

ADVISORY ETHICS OPINION 90-02

SYNOPSIS:

An unlicensed lawyer who provides consultation to a licensed Vermont attorney, who in turn advises his or her clients, is not engaged in the unauthorized practice of law.

FACTS:

Licensed Vermont attorney consults with a law professor who is not licensed to practice law in Vermont. They discuss legal issues relating to certain legal matters which the licensed attorney is working on for clients. In some instances the discussions are very general. Some discussions involve the disclosure of certain confidential client information. At no time is the identity of the client revealed. The licensed attorney compensates the professor for these services.

ISSUES:

1. Is the professor, who is not a licensed Vermont attorney, engaged in the unauthorized practice of law?
2. What are the ethical implications of compensation an unlicensed attorney for these services?

ANALYSIS:

Canon 3 of the Vermont Code of Professional Responsibility states

"A Lawyer Should Assist in Preventing the Unauthorized Practice of Law."

Disciplinary Rule 3-101(B) states

"A lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction."

Under these facts, the crucial question is whether the unlicensed attorney is engaging in the practice of law. Ethical Consideration 3-5 states

"It is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law. Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer."

In *In Re Welch*,¹ the Vermont Supreme Court stated that "a person is deemed to be practicing law whenever he furnishes advice or service under circumstances which imply the possession and use of legal knowledge and skill."² However, the Court went on to say that the practice of law includes all advice *to clients* and all actions taken for them in matters connected with the law.³ (emphasis added)

There is a distinction between performing legal work directly for a client and providing a licensed attorney with legal consultation and advice. When an attorney prepares documents, appears as an advocate and provides legal advice to a client, there is no question that the attorney is engaged in the practice of law. However, this reasoning does not extend to situations in which an unlicensed attorney is providing consultation, legal research and other assistance to a licensed attorney.

When an unlicensed attorney provides consultation and other legal services to a licensed attorney, the licensed attorney remains ultimately responsible for the final work product which is given to the client. Such an arrangement is analogous to the situation in which an attorney delegates research and writing work to law clerks and paralegals. In both situations, the licensed attorney is ultimately responsible for the work that is given to the client, whether it consists of advice, written materials or advocacy.

Ethical Consideration 3-6 of the Vermont Code of Professional Responsibility addresses such situations.

"A lawyer often delegates tasks to clerks, secretaries and other lay persons. Such delegation is proper if the lawyer maintains a direct relationship with his client, supervises the delegated work and has complete professional responsibility for the work product This delegation enables a lawyer to render legal services more economically and efficiently."

¹ *In Re Welch*, 123 Vt. 180 (1962)

² *Id.* at 182.

³ *Id.*

Ethical Consideration 3-6 can be applied to work performed by unlicensed attorneys. A licensed attorney may consult with and solicit legal advice from an unlicensed attorney for the purpose of advising a client as long as the licensed attorney maintains direct client contact, supervises and verifies the unlicensed lawyer's work and assumes complete professional responsibility for the unlicensed attorney's work and advice.

This approach is consistent with the positions taken in other jurisdictions. In Formal Opinion 426, the Los Angeles County Bar Association decided that a foreign lawyer, who advises a resident lawyer in matters of foreign law, does not engage in the unauthorized practice of law if: his role is to assist and advise the employer's clients; the employer does not communicate in any way that his employee is acting as a lawyer admitted to practice in the state; the employer is assured of his employee's competence and takes steps to verify the accuracy of his work; and the employee does not receive a percentage of profits or compensation for referrals.

In Ethics Advisory Request No. 83-34, the South Carolina Professional Responsibility Committee states that they knew of no provision of the Code of Professional Responsibility which would prevent an unlicensed retired attorney from voluntarily assisting the Solicitor by reviewing evidence in criminal cases, researching particular points of law, assisting in preparing trial briefs and generally doing all things necessary to prepare cases of moderate difficulty. However, the Solicitor must retain complete professional responsibility for the work product of the unlicensed attorney.

Similarly, in Formal Ethics Opinion 85-F-91, the Tennessee Bar Ethics Committee addressed the problems which arise when an unlicensed attorney works in a Tennessee law office while awaiting admission. The Committee found that unlicensed lawyers must function only under the direct supervision of licensed Tennessee attorneys; and the employing law firm or lawyer shall be responsible for the ethical and professional obligations of the unlicensed attorney.

These opinions all concur that an unlicensed attorney who provides advice, research or other legal work for a licensed attorney, will not be considered to be engaged in the unauthorized practice of law, so long as the licensed attorney supervises or verifies the work and takes complete responsibility for the work product

The second issue arises when the unlicensed attorney is compensated for these services. In such a case, the unlicensed attorney should bill the Vermont attorney, rather than billing the client directly. There are two reasons for this. First, the unlicensed attorney is doing the work for the Vermont attorney, not the client. Second, DR 3-102 generally prohibits a lawyer or law firm from sharing legal fees with a non-lawyer. If the unlicensed attorney billed the client directly, the unlicensed attorney and the Vermont attorney would essentially be sharing the legal fees, in violation of DR 3-102. The proper arrangement would be for the Vermont attorney to compensate the unlicensed attorney for his or her services. The Vermont attorney would then bill the client for these support services, much like billing a paralegal's time.

Under the facts presented, we are of the opinion that an unlicensed attorney may consult with and advise a licensed Vermont attorney without engaging in the unauthorized practice of law, providing the Vermont attorney verifies the information and assumes complete professional responsibility for the work product given to the client

Consistent with this, a Vermont attorney should compensate the unlicensed attorney for the consultation provided, rather than having the unlicensed attorney bill the client.

As noted, our opinion assumes that the licensed attorney does not reveal the client's identity or any confidences or secrets obtained from the client. If it were necessary to do so, in the judgment of the licensed attorney, it would require client consent after full disclosure. Moreover, where the cost of consultation with the unlicensed attorney is likely to be substantial, the lawyer is advised to obtain client approval.