INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE

OPINION NO. 1 OF 1981

The facts giving rise to this inquiry are as follows: A client has hired an attorney on a contingent fee contract. The client wishes to retain a non-lawyer medical consultant to provide the following services: (1) Evaluate the medical aspects of the case; (2) Help the attorney in preparation for the medical issues involved in the case, including preparation for depositions, cross-examinations, and trial; and (3) Helping attorney and client find appropriate medical expert witnesses. The medical expert witnesses, other than the consultant, are paid a reasonable fee, plus expenses, regardless of the outcome of the case.

In exchange for the aforementioned services to be performed by the medical consultant, the client would pay the medical consultant a contingent fee, consisting of a percentage of either (a) the total recovery, or (b) the client's share of a settlement or judgment. This contingent fee agreement of the medical consultant is to be separate and apart from the contingent fee charged by the attorney for his legal services; however, in the event of a settlement or judgment, the client wishes to designate the attorney as the conduit to distribute the final funds to everyone involved, including the consultant. The client cannot affort to hire a medical consultant on a non-contingent fee basis.

A very similar arrangement was approved on August 10, 1976, in ABA Informal Opinion 1375 if these four requirements were met:

(1) The lay person or agency was not to engage in the unauthorized practice of law contrary to DR 3-101(A);

(2) The lawyer did not share legal fees with the lay person or agency contrary to DR 3-102(A)(1-3);

(3) The contingent fee was not payable for the testimony of the lay person or agency contrary to DR 7-109(C)(1-3); and

(4) The arrangement was not merely a subterfuge for fee-splitting between a lawyer and a lay person.

Thereafter on February 1, 1980, ABA Informal Opinion 1445 stated that where a consulting corporation rendered services to a trial attorney in connection with economic matters, the consulting corporation could not work on a contingent fee basis "even if the consulting corporation had no witness role in a trial" where the consulting corporation was employed by the attorney instead of by the client.

The rule that one should not be permitted to do indirectly what one cannot do directly is valid in the field of legal ethics. The Committee is concerned that the arrangement here can be misused so that the Code is violated by the attorney. The Committee nevertheless has determined that the arrangement is proper if the four requirements of ABA Informal Opinion 1375 noted above are met.

INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE

OPINION NO. 2 OF 1981

We have been asked whether it is ethically permissible for a lawyer to charge clients interest on unpaid balances of past due accounts.

This matter was discussed in American Bar Association Formal Opinion 338. We approve and adopt the language of that Opinion which states in part:

> It is . . . the Committee's opinion that a lawyer can charge his client interest providing the client is advised that the lawyer intends to charge interest and agrees to the payment of interest on accounts that are delinquent for more than a stated period of time.

INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE

OPINION NO. 3 OF 1981

The Legal Ethics Committee has been asked whether there is a conflict of interest for the Prosecuting Attorney's Office to represent a petitioner in a support matter under Title IV-D of the Social Security Act, who is also being criminally prosecuted by the same Prosecuting Attorney's Office.

It is understood that Statutes impose a duty on the Prosecuting Attorney to represent Title IV-D (Welfare) petitioners in support cases. Under the Title IV-D program, the Child Support Division of the Indiana State Department of Public Welfare enters into cooperative agreements with the Prosecuting Attorney of each judicial circuit to enforce support rights assigned by welfare recipients to the Department. (See I.C. 12-1-6.1-10 and I.C. 12-1-6.1-12)

Previous opinions of the Committee have pointed out the difficulty in questions involving conflict of interest. (See, e.g., Legal Ethics Committee Opinion No. 5 of 1980) Part of the difficulty is that many conflict of interest questions must be resolved under three separate but closely related Canons of the Code of Professional Responsibility.

Canon 4 requires the preservation of confidences and secrets of a client; Canon 5 requires the lawyer to exercise independent professional judgment on behalf of a client; and Canon 9 requires that a lawyer avoid even the appearance of professional impropriety.

A.B.A. Formal Opinion No. 342 strikes a balance between the wording of these Canons, and contains an excellent discussion of the relationship of these Canons, and concludes that a strict course of conduct is usually necessary.

Previous opinions of the Committee have indicated that if there is any doubt as to whether or not a conflict of interest exists, then the problem should be resolved by the attorney not accepting the employment. However, the question now before the Committee is unique in that specific statutes impose an obligation that creates a possible duty to represent potentially differing interests.

