Advisory Opinion 1984-11

An attorney has requested an opinion concerning the propriety of his being employed in a legal clinic organized by a nonprofit organization which has no attorneys on its board of directors. The attorney will be in charge of the operation of the clinic, including staff, budget, clients, and files. In order to encourage the attorney to be available to clinic clients, the nonprofit corporation will allow him to use the premises to conduct his part-time private law practice. The attorney also inquires whether malpractice insurance should be on the attorney or the clinic and who should pay for it.

The letter raises the question whether the attorney may accept employment in his capacity as an attorney with a nonprofit organization run by nonlawyers. Such employment is authorized by Rule 2-103(D) of the New Mexico Code of Professional Responsibility if the employer is of a type listed in Rule 2-103(D) and the conditions stated in the Rule are met. See also model Rules of Professional Conduct, Rule 5.4. It appears that the nonprofit corporation will not be operating a legal aid office (Rule 2-103(D)(1)(b)),, since the letter implies that there will be a charge to clients for the legal services provided. The only other category in which the nonprofit corporation could fit would be that of Rule 2-103(D)(4), a "bonafide organization that recommends, furnishes or pays for legal services to its members or beneficiaries...." The nonprofit corporation will be recommending the services of the legal clinic attorney and perhaps paying for them in part by some form of direct or indirect subsidy to the clinic. As there is no indication that the recipients of the services would be "members" of the nonprofit corporation, the recipients must be "beneficiaries" of the nonprofit corporation if the corporation is to come within the definition of Rule 2-103(D)(4). The term "beneficiaries" was no doubt employed by the drafters of the Rule principally to apply to beneficiaries of prepaid legal insurance plans. To the extent that the purpose of the nonprofit corporation is to provide or make available low-cost legal services to members of "a lower income community," the users of the clinic may be considered beneficiaries of the nonprofit corporation in the broader sense that they are recipients of a "benefit or advantage." *See, Bauer v. Myers*, 224 F. 902, 908 (8th Cir., 1917). The attorney should determine for himself that the applicable conditions of Rule 2-103(D)(4)(a) through (h) are satisfied. If they are, the Committee considers the attorney's proposed employment to come within the scope of Rule 2-103(D).

Rule 2-103(D) also requires that the attorney may accept employment from or recommendation by the nonprofit corporation only "if there is no interference with the exercise of independent professional judgment in behalf of his client." Rule 5-107(B) is to the same effect. The attorney's letter states that there will be no restraint by his employer on his exercise of independent professional judgment. He indicates, however, that the clinic is intended to provide legal services at a minimum cost "in areas of the law which do not require much attorney time." Counsel should satisfy himself that limitations imposed by his employer on the types of cases he can handle for the legal clinic or the time he can spend on them are intended solely to make his services as widely available and effective as possible, and that they do not constitute impermissible restraints on the exercise of his professional judgment or cause him to violate Rule 6-101(A)(2) and (3), which requires that he prepare adequately for legal matters entrusted to him and that he not neglect such legal matters. *See,* Formal Opinion 334 (August 10, 1984), and Informal opinion 1359 (June 4, 1976), ABA Committee on Ethics and Professional Responsibility.

The attorney proposes to dovetail his activities as the employee of a nonprofit legal clinic with the conduct by him of a private legal practice for profit on the same premises. The employer apparently wishes him to be available at the clinic even when he is not working on clinic matters, and has offered to compensate him for his time by allowing him to use the clinic premises (and possibly personnel, equipment, or other resources of the employer) to conduct his private practice.

The Committee does not find this arrangement objectionable if counsel delineates clearly with his employer (preferably in a written agreement) the scope of his employment by and compensation from the nonprofit corporation and discloses fully to his clinic clients and private clients in which capacity and on what terms he is representing them. See Rule 5-107(A) and EC 5-21 through 5-24 concerning the possibility of influence being exerted over a lawyer through compensation from one other than his or her client. EC 5-24 points out the desirability of a written agreement.

Counsel should have an agreement as to what portion of his compensation consists of use of an office and any equipment, personnel, and the like of the nonprofit corporation. Standards for the scope of his duties as a-part-time employee of the nonprofit corporation should be established, although counsel should always be mindful that his highest responsibility is to his clients (whether in the clinic or private practice), and that no agreement with an employer can lessen his obligation to his clients under Rule 6-101(A)(2) and (3).

Disclosures to clients should be sufficient to make clinic clients aware of the limitations on services offered through the clinic and the amount of the fee. Clients in counsels private practice should be informed of the nature of the services counsel is to provide, any limitations on their scope, and the basis for the fee (hourly, contingent, or other). In view of the

possibility for confusion as to the two types of practice to be conducted by counsel, written agreements concerning services and fees would be highly desirable.

Counsel's final question, concerning malpractice insurance,, appears to be chiefly a practical question rather than an ethical one, and to that extent, outside the scope of this Committee. The query about who should pay for malpractice insurance does have ethical implications. As an independent sole practitioner, counsel is responsible for payment for insurance covering the private practice, in which the nonprofit corporation has no interest. Counsel's responsibility to pay for insurance for his private practice is not necessarily a bar to obtaining a single policy which covers risks to the attorney (in both his private practice and his legal clinic practice) and to the nonprofit corporation that employs him, so long as the attorney pays at least the portion of the insurance premiums that is attributable to coverage of his private practice. Counsel is advised to consult the Risk Manager of the State Bar of New Mexico about what kind of coverage is needed by him and his employer in the legal clinic area of his practice.