

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OFFICE OF SECRETARY

OPINION 2002-2 Issued April 5, 2002

[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

SYLLABUS: It is improper under DR 5-101(A)(1) and DR 5-104(A) of the Ohio Code of Professional Responsibility for a lawyer to provide loan applications and make referrals of clients to lenders recommended to the law firm by a consulting company that receives commissions or referral fees from the lender for each loan completed and also receives an annual consulting fee from the law firm, unless there is full disclosure and informed consent. Because of the interrelated multiple business transactions that impact the attorney-client relationship, the requirement of full disclosure and informed consent would be difficult to meet without the benefit of independent legal counsel for each client. To preserve client loyalty which is a fundamental aspect of the attorney-client relationship and to avoid even the appearance of professional impropriety, lawyers are discouraged from the proposed use of the attorney-client relationship to facilitate client loans that financially benefit both a lender and a consulting company with which the lawyer has business relationships. Further, lawyers are cautioned that the degree of involvement of a law firm, a lawyer, or law firm staff in the client loan application process may trigger legal implications such as a requirement of their licensure and regulation by the Division of Financial Institutions of the Department of Commerce which might jeopardize the attorney's duty to preserve client confidences and secrets.

OPINION: This opinion addresses a lawyer's use of the attorney-client relationship to facilitate client loans that financially benefit both a lender and a consulting company with which the lawyer has business relationships. Is it proper for a lawyer to provide loan applications and make referrals of clients to lenders recommended to the law firm by a consulting company that receives commissions or referral fees from the lender for each loan completed and also receives an annual consulting fee from the law firm?

A law firm pays an annual membership fee to a consulting company to select, implement, evaluate, and manage products and services used by the law firm in operating its law practice. As part of the agreement, the consulting company contracts with various service providers to provide products and services to the law firms in an efficient and cost saving manner. Each member law firm is eligible to receive the favorable terms and conditions offered by the service providers listed with the consulting company.

The consulting company's list of service providers typically includes, but is not limited to telecommunications, office supplies, computers, office equipment, court reporting, accounting, marketing, banking, and insurance. The consulting company now proposes the addition of "client financing lenders" to its list of service providers.

It is anticipated that the consulting company would select one or more client financing lenders to become service providers. The consulting company would evaluate and select client financing lenders as service providers based upon established criteria, such as:

- Capability to originate the loan in a fast and efficient manner;
- Ability to close and service the loan;
- Ability to provide competitive interest rates and disclosure of interest rates to qualified applicants;
- Ability to create monthly payment schedules based upon the amount and length of the loan;
- Strength of the client financing lender's balance sheet;
- Client financing lender's knowledge of the legal industry.

Member law firms would agree to make available the lender's electronic loan application so that a law firm client could complete the loan applications online at the law firm office. In addition, the scope of duties of the law firm to the client financing lender would be to:

- Establish an account with the client financing lender;
- Make available the client financing lender's credit application for completion by the client;
- Verify the identity of the client/borrower;
- Provide an estimate of the expenses of litigation or legal representation in order for the client financing lender to determine the loan amount;
- Provide proof to the client financing lender through a standard billing statement that the law firm performed legal services or advanced costs and expenses.

The lawyers would refer clients in need of financing to pay the costs and expenses in contingent fee cases and clients in need of financing to pay attorney fees as well as costs and expenses in non-contingent fee cases. The lawyers would not refer law firm clients for financing of attorney fees in contingent fee cases.

The law firm and the lawyers would not receive referral fees from the lender or from the company. Lawyers would have discretion as to whether to refer law firm clients in need of financial assistance to the client financing lender recommended by the company or to consider any other available financing option. The choice as to whether to use a lender would be made by the client.

The consulting company would be paid either a referral fee or a commission from the lender on each loan made to a client referred by the law firm. The consulting company would not have an equity or ownership interest in the lenders.

The Board must determine whether a lawyer providing loan applications and making referrals to client financing lenders is proper under the Ohio Code of Professional Responsibility in view of the above business agreements that exist among the law firm, the company, and the lender.

The following rules apply:

DR 5-101(A)(1) Except with the consent of the client after full disclosure, a lawyer shall not accept employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's financial, business, property, or personal interests.

DR 5-104(A) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his [her] professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

DR 5-101(A)(1) prohibits a lawyer from accepting employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's business interests. A lawyer who makes available loan applications and refers clients to a lender recommended to the law firm by a consulting company that receives commissions or referral fees from the lender for each loan completed and also receives an annual consulting fee from the law firm has a business interest under DR 5-101(A)(1) that may reasonably affect the lawyer's exercise of professional judgment in making client referrals to lenders.

A lawyer's exercise of professional judgment may be influenced by reliance on the consulting company's judgment as to an appropriate lender. A lawyer's exercise of judgment may be influenced by the convenience of having a pre-selected lender's loan application available through the law office. A lawyer's exercise of professional judgment may be subtly influenced by a desire to further the consulting company's ability to negotiate good deals from service providers, by making referrals that contribute to the consulting company's overall continued financial success.