In Title IV-D cases, we do not believe a conflict of interest exists because no true attorney-client relationship exists between the prosecuting attorney's office and the welfare recipient. In Gibson v. Johnson (1978), 35 Ore. App. 493, 582 P. 2d 452, the Oregon Court of Appeals reached this conclusion in a case involving similar statutory requirements. The following quote from that case is helpful:

> "The general statutory plan is that the recipient must assign support rights to the state, and the state, with the required cooperation of the recipient-assignor,

collects the support from the obligor. The support is collected on behalf of the state as assignee and not on behalf of the recipient. . . . The essence of this statutorily created relationship is that of assignor-assignee. The mere fact that the assignor is required to cooperate with the attorney for the assignee does not establish an attorney-client relationship. The contact between the recipient and the SED attorneys is for the benefit of the state in recouping some of the funds paid out for aid to dependent children. The state may enforce the obligation whether the recipient cooperates or even over the specific objection of the recipient-assignor. . . . If the SED attorneys were representing the recipient in an attorney-client relationship, it would seem the wishes of the recipient would have to be given some status in the decision to proceed.

"It is true the ADC recipient can reap the benefits of a support decree, obtained by the SED on behalf of the state, after the ADC benefits are terminated. This is merely an ancillary benefit of the state's enforcement of the support obligation for its own purposes and does not create an attorney-client relationship."

INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE

OPINION NO. 4 OF 1981

The Legal Ethics Committee has been supplied the following inquiry, viz:

Attorney R and D formed a partnership and established "a legal clinic" known as "Sand Hill Legal Clinic" (although the exact name has been changed, the supplied name Sand Hill accurately approximates the geographic generic-trade name which is the subject of the inquiry). The letterhead which was supplied with the inquiry is entitled "Sand Hill Legal Clinic" and portrays a picture of a body of water coupled with a sand hill, approximately four and a half inches (4-1/2") long and one inch (1") high at the peak, and shows the names of "R & D" together with a former undisclosed associate. Also supplied are copies of telephone and newspaper advertising which show that the three attorneys' names are listed in the telephone directory. The other ads submitted did not disclose who are the lawyers that operate the "Sand Hill Legal Clinic," but do quote a fixed figure "for half hour consultation." A telephone listing indicates that all three attorneys are available for practice in "bankruptcy, wills, real estate, divorce, traffic, adoption, general practice."

After Opinion No. 3 of 1979 specifically prohibiting the use of the trade name "Indianapolis Legal Clinic" came to the attention of the firm, "R & D" ceased using a prior trade name "Sand Hill Legal Clinic" and since such time the employee-associate attorney has been dismissed. However, the partner indicates that any future associate employed by "R & D" would be identified in the letterhead. "R & D" specifically desire to continue the use of "Sand Hill Legal Clinic" as part of the firm name much as though this was a predecessor firm or deceased or retired partner.

The following questions arise from the inquiry, viz:

1. Is a logo on the letterhead permissible?

2. Is the use of the proposed trade name "R & D Sand Hill Legal Clinic" proper?

With respect to the first question, the committee feels that the use of the aforesaid logo in connection with either advertising or on the letterhead is in violation of the rules. The aforesaid logo would appear to substitute for or be more prominent than the name of the firm in advertising, and would tend to mislead as to the identity, responsibility and status of those practicing thereunder in violation of DR 2-102 (B); c.f. Illinois State Bar Association Opinion #623 (12/9/78), BA of Greater Cleveland Opinion #99 (9/5/73), Official Opinion #3 of 1979 holding "distinctive advertising is improper . . .," EC 2-10, 10 (A).

The decision is consistent with New York County Bar Association Opinion 591 (7/7/71) disapproving of the use of monogram on lawyers letterhead for the reason that . . ." The first sentence of DR 2-102 (A) is paraphrased in the following language in Wise, Legal Ethics, Second Edition, P. 143:

> "As a safe generality, the more nearly the letterhead conforms to the conventional, the customary, the usual, and the ordinary, the safer its use. The usual letterhead, of course, is in quiet good taste, with normal, modest-sized lettering, giving the name of the individual or firm, the address, the telephone number, and occasionally a cable code name."

With respect to the second question raised, the Committee notes that the latter amendment of the trade name by adding "R & D" prior to the trade name differentiates facts only slightly from the facts which were involved in Illinois State Bar Association Opinion #623 (12/9/78), which prohibited the use of the term "The Main Street Legal Clinic" on the following grounds:

> ". . . DR 2-102 (B) provides that 'a lawyer shall not practice under a name that is misleading as to the identity, responsibility or status of those practicing thereunder or contain any other deceptive statement or is contrary to law.' The Section goes on to permit the use of the names of deceased or retired members of the firm, but the clear implication is that the names involved must be those of lawyers. See also DR 2-101 (B) (1). ('A deceptive statement includes any communication that fails to identify the lawyer making the communications.') . . ."

