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October 2, 1987

OPINION
OF
HAL STRATTON
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Opinion No. 87-61

By: Jeff Foster McElroy
Assistant Attorney General

To: Harris Hartz, Chairman
NM State Racing Commission
P. O. Box 8576, Highland Sta.
Albuquerque, NM 87198

QUESTION:

Does the New Mexico State Racing Commission have the authority to prohibit an attorney from representing a client before the Commission in adjudicatory proceedings or public hearings on the basis of alleged misconduct?

CONCLUSION:

No.

ANALYSIS:

In your letter requesting this opinion, you allege possible misconduct by a lawyer who represents private clients before the New Mexico State Racing Commission and who is a member of the New Mexico State Legislature. According to the information you forwarded with your letter, the lawyer is an influential member of the legislature regarding the approval of requested changes in the Commission budget and other legislation effecting horseracing in New Mexico. This lawyer's client has an interest in virtually all matters involving racing, and the lawyer speaks at Commission meetings on almost every subject open to public discussion. You have provided transcripts of instances at Commission meetings where you allege the lawyer has brought up his importance to the

Commission as a legislator while representing his client's position.

When this lawyer appears before the Commission representing a client, he is appearing before the Commission in his professional capacity as a lawyer. Section 36-2-1 NMSA 1978 (1984 Repl. Pamp.) gives to the Supreme Court of New Mexico the responsibility to define and regulate the practice of law within the state. Rule 1 of the Supreme Court Rules Governing Discipline states: "Any attorney regularly admitted to practice law in this state...is subject to the exclusive disciplinary jurisdiction of the supreme court and the disciplinary board hereinafter established." Rule 10 of the Supreme Court Rules Governing Discipline states: "Acts or omissions by an attorney which violate the Code of Professional Responsibility; (sic) Canons and Disciplinary Rules or violate the provisions of a court rule, statute or other law shall be grounds for discipline." The Supreme Court Disciplinary Board Rules of Procedure provide a method to receive complaints and to resolve disciplinary matters.

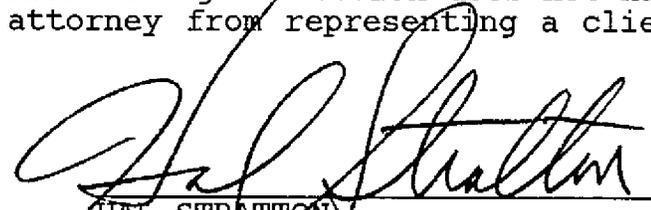
We are not aware of case law in New Mexico that expressly forbids the Commission from excluding this lawyer from appearing before it. We are persuaded, however, by the reasoning found in Tumulty v. Rosenblum, 134 N.J.L. 514, 48 A.2d 850 (1946). In that case, a county Board of Taxation sought to disbar an attorney from practicing before the board because of misconduct during hearings. The New Jersey Supreme Court held that the board had no authority to disbar the attorney, noting that exclusive jurisdiction was in the supreme court. The court specifically rejected the argument that the supreme court only regulated lawyers' conduct in courts of law and not before governmental bodies. Justice Heher wrote:

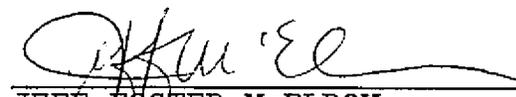
Such is plainly not the case. If it were, the attorney at law would not be answerable to the Supreme Court for derelictions in the multifarious legal activities that have no relation to litigation in courts of record; and thus there would be no protection against the culpable misconduct of erring practitioners in the other fields of legal service. And a disbarred attorney would not be excluded from practice in this wider sphere of the law. The practice of law is not confined to the conduct of litigation in courts of record. Apart from such, it consists, generally, in the rendition of legal service to another, or legal advice and counsel as to his rights and obligations under the law, calling for a degree of legal knowledge or skill, usually for a fee or stipend, i.e. that which an attorney as such

is authorized to do; and the exercise of such professional skill certainly includes the pursuit, as an advocate for another, of a legal remedy within the jurisdiction of a quasi judicial tribunal. Such is the concept of R.S. 2:111-1, N.J.S.A., classifying as a misdemeanor the practice of law by an unlicensed person. The attorney's commission is not to be circumscribed as defendants suggest, simply because of its specific authority to practice in all the State's courts of record. The grantee is therein constituted an attorney at law; and he is thus invested with all the powers usually exercisable as such. The character of the service rendered is the controlling consideration. Legal service that avoids the pitfalls leading to litigation is not of less value, economic and otherwise, than that contributed to the judicial solution of controversies arising out of unintelligent legal advice or no counsel at all. Indeed, it is usually of far greater advantage. The licensing of attorneys and counsellors is grounded in the public right to protection against unlearned and unskillful advice in matters relating to the science of the law. Lowell Bar Association v. Loeb, 315 Mass. 176, 52 N.E.2d 27; Fink v. Peden, 214 Ind. 584, 17 N.E.2d 95.

48 A.2d, at 852.

We believe the Supreme Court, pursuant to Section 36-2-1 NMSA 1978 and its own rules has exclusive authority to discipline lawyers. The Commission should provide the information that accompanied this request for an opinion to the Disciplinary Board of the Supreme Court if it wishes to pursue this matter further. In any case, the New Mexico State Racing Commission does not have the authority to prohibit an attorney from representing a client before the Commission.


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