Further, DR 5-104(A) prohibits a lawyer from entering a business transaction with a client when there are differing interests therein. "Differing interests' include every

interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting inconsistent, diverse, or other interest.” Definitions Section, Ohio Code of Professional Responsibility.

Circuitously, a lawyer enters a business transaction with a client as a result of the multiple business arrangements, the financial success of which in part hinges upon the attorney-client relationship. The law firm enters a business agreement with a consulting company, the consulting company enters an agreement with a lender, the law firm enters an agreement with the lender to make loan applications available to clients, the lawyers refer clients to the lender, and the lender enters agreements with the lawyers’ clients that financially benefit the lender and the consulting company.

A consequence of the business transactions is that differing interests arise in the attorney-client relationship. A client’s interest is to obtain financing when needed from the best available source. A client expects his or her lawyer to exercise, free of compromise, independent professional judgment in making referrals to client financing lenders. A lawyer’s interest is to properly refer a client who needs financing to the best available source, but the lawyer’s interest may be compromised by the business transaction. The lawyer knows that the consulting company will benefit financially on the loans made to law firm clients by the lender. The lawyer knows that a strong and financially successful consulting company may be better able to negotiate cost saving deals for the law firm with other service providers. Further, the lawyer knows that the convenience of completing a loan application at the lawyer’s office may influence the lawyer’s judgment in making the referral as well as the client’s judgment as to obtaining financing.

To resolve conflicts prohibited under DR 5-101(A)(1) and DR 5-104(A), full disclosure and informed consent are options within the rules. Nevertheless, in view of the interrelated multiple business transactions that impact the attorney-client relationship, the requirement of full disclosure and client consent would be difficult to meet without the benefit of independent legal counsel for the client.

Client loyalty is a precept that is fundamental to the attorney-client relationship. When a lawyer agrees to provide loan applications for a lender and participates in referrals that provide financial benefit to a lender and a consulting company that have business relationships with the law firm, the lawyer dilutes his or loyalty to the client and may create an appearance of impropriety. The broad mandate of Canon 9 is a reminder to the legal profession that “A LAWYER SHOULD AVOID EVEN THE APPEARANCE OF PROFESSIONAL IMPROPRIETY.”

A client’s interest should be paramount in the attorney-client relationship, not the interests of third persons.

EC 5-1 The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his [her] client and free of compromising influences and loyalties. Neither his [her] personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalties to his [her] client.

Preservation of the personal nature of the attorney-client relationship, including loyalty to the client, fosters the exercise of professional judgment on behalf of a client.

EC 3-2 The sensitive variations in the considerations that bear on legal determinations often make it difficult even for a lawyer to exercise appropriate professional judgment, and it is therefore essential that the personal nature of the relationship of client and lawyer be preserved. Competent professional judgment is the product of a trained familiarity with law and legal processes, a disciplined, analytical approach to legal problems, and a firm ethical commitment.

To preserve client loyalty which is a fundamental aspect of the attorney-client relationship and to avoid even the appearance of impropriety, lawyers are discouraged from using the attorney-client relationship to facilitate client loans that financially benefit both a lender and a consulting company with which the lawyer has business relationships.

Further, the degree of involvement by a law firm, a lawyer, or law firm staff with lenders in the client loan applications process may trigger legal implications. For example, if a law firm, lawyer, or law firm staff engages in loan activities that require licensing by the Division of Financial Institutions in the Department of Commerce, they would be subject to state regulation and licensure which might jeopardize the preservation of client confidences and secrets. A lawyer with questions regarding what constitutes regulated activities with regard to loans should contact the Department of Commerce for guidance.

In conclusion, the Board advises that it is improper under DR 5-101(A)(1) and DR 5-104(A) of the Ohio Code of Professional Responsibility for a lawyer to provide loan applications and make referrals of clients to lenders recommended to the law firm by a consulting company that receives commissions or referral fees from the lender for each loan completed and also receives an annual consulting fee from the law firm, unless there is full disclosure and informed consent. Because of the interrelated multiple business transactions that impact the attorney-client relationship, the requirement of full disclosure and informed consent would be difficult to meet without the benefit of independent legal counsel for each client. To preserve client loyalty which is a fundamental aspect of the attorney-client relationship and to avoid even the appearance of professional impropriety, lawyers are discouraged from the proposed use of the attorney-client relationship to facilitate client loans that financially benefit both a lender and a consulting company with which the lawyer has business relationships. Further, lawyers are cautioned that the degree of involvement of a law firm, a lawyer, or law firm staff in the client loan application process may trigger legal implications such as a requirement of their licensure and regulation by the Division of Financial Institutions of the Department of Commerce which might jeopardize the attorney's duty to preserve client confidences and secrets.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.

