).

DR 3-101 prohibits a lawyer from aiding and abetting the unauthorized practice of law. The clinic lawyer would be aiding the clinic in the unauthorized practice of law. The Colorado Supreme Court imposed discipline upon a lawyer for aiding a corporation in preparing trust instruments for individuals. *People ex rel. MacFarlane v. Boyls*, 197 Colo. 242, 591 P.2d 1315 (1979). See also, ABA Formal Opinions 122 (12-14-34); 239 (2-21-42); and 297 (2-24-61).

B. Division of Fees

It is plain that the clinic receives the fee directly from the client at the plea bargaining stage. Thereafter, the clinic filters a portion of the fee down to the clinic lawyer in order to pay him the “flat monthly retainer.” The clinic retains the balance of the fee for clinic operations and profits to the non-lawyer principals. From whichever perspective this is viewed, the arrangement amounts to an impermissible division of fees between a lawyer and nonlawyers, contrary to the provisions of DR 3-102. See ABA Informal Opinion 1392 (6-2-77).

C. Potential Problems

In addition to the ethical problems discussed, there are other areas of potential ethical problems which could arise. One consideration involves the potential for non-lawyer principals of the clinic to influence the independent professional judgment of the clinic lawyer. Regardless of the ostensible mechanics of the relationship between clinic lawyers and clinic ownership, an employer-employee relationship most likely exists. See DR 5-107; EC 5-22; EC 5-23; and EC 5-24.

Another potential problem would involve the situation where a clinic lawyer leaves the employment of the clinic. What happens to the cases of that lawyer? Does he take them with him at an additional charge to the client or at no charge to the client? DR 2-110 prohibits a lawyer from withdrawing from representation of a client without taking steps to avoid foreseeable prejudice to that client. If a case were still at the plea bargaining stage, and the departing lawyer took the case with him for further plea bargaining efforts, DR 2-106 would most likely prohibit the lawyer from entering into a new fee arrangement with the client for further plea bargaining, since the fee arrangement for plea bargaining had already been consummated with the clinic. This could cause the departing lawyer to be in a financially difficult position. It should be mentioned that the Code of Professional Responsibility requires an attorney to zealously represent his client, with undivided fidelity, from start to finish, unless an appropriate withdrawal of counsel is effected.

Finally, the referral of cases, incapable of disposition by plea bargaining, to the handling clinic attorney for trial, as opposed to an open referral, may not comply with the recently amended lawyer referral provisions of DR 2-103. Whether or not there is compliance may depend upon the advice concerning the availability of legal services given at the time of referral. EC 2-8 indicates that referrals should be disinterested in order that a client may make an informed and intelligent judgment about appropriate legal services.

Conclusion

Employment of a lawyer in a traffic clinic, owned and controlled by nonlawyers, wherein the clinic sets a fee schedule and collects the fees from the client, using a portion thereof for operating costs and profits and pays a portion to the lawyer in the form of the “flat monthly retainer,” amounts to an ethically impermissible division of fees. Since the legal services provided by the clinic are the only means of producing income for the clinic, the lawyer’s participation in clinic operations amounts to aiding and abetting the unauthorized practice of law by a corporation. This opinion does not purport to define the unauthorized

practice of law by nonlawyers. It does, however, deal with a lawyer's activities in aid of the unauthorized practice.

Other ethical difficulties in the arrangements between lawyer and nonlawyer-owned traffic clinic involve a potential for improper influence on the independent professional judgment of the lawyer by his superiors and the problems created by the departure of a clinic lawyer. Canon 7 of the Code of Professional Responsibility requires a lawyer to zealously represent his client from start to finish unless a permissible withdrawal of counsel occurs. Finally, the referral of cases for trial may not meet the requirements of DR 2-103.

The Committee concludes that because of the impermissible division of fees between lawyer and nonlawyers, and because of the proscription against aiding and abetting in the unauthorized practice of law by a corporation, a lawyer may not enter into an employment relationship with a traffic clinic owned and operated by nonlawyers.

1995 Addendum

The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review Tables A & B: Related Sections in the Colorado Rules of Professional Conduct and The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

Relevant provisions of the Colorado Rules of Professional Conduct, which should be examined together with this Opinion, are Rule 5.5(b) (prohibiting lawyers from assisting in the unauthorized practice of law); Rule 5.4 (regarding sharing legal fees with non-lawyers) and Rule 5.4 and 2.1 (regarding the duty to exercise professional judgment).