The New York State Bar Association Opinion #445 (11/10/76) relying upon EC 2-11 as well as DR 2-102 (B) outlines the reasons for the prohibition as follows:

> ". . . These provisions of the Code were derived from former Canon 33, which provided in part:
>
> "That the selection and use of a firm name, no false, misleading, assumed or trade name should be used.
>
> "ABA 318 (1967), a comprehensive opinion on the subject of firm name, reviewed a number of opinions decided under former Canon 33. It referred disapprovingly to the use of 'Legal Bureau' (N.Y. City 48 (1926-27), 'Legal Clinic' (N.Y. City 793 [1954], and 'Northern Law Clinic' (ABA Inf. 376), as firm names, presumably on the ground that trade names were inappropriate. The present Code provisions are equally proscriptive of the use of trade names, hence the name 'Community Law Office' would be improper. It is well known that offices staffed by the Legal Aid Society Volunteer Lawyers in New York City operate under the name 'Community Law Office.' Since the term 'Community Law Office' connotes an indefinite tie to the community, or to the use of volunteer lawyers to serve the underprivileged,

> it also could mislead laymen concerning the identity, responsibility, and status of those practicing thereunder. The use of such term under the circumstances described by the inquirer would be in contravention of the provisions of EC 2-11 and could not, therefore, be deemed proper . . ."

There are a number of authorities which have prohibited the naming of a building where it would tend to mislead lay-people, e.g. Alaska Bar Association Opinion 69-4 (9/69) "Anchorage Legal Center"; Massachusetts Bar Association Opinion 74-3 (Fall/74) "a lawyers center or legal center"; Arizona Bar Association Opinion 72-3 (1/27/72) "legal building, law building or legal center."

Texas State Bar Association Opinion 242 (8/61) held the use of the name "legal clinic" or "court house annex" failed to conform to prior Canon 24. Consistent with this viewpoint is the Illinois State Bar Association Opinion #602 (5/20/78) held that the practice of law may not be conducted through a professional corporation with a fictitious trade name such as "Suburban Law Offices, Chartered." Ind. A.D. Rule 27 (a) by its plain language would prohibit use of a trade name because the name may only contain the surnames of some of its shareholders followed by the word "Professional Corporation" or "Pro. Corp."

In Texas State Bar Association Opinion 398 (11/78) the Committee interpreted Bates v. State Bar of Arizona (1977) 433 U.S. 350, which was cited by this Committee in the aforesaid Opinion No. 3 of 1979, in light of Friedman v. Rogers (1979) 440 U.S. 1. It cited the latter Supreme Court decision which prohibited an optometrist from practicing under an assumed or trade name because the trade name conveyed no information about the price and nature of the service offered and was, therefore, deceptive. Additionally the Supreme Court noted that a trade name could be readily changed to avoid the stigma of negligence or misconduct, and said trade name usage was not proper.

The conclusion of that Opinion reads in material part as follows:

> "A lawyer or professional corporation may practice under any name that is not misleading as to the identity, responsibility or status of those practicing thereunder, or otherwise false, fraudulent, misleading or deceptive. For example, 'Legal Clinic, Ltd.' The State Bar may constitutionally disallow the use of impersonal trade names or assumed names such as 'Southwest Trial Associates' by attorneys in private practice. This policy does not restrain the flow of commercial speech within the protective scope of the First Amendment; in fact, it is designed to assure that the public receives more information about the identity, responsibility and status of persons engaged in the practice of law."

To the same effect Washington State Bar Association #159 (4/75) held that private law firms or offices as distinguished from publicly funded non-profit organizations must have in their names the name of one of the lawyers in the

firm, as impersonal names are improper.

It is the opinion of this Committee that "R & D Sand Hill Legal Clinic" may not be utilized by "R & D" because the word "Sand Hill" is a generic term and does not import any specialty or degree of expertise.

As noted in our earlier Formal Opinion No. 3 of 1979, the ". . . Use of a trade name is prohibited by DR 2-102 (B)." Accordingly "R & D" should not show on their letterhead that they are a successor to "Sand Hill" because "Sand Hill" was never an active partner. "Sand Hill" is not the name of a deceased or retired partner. "Sand Hill" should be permanently buried, because it was nothing more than a trade name established in apparent unknown violation of DR 2-102 & EC 2-11.