

79

USE OF LEGAL ASSISTANTS IN CLIENT REPRESENTATION

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Syllabus

The use of paralegals, law clerks or other legal assistants (who are not licensed attorneys) employed by a licensed attorney to appear at depositions, hearings or administrative proceedings to represent the attorney's client constitutes a violation of DR 3-101(A) and 6-101 of the Code of Professional Responsibility where the duty thus entrusted to such legal assistants would constitute the unauthorized practice of law. Where the use of such lay assistants does not constitute the practice of law, or where such use is expressly authorized under Colorado Supreme Court Rule or decision, the attorney must, nonetheless, train, supervise and control such assistants to assure competent representation of clients as required by DR 6-101. (See the guidelines formulated by the Ethics Committee in Formal Opinion No. 61, adopted on October 23, 1982.)

Facts

This opinion addresses the propriety of the use of paralegals, law clerks and legal assistants (who are not licensed attorneys) employed by a licensed attorney to appear at depositions, hearings, administrative proceedings or other proceedings to represent the interests of the attorney's client or clients, where the nature of the representation involved would constitute the practice of law.

Opinion and Analysis

DR 3-101(A) prohibits a lawyer from aiding a nonlawyer in the unauthorized practice of law. As stated in EC 3-1 and 3-2, this Rule is grounded in the need of the public for the integrity and competence of those who undertake to render legal services, in the recognition that competent professional judgment is the product of a trained familiarity with law and legal process and a disciplined, analytical approach to legal problems coupled with a firm ethical commitment. Further, as recognized by the statements contained in EC 3-5, though there is no single, specific definition of what constitutes the practice of law, it nonetheless relates to the rendition of services for others that call for the professional knowledge and judgment of a lawyer.

Formal Opinion No. 61 adopted by the Ethics Committee on October 23, 1982, sets forth ethical guidelines applicable to the use of lay legal assistants to assure compliance with the Code of Professional Responsibility. That opinion provides, in part: "A lawyer is responsible for assuring that the assistant does not engage in the unauthorized practice of law. . . ."

The practice of law in the State of Colorado by an unlicensed person constitutes contempt of the Colorado Supreme Court. C.R.S. § 12-5-112, *Unauthorized Practice of Law Committee v. Grimes*, 654 P.2d 822 (Colo. 1982). Determining what acts do or do not constitute the practice of law is a judicial function falling within the powers and duties of the judicial branch exercised by the Supreme Court. *Unauthorized Practice of Law Committee v. Prog*, 761 P.2d 1111 (Colo. 1988); *Unauthorized Practice of Law Committee v. Employers Unity, Inc.*, 716 P.2d 460 (Colo. 1986), *Conway-Bogue Realty Inv. Co. v. Denver Bar Assn.*, 135 Colo. 398, 312 P.2d 998 (1957); *Ross v. Industrial Comm.*, 39 Colo. App. 204, 566 P.2d 367 (Colo. App. 1977). (See, C.R.C.P. 228-240.) Precise boundaries of what constitutes the unlawful practice of law are not firmly drawn (*Ross v. Industrial Comm.*, *supra*), but must be judged by surrounding circumstances and the nature of the activity involved. *People, ex rel. Atty. Gen. v. Jersin*, 101 Colo. 406, 74 P.2d 668(1937); *Denver Bar Assoc. v. Public Utilities Comm.*, 154 Colo. 273, 391 P.2d 467 (1964). Generally, when one acts in a representative capacity in protecting, enforcing or defending legal rights and duties of another and in counseling, advising and assisting in connection with such rights and duties, such

conduct constitutes the “practice of law.” *Denver Bar Assoc. v. Public Utilities, supra; Unauthorized Practice of Law Committee v. Prog, supra.*

Persons appearing in a representative capacity in, or in connection with, proceedings which may be characterized as judicial, or which involve the resolution of disputes of adjudicative facts or law, whether before administrative agencies or courts of record, are generally deemed to be practicing law. *See, Denver Bar Assoc. v. Public Utilities Comm., supra*, at 471. Those appearing in a representative capacity before administrative agencies in connection with proceedings which are purely legislative or non-judicial, generally are not deemed to be practicing law, *id.* Nonetheless, representation of a client at hearings or proceedings of a legislative character before legislative committees or administrative agencies may entail the practice of law where a client’s rights, privileges or immunities could be adversely affected. As an example, a client called upon to testify in a proceeding “investigative” in nature concerning proposed legislation but involving past conduct, could provide testimony which may be self-incriminating. The client should be properly advised by an attorney with respect to such testimony and the desirability of invoking the privilege against self-incrimination. Further, even though the proceedings are legislative in nature, because of circumstances peculiar to the client, the resulting rule or regulation could constitute a deprivation of constitutionally protected rights, in which case representation would involve the practice of law.

