ADVISORY ETHICS OPINION 88-04

SYNOPSIS:

A non-lawyer employee of a law firm may not represent the firm's client at proceedings before the Motor Vehicle Arbitration Board.

DISCUSSION:

A law firm which regularly represents an automobile manufacturer in proceedings before the Vermont Motor Vehicle Arbitration Board seeks the Committee's opinion on whether it would be ethical if the client's cases were presented to the Board by a non-lawyer legal assistant employed by the firm, rather than by a lawyer in the firm. Our response is that the proposal would constitute aiding the unauthorized practice of law by a non-lawyer and would be barred by Disciplinary Rule 3-101(A).

The Vermont Motor Vehicle Arbitration Board is a legislatively-created body "attached to the transportation board," having subpoena power, obligated to promulgate administrative procedure rules, and charged with conducting hearings and issuing damages in accordance with the remedial provisions of the New Motor Vehicle Arbitration Act. 9 V.S.A. §4174.

The Board's statutory purpose is to resolve motor vehicle warranty problems more quickly and at less cost than the private sector resolves them. 9 V.S.A. §4170. When a consumer elects arbitration, the Board determines whether the consumer is entitled to a refund or replacement vehicle, or neither, as described in 9 V.S.A. §§4172-4173. The manufacturer's chief affirmative defense is that the alleged warranty nonconformity "does not substantially impair the use, market value or safety or that the nonconformity is the result of abuse, neglect, or unauthorized modifications or alterations of a motor vehicle by a consumer."[1] The Board's decision is final, yet it is subject to change or vacation in the superior court for jurisdictional or grave procedural error.[2] The failure of a manufacturer or authorized dealer to comply with a decision of the Board is under 9 V.S.A. §4177 a *per se* unfair and deceptive act under the Consumer Fraud Act.

The rules adopted by the Board cover such things as how a matter is brought before the Board, discovery, prehearing conferences, subpoenas, evidence, the burden of proof, the record, transcripts, and the decision of the Board. Rule 16 reads:

> **Conduct of the Hearing:** The board shall conduct a hearing on all issues for decision. Each party shall have the opportunity to examine all documents or records used at the hearing; to bring witnesses and cross-examine adverse witnesses; to express all pertinent facts and circumstances through evidence, oral or written, to advance any arguments, oral or written; and to question or refute any testimony or evidence. The board may administer oaths to witnesses and all oral testimony shall be presented under oath.

The inquiring law firm reports that its non-lawyer employee currently "does virtually everything with the cases," including analyzing the technical aspects of the claim, developing the client's factual defenses, and arranging for witnesses. All such work is done subject to lawyer supervision, and the lawyer reviews the file for legal issues and appears at the arbitration hearing.

The firm proposes to continue having a lawyer represent the client at those hearings where the case involves a "legal issue." In all other cases it would like to have its non-lawyer legal assistant represent the client at the Board hearings, because it would lower the cost to the client, the assistant's more flexible schedule would allow more efficient service to the client, and there would be no sacrifice in the quality of service rendered to the client. The firm posits that although the legal assistant would not be subject to the Code of Professional Responsibility, the firm would be, and because "the firm insists on the same level of ethical responsibility of the legal assistant as it does of its lawyer employees," an adequate safeguard of compliance with ethical standards would exist.

Disciplinary Rule 3-101(A) reads: "A lawyer shall not aid a non-lawyer in the unauthorized practice of law." Because the law firm employs the assistant, provides him with cases involving the firm's client, and would send him out to Board hearings involving disputes between consumers and the client, we think there is no escaping the conclusion that the lawyers in the firm would be "aiding" the assistant, as that term is used in DR 3-101(A).

[1] 9 V.S.A. §4172(f).
[2] 9 V.S.A. §4176.

It is given that the firm's legal assistant is a non-lawyer, not licensed to practice law in Vermont. The Vermont Supreme Court by rule has prohibited the practice of law without a license.[3] The practice of law without a license, therefore, is unauthorized.

Pro se appearances, and appearances in court by law interns, are not exceptions to this rule, for they are authorized appearances.[4] Although the firm's client may represent itself at Board hearings, through its own employees, no similar authorization exists for a non-lawyer, law firm employee to appear for the client.

The critical question to which our analysis finally brings us is whether appearing before the Board on behalf of a client is the practice of law. Our Code of Professional Responsibility does not define what constitutes the practice of law. See EC 3-5. "It is not easy to define the practice of law".[5] Nonetheless, the practice of law clearly " . . . is not confined to performing services in an action or proceeding pending in courts of justice . . . (and it) includes 'all advice to clients and all actions taken for them in matters connected with the law."[6]

One who represents a client-manufacturer before the Motor Vehicle Arbitration Board is engaged in the practice of law. The procedure and remedy are controlled by law. The claims are legal, the defenses are legal. The Board's decision is legal. Review is in a court of law for reasons strictly legal. However technical or based in common sense the subject matter of the hearings may be, the process is legal. At least for those who choose not to represent themselves, but employ others for that purpose, the exercise of professional legal judgment is required at each step of the way.

> The essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client; and thus, the public interest will be better served if only lawyers are permitted to act in matters involving professional judgment.[7]

The firm's client may wish to reduce costs by having the assistant, rather than a lawyer, appear at the hearings. That would not diminish the prohibition. Ethical Consideration 3-4 recognizes that the "layman who seeks legal services often is not in a position to judge whether he will receive proper professional attention." Accordingly,

> (p)roper protection of members of the public demands that no person be permitted to act in the confidential and demanding capacity of a lawyer unless he is subject to the regulations of the legal profession.[8]

Similarly, despite the law firm's willingness to oversee the ethics of its assistant's conduct, it is simply a truism that "(a) non-lawyer who undertakes to handle legal matters is not governed as to integrity or legal competence by the same rules that govern the conduct of a lawyer."[9] These considerations mandate against a non-lawyer's representation of a client before the Motor Vehicle Arbitration Board.

Representing clients before the Board in legal arbitration proceedings is practicing law, and that is something only lawyers may do. Sending a non-lawyer legal assistant to represent a client before the Board, despite what good may come of it, would be aiding a non-lawyer in the unauthorized practice of law. DR 3-101(A) bars the proposal. In the words of ABA Formal Opinion 316 (Jan. 18. 1967), however, this conclusion does not diminish those lawful contributions lay assistants make:

> A lawyer can employ lay secretaries, lay investigators, lay detectives, lay researchers, accountants, lay scriveners, nonlawyer draftsmen or nonlawyer researchers. In fact, he may employ nonlawyers to do any task for him except counsel clients about law matters, engage directly in the practice of law, appear in court or appear in formal proceedings that are a part of the judicial process, so long as it is he who takes the work and vouches for it to the client and becomes responsible for it to the client. In other words, we do not limit the kind of assistants the lawyer can acquire in any way to persons who are admitted to the Bar, so long as the nonlawyers do not do things that lawyers may not do or do the things that lawyers only may do.

[3] 12 V.S.A. App. I, Pt III, §2. See generally *In re Morse.* 98 Vt. 85, 126 A. 550 (1924); J. Dooley, *The Regulation of the Practice of Law, Practice and Procedure, and Court Administration in Vermont - Judicial or Legislative Power?*, 8 Vt. L. Rev. 211, 222-37 (1983).
[4] See V.R.C.P. 79.1(a); 12 V.S.A. App. I, Pt II, §13.
[5] *In re Pilini.* 122 Vt. 385, 390, 173 A.2d 828 (1961).
[6] *Id.,* 122 Vt. at 390-91.
[7] EC 3-5.
[8] *Id.*
[9] EC 3-3.