Ethics Opinion No. 81-1

Propriety of an in-Person Offer to Handle a Specific Legal Problem on a Pro Bono Basis.

The Committee has been asked several questions arising out of an attorney's in-person offer to an individual to handle a specific legal problem on a pro bono basis. The facts are as follows.

Attorney A becomes aware of a proceeding in which Attorney B is attempting to collect legal fees from a former client. The debtor, though he does not qualify for help from Alaska Legal Services, is genuinely indigent and thus cannot afford counsel. He has been unable to find counsel who will represent him on a pro bono basis.

Attorney A therefore approaches the debtor and offers to represent him subject to confirmation by the Bar Association Counsel that there is no ethical violation. It is expressly stated that Attorney A will not be compensated for these services at any time or in any manner. The debtor accepts this offer. Bar Counsel states that there is no ethical violation.

The issues presented to this Committee are: (1) has Attorney A violated any ethical rules through his solicitation of the debtor; (2) would Attorney A have violated his ethical obligations had he failed to offer his services pro bono; (3) is Bar Counsel required to express an opinion when consulted; and (4) having given his opinion, is the Bar Association now estopped from instituting disciplinary proceeding on this matter. These issues will be addressed seriatim. Attorney A has committed no ethical violation by his approach to the debtor. This situation is governed by DR 2-104 which states in relevant part:

(A) A lawyer who has given in-person unsolicited advice to a layperson that he should obtain counsel or take legal action shall not accept employment resulting from that service, except that: [exceptions not relevant].

The answer to the issue posed lies in the term "employment." EC 2-4 states:

EC 2-4 Since motivation is subjective and often difficult to judge, the motives of a lawyer who volunteers in-person advice likely to produce legal controversy may well be suspect if he receives professional employment or other benefits as a result. A lawyer who volunteers in-person advice that one should obtain the services of a lawyer generally should not himself accept employment, compensation, or other benefit in connection with that matter. However, it is not improper for a lawyer to volunteer such advice and render resulting legal services to close friends, relatives, former clients (in regard to matters germane to former employment), and regular clients.

"Employment" in this instance denotes activities carried on for a material benefit, favorable publicity or other private gain; it does not include pro bono legal representation. This view has been adopted by the United States Supreme Court.

In recognition of the overarching obligation of the lawyer to serve the community, *see* Canon 2 of the ABA Code of Professional Responsibility, the ethical rules of the legal profession traditionally have recognized an exception from any general ban on solicitation for offers of representation, without charge, extended to individuals who may be unable to obtain legal assistance on their own.

In re Primus, 436 U.S. 412, 437, 98 S.Ct. 1893, 1907, n.31 (1978); *accord*, American Bar Association, Opinions of the Committee on Professional Ethics, Formal Opinion 148, (1967); American Bar Association, Committee on Ethics and Professional Responsibility, Informal Opinion 1339 (1975).

Because the offer of Attorney A under the facts presented, is purely probono, there is no violation of ethical rules relating to solicitation; in fact, Attorney A is to be commended as acting within the finest traditions of the profession in his active effort at providing legal representation to an indigent individual at a personal financial sacrifice.

Had Attorney A failed to offer to represent the debtor, he would not, by that act, have violated his ethical obligations.

As a practical matter there are many persons who are unable to pay a reasonable fee for needed legal representation. Canon 2 states, "[a] lawyer should assist the legal profession in fulfilling its duty to make legal counsel available." In order to assure that such needs are met, "every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged." Code of Professional Responsibility, EC 2-25. This duty however, is not to each person who wishes to become the lawyer's client, but rather to a reasonable portion of those disadvantaged persons in need of professional services. Thus the attorney does not violate ethical obligations by refusing to help a specific individual; rather, any violation must be ascertained by observation of his or her pattern of practice over a period of time.

Finally, the Committee believes that any question as to the duty of bar counsel to state an opinion on ethical considerations of proposed conduct, and as to the legal effect of any such opinion, must be answered by the officers of the Bar Association, and the courts.

Approved by the Board of Governors on June 3, 1981.