To determine whether the use of paralegals or other lay legal assistants in the representation of the attorney’s client or clients at such hearings or proceedings constitutes aiding a non-lawyer in the unauthorized practice of law, examination must be made into the purpose, nature and effect of the particular hearing or proceeding involved. Factors which must be considered (*see generally, Denver Bar Assoc. v. Public Utilities Comm., supra*) include:

- a. Whether the client’s testimony is to be taken under oath and recorded, or whether there is significant potential for collateral use of such testimony. Where testimony is under oath and recorded, its potential for impeachment or collateral use is magnified and the client’s interests in collateral actions or proceedings must be taken into account. The degree to which the client’s testimony may be used in other pending or foreseeable actions or proceedings, and the effect of such use, must be carefully analyzed and considered.
- b. Whether the client will be subject to cross-examination, and if so, the potential need for rehabilitation. The potential use of the client’s testimony given on cross-examination dictates the lawyer’s duty to ensure that it fully discloses all relevant circumstances to allow its assessment in a light most favorable to the client.
- c. Whether there may be a need to invoke privileges, such as the privilege against self-incrimination and the attorney-client privilege. Constitutional or evidentiary privileges not invoked in a timely fashion are generally deemed waived and thus the lawyer must take care to ensure that privileged information is protected from disclosure.
- d. Whether spontaneous decisions may be required concerning the assertion or waiver of privileges, recording objections, limiting the scope of examination, stipulations, and similar decisions requiring professional legal judgment. Whether a privilege should be asserted or objection made generally calls for artful decisions of strategy which require professional skill and judgment based on full knowledge of the facts and governing law.
- e. Whether the hearing or proceeding involved is adjudicative, rather than legislative, in nature. Representation in legislative actions or proceedings generally does not constitute the practice of law. *Denver Bar Assoc. v. Public Utilities Comm., supra.*
- f. Whether the testimony of an essential or important witness or that of an adversary is to be taken at the proceeding. The importance or significance of the evidence to the issues affecting the client’s interest must be evaluated in determining the need for or extent of cross-examination.
- g. Whether the client may need assistance or advice concerning applicable law during the course of the hearing or proceeding. Identifying and explaining applicable legal principles and giving counsel concerning them lies at the heart of the practice of law.

h. Whether determinations made based on the particular hearing or proceeding may affect the client's rights to life or liberty or significantly affect the client's property rights. The degree to which the outcome of the proceeding may affect or impinge on the client's rights must necessarily direct and affect the manner of representation.

Thus, defending a debtor upon examination at § 341 meetings may involve artful (and possibly spontaneous) decisions concerning waiving or invoking the privilege against self-incrimination, and obtaining "use and derivative use" immunity under § 344, as it may relate to the risk of subsequent criminal prosecution (*See, e.g.*, 18 U.S.C. § 152), and detrimental use of damaging admissions in the bankruptcy case (i.e. motions to dismiss petition or to bar discharge, or adversary proceedings).

In view of the nature of a Creditors Meeting under § 341 of the Code, and the requisite knowledge, judgment and skill necessary to proper representation of the Debtor thereat, use of paralegals by a licensed attorney to accomplish such representation would constitute a violation of the provisions of DR 3-101(A) of the Code of Professional Responsibility.

Similarly, the lawyer's use of lay legal assistants in client representation at depositions upon oral examination would, except in the most extraordinary circumstances, constitute a violation of DR 3-101(A) and DR 6-101. The importance of the deposition in litigation stems, in part, from its potential use at trial to provide or impeach evidence. Such use is expressly allowed against any "party who was present or represented at the taking of the deposition. . ." C.R.C.P. 32(a).

In view of the potential for use of testimony taken by deposition against the client, utilization of lay assistants by the lawyer in client representation at the deposition would be inappropriate. The knowledge, judgment and skill necessary for proper decisions regarding examination, cross-examination or objections thereto, and other deposition strategies require the direct involvement of a licensed lawyer. Special circumstances may permit the use of lay legal assistants to attend depositions for the sole purpose of taking notes on testimony given or taken in actions or proceedings in which the client is either not a party or has only limited interest or involvement. In such special cases, the lawyer must, after careful evaluation, determine that the client's interests will not require participation in the deposition by examination or cross-examination of witnesses or making of objections to questions or testimony, or the consideration of stipulations, before authorizing such use of lay assistants.

The Supreme Court of the State of Colorado has permitted lay representation under certain limited circumstances before the Public Utilities Commission and before the Division of Employment and Training of the Colorado Department of Labor and Employment. *See, Denver Bar Assoc. v. Public Utilities Comm., supra*, and *Unauthorized Practice of Law Committee v. Employers Unity, Inc.*, 716 P.2d 460 (Colo. 1986). Absent such express permission by the Supreme Court of Colorado, lay representation of clients in adjudicatory proceedings before administrative agencies is deemed to constitute the unauthorized practice of law.

In those instances in which the use of lay legal assistants by the attorney would not constitute aiding the unauthorized practice of law and in those cases where lay representation is expressly authorized by the Supreme Court (*see, Denver Bar Assoc. v. Public Utilities Comm.*, and *Unauthorized Practice of Law Committee v. Employers Unity, Inc., supra*), the attorney must nonetheless ensure that the legal assistant possesses the requisite knowledge, judgment and skill necessary for proper and competent representation of the client's interests under all the circumstances, and that the ethical guidelines noted in Formal Opinion No. 61, adopted by the Committee on October 23, 1982, are observed. In this regard, attention is directed to the Guidelines for the Utilization of Legal Assistants, promulgated by the Legal Assistants Committee of the Colorado Bar Association, for guidance. (14 Colo. Law. 1599, Sept. 1985.)

The economic expenditure of the client's resources must always be an important consideration of the lawyer and proper utilization of legal assistants can be a valuable means to assist the lawyer in providing quality professional services to the public at a reasonable cost. Nonetheless, lawyers are ultimately responsible for the work product of their assistants and cannot aid or abet the unauthorized practice of law or delegate their ethical responsibilities mandated by the Code of Professional Responsibility.

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 5.3 (regarding the use of non-lawyer assistants); Rule 1.1 (requiring competent representation); Rule 1.3 (reasonable diligence required in client representation); and Rule 1.4 (communication with client during representation).