(LES 1977J)

DIGEST OF ETHICS ADVISORY PANEL
Opinion #90-34, Request #112
Issued August 2, 1990

An attorney seeks Panel advice as to whether she may properly undertake certain activities in connection with her role as a principal in a placement agency for the temporary employment of lawyers.

The attorney first advises the Panel that she has a small private practice as a sole practitioner. The attorney states that in addition to and entirely apart from this private practice she and a non-lawyer are jointly opening a placement agency, "Agency" for temporary employment of lawyers. The attorney stresses that her practice is entirely separate from Agency, noting that it is advertised separately, has its own books, stationery and accounts and is situated at a different address and telephone number. The attorney states that she has read ABA Formal Opinion 88-356, rendered December 16, 1988, titled "Temporary Lawyers" and reported at ABA/BNA Manual on Professional Conduct 901:116 and that Agency conforms to the requirements of this opinion.

The attorney first asks whether it would constitute the practice of law for her to give the information found in Formal Opinion 88-356 to other attorneys. If the answer is that it would constitute the practice of law then the attorney asks whether it is permissible or not for her to give such information when she is functioning as a principal of Agency as opposed to those times when she is functioning as a sole practitioner.

The comment to Rule 5.5, titled "Unauthorized Practice of Law," notes that "[t]he definition of the practice of law is established by law . . ." G.L. 1956 (1981 Reenactment) § 11-27-2, titled "Practice of law defined" provides, in pertinent part that the practice of law includes:

> (2) The giving . . . to another person for a consideration direct or indirect, of any advice or counsel pertaining to a law question . . .

Formulating a precise definition of a "law question" or of the practice of law is virtually impossible. ABA/BNA Manual on Professional Conduct 21:8003. "In our law dominated society, almost every significant financial decision has at least some legal element to it, and legal elements predominate in many common transactions" I G. Hazard, The Law of Lawyering 480 (1989). Most courts have defined the practice of law on a case by case basis. Two of the most common themes recurring in questions of what constitutes the practice of law are

> [First] that the practice of law serves two interests -- those of individual clients and those of the effective administration of the legal system; and [second] the

> proposition that the restriction of the practice of law to lawyers is necessary to insure integrity, competence and undivided loyalty to clients. ABA/BNA Manual on Professional Conduct 21:8004.

The Panel noted that in the circumstances the attorney has described, she would be discussing Formal Opinion 88-356 only with another attorney. Thus, public interest factors such as protection of laypersons from inadequate advice and facilitation of the proper and effective administration of justice do not come into play. The Panel also notes that the attorney with whom the inquiring attorney would discuss Formal Opinion 88-356 would be either contemplating or already engaged in a professional relationship with Agency. Under these circumstances any consideration the attorney-client has paid to the inquiring attorney has been paid in connection with placement services, not in connection with obtaining legal advice on the interpretation of a quasi-legal opinion. In light of this fact and the considerations noted above, the Panel concludes that the attorney's explanation of Formal Opinion 88-356 would not fall within the definition of the practice of law.

The attorney next asks whether the non-lawyer principal in Agency, may give attorneys similar information concerning Formal Opinion 88-356. Normally the Panel can respond only to questions about the propriety of the inquiring attorney's own conduct. See, e.g. Digest of Ethics Advisory Panel Opinion 90-13. Rule 5.5, titled "Unauthorized Practice of Law" provides, however, that

> A lawyer shall not:
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> * * *
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> (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

The attorney's association with the non-lawyer principal is sufficient to activate the prohibition of Rule 5.5(b) and to make Panel response appropriate. In the case of the non-lawyer principal, as in the case of the inquiring attorney, consideration is paid for placement services, not legal advice. The other issues, outlined earlier also remain unchanged. The non-lawyer principal may properly answer questions from information that the inquiring attorney has provided her.

The attorney next asks whether it is permissible for her to indicate that she is a member of the Rhode Island bar when her name appears in Agency advertising. Advertisements for Agency are, of course, advertising a placement service, not a legal service. It is well settled, however, that a lawyer is bound by the applicable rules of Professional Responsibility whether he or she is acting in a professional capacity or otherwise. See ABA Formal Opinion 336 (June 3, 1974); Digest of Ethics Advisory Panel Opinion 87-3.

In Bates v. State Bar of Arizona, 433 U.S.. 350 (1977) the United States Supreme Court held that since attorney advertising enjoys First Amendment protection the permissible extent of state regulation is extremely limited. "For all practical purposes the only remaining permissible limitation on advertising -- as distinct from solicitation -- is that it not be misleading." I G. Hazard The Law of Lawyering, 508 (1989). Rule 7.1, titled "Communications Concerning a Lawyer's services" provides the Rules' definition of "false and misleading" in this context:

> A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:
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> (a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;
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> (b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or
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> (c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

In Opinion 589, rendered July 24, 1986, the New Jersey Supreme Court Committee on Professional Ethics ("New Jersey Committee") concluded that it was permissible for an attorney who was also a certified public accountant to use the designation "C.P.A." on his law office stationery, "provided, of course that the designation is accurate and not misleading." The New Jersey Committee added that its position would be the same with regard to adding "C.P.A." to directory listings. The Panel notes that the inquiring attorney's advertisements will be run in professional journals only and are, by their nature, of interest only to attorneys. Any risk is thus eliminated that the attorney's use of Esquire would confuse or mislead. The Panel takes the position that it is permissible for the attorney to indicate in Agency advertisements that she is an attorney as well as a principal. The attorney may use either the appellation "Esq." or an asterisk referring the reader to a legend stating that she is a member of the Rhode Island Bar. This opinion overrules Ethics Advisory Panel opinion 88-28, Request #29 insofar as it is in conflict with the Panel's position regarding the proper use of the appellation "Esquire".

The attorney's final question involves the scenario in which an attorney calls Agency with an assignment which the inquiring attorney feels she would like to complete. In this situation the inquiring attorney asks the Panel whether she should accept the assignment through her private practice and not charge the calling attorney the usual fee charged by Agency.

If the inquiring attorney accepts an assignment, it would be in her capacity as qualified sole practitioner, not in her capacity as a

principal of Agency. Thus, although it is entirely proper for the inquiring attorney to accept an assignment for which she is qualified, it is not proper for Agency to give her preferential treatment by declining to charge the usual placement fee. For Agency to treat the inquiring attorney differently would call into question the existence of the crucial distinction between Inquiring Attorney X, Esquire, sole practitioner and Inquiring Attorney X, principal in Agency.

Ethics Advisory Panel advice is protective in nature. There is no requirement that an attorney abide by a Panel opinion, but if he or she does, he or she is fully protected from any charge of impropriety.