Committee Opinion
October 19, 1992

LEGAL ETHICS OPINION 1975 ADVERTISING: DRAFTING OF LEGISLATION.

You have presented a hypothetical situation in which a governmental agency initiated drafting of a bill to amend a Virginia law to conform to federal law concerning the same subject. When drafting began, three Virginia attorneys (all of whom were employees of the agency and two of whom served, consecutively, as the enforcing agency's delegatee for enforcement of the law) worked together with the following materials: the federal law, the existing Virginia law, the Federal Register, relevant Virginia and federal case law, the federal and state constitutions, the federal regulations, and similar state laws. These attorneys also consulted appropriate federal officials in the legislative and executive branches and similar agencies in other states and Virginia, attended federal seminars on the legislation, and drew on other such resources in drafting the bill. They also prepared suggested alternative approaches to, and language for, use in the event of anticipated trouble with particular portions in the proposed legislation.

You further indicate that the draft was introduced as a bill, and it: (1) preserved much of the content of the old law; (2) contained original material and ideas of the attorneys (not found in federal or prior state law); (3) contained material borrowed directly from federal law and regulations; (4) substantially restructured the law within its existing general structure; and (5) added sections which, while not innovative or unique, were not in prior Virginia or federal law.

You advise that, after the bill was introduced, it went through the ordinary processes: comment by the public and agencies; review by the Attorney General's Office, the Governor's Office and Legislative Services; hearings in the General Assembly; agency impact analyses, etc. The bill was tabled pending changes to incorporate the results of these processes. All three attorneys left the agency before the process was complete: two left before the bill was introduced. One had made continuing drafting contributions and participated in an official capacity in the legislative process for a year and a half, including examining comment and review, reviewing and researching proposed changes, preparing agency impact statements and drafting agency responses to proposed changes; the other two attorneys had contributed about a year during the same period.

After the last of the three attorneys had left, a fourth attorney, a part- time agency employee assigned to work on the bill, incorporated the review and commentary changes, and the proposed legislation was brought back before the legislature as an amendment in the nature of a substitute. You indicate that the fourth attorney added no original ideas or material; his contribution was to incorporate agency and public comment, changes worked out through the political process, language advised by or provided by the Attorney General's Office and additional language from federal law and regulations. That [fourth] attorney consulted the original law, the bill, federal law and regulations, and similar state laws. The restructuring of the law and unique language and ideas produced by the first three attorneys remained intact and some of the first three attorneys' suggested

alternate approaches and language (prepared in anticipation of trouble areas) was included in the fourth attorney's changes. The fourth attorney describes his contributions as having been completed in a matter of weeks.

The amendment in the nature of a substitute was adopted and is the current Virginia law. None of the attorneys represented the agency or stood in an attorney-client relationship to any agency.

You have raised several questions all relative to the four attorneys presenting their credentials in having participated in the drafting of the law in question.

The appropriate and controlling Disciplinary Rules related to your inquiry are DR:2-101(A) which provides that a lawyer shall not, on behalf of himself or any other lawyer affiliated with him or his firm, use or participate in the use of any form of public communication if such communication contains a false, fraudulent, misleading, or deceptive statement or claim; DR:2-102(A) which states that a lawyer or a law firm may use or participate in the use of a professional notice or device unless it includes a statement or claim that is false, fraudulent, misleading, or deceptive; and DR:2-104(A) and (B) which provide, respectively, that a lawyer shall not hold himself out publicly as, or imply that he is, a recognized or certified specialist except in certain limited areas and that a lawyer may state, announce or hold himself out as limiting his practice to a particular area or field of law so long as his communication of such limitation is in accordance with the standards of DR:2-101, DR:2-102, or DR:2-103, as appropriate.

The Committee responds to your inquiries relative to the facts you have presented as follows:

1. With regard to whether it would be improper for any of the attorneys to hold himself out as a "co-drafter" or "contributing drafter" of the current Virginia law, the Committee is of the view that it would not be improper under DR:2-101(A). The Committee is of the opinion that such designation accurately reflects the participatory nature of the drafting process and that it does not imply that any one person was solely responsible for the law's writing or passage.

2. The Committee is of the opinion that both variations on your first inquiry, i.e., (1) representations intended to attract clients concerned with or seeking advice in the area covered by the law, and (2) representations made in descriptions of the attorneys' credentials in CLE materials or in other places in which they may instruct on the law, are immaterial to the conclusions reached above. Thus, the Committee also opines that the representations would not be improper under DR:2-102(A).

3. With regard to whether it would be improper for the fourth attorney to represent that he "drafted Virginia's current [name of law] law", the Committee considers such representation misleading under DR:2-101(A). Under the hypothetical facts you have presented, it appears to the Committee that the fourth attorney incorporated agency and public comments and changes made through the political process while keeping the other

attorneys' work largely intact. The facts also assert that the fourth attorney describes his contributions as having been completed in a matter of weeks. The Committee believes, then, that the fourth attorney's claim to have drafted the law overemphasizes and exaggerates his role in the drafting process.

The Committee is of the opinion that all three variations on your inquiry, i.e., (1) representation appearing in a professional notice in a publication for attorneys, (2) representation contained in direct mail solicitations of clients interested in the law, and (3) representation accompanied by a statement that the attorney is "concentrating his practice" in the area covered by the current law, are immaterial to the conclusions reached above. The Committee is of the further opinion that any such representations contained in professional notices or devices would be violative of DR:2-102(A).

4. The Committee is of the view that the fourth attorney's representations as to the concentration of his practice would not be improper under DR:2-104(B), since he has not stated that he is a recognized or certified specialist in that area. See LE Op. 923, LE Op. 979, LE Op. 1107.