

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 92-6

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[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]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: An attorney engaged in the general practice of law with an emphasis on criminal practice may acquire an ownership interest in a corporation that sells and provides house arrest programs for various courts in Ohio, including courts in which an attorney represents criminal defendants whose sentences might include house arrest as an alternative to incarceration. However, since a lawyer's independent professional judgment on behalf of a client could be affected by such business interest, the attorney must obtain the consent of the client after full disclosure as required by Disciplinary Rule 5-101 (A).

OPINION: The question presented is whether an attorney engaged in the general practice of law with an emphasis on criminal practice may acquire an ownership interest in a corporation that sells and provides house arrest programs for various courts in Ohio, including courts in which the attorney represents criminal defendants whose sentences might include house arrest as an alternative to incarceration.

The house arrest program provides electronic monitoring as an alternative to formal incarceration for convicted offenders. An ankle bracelet worn by a convicted offender emits an electronic signal which is picked up by a receiving device in the offender's home. The receiving device transmits an electronic signal to a central monitoring station during the times when the offender is required to be home under house arrest, notations are made, and the sentencing court is notified.

The Code of Professional Responsibility places restraints on a lawyer's representation of a client when the lawyer has an interest that could affect the lawyer's exercise of professional judgment on behalf of the client. This restraint is found within Disciplinary Rule 5-101 (A) of the Code of Professional Responsibility which provides that "[e]xcept with the consent of his [her] client after full disclosure, a lawyer shall not accept employment if the exercise of his [her] professional judgment on behalf of his [her] client will be or reasonably may be affected by his [her] own financial, business, property, or personal interests."

The ethical concern behind Disciplinary Rule 5-101 (A) is that “[w]hen the interests of a lawyer and a client cross, loyalties are confused, and the lawyer's effectiveness is diminished.” ABA/BNA Lawyers' Manual on Professional Conduct § 51:404 (1990). Another concern is that when interests conflict, a lawyer might use the confidences and secrets of a client to the advantage of the lawyer. Id.

Disciplinary Rule 5-101 (A) is peculiar in several respects. As written, “[e]ven if the attorney's judgment may be so impaired, DR 5-101 (A) permits employment if the client consents after full disclosure.” Annotated Code of Professional Responsibility 193 (1979). Further, the rule makes no reference to the appropriate conduct when such a conflict of interest arises after the attorney accepts employment. Id. at 194.

However, there are several ethical considerations within the Code of Professional Responsibility that provide guidance. Ethical Consideration 5-1 states that

[t]he 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 [her] loyalty to his [her] client.

Under Ethical Consideration 5-2

[a] lawyer should not accept proffered employment if his [her] personal interests or desires will, or there is a reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client. After accepting employment, a lawyer carefully should refrain from acquiring a property right or assuming a position that would tend to make his [her] judgment less protective of the interests of his [her] client.

According to Ethical Consideration 5-3

[e]ven if the property interests of a lawyer do not presently interfere with the exercise of his [her] independent judgment, but the likelihood of interference can reasonably be foreseen by him [her], a lawyer should explain the situation to his [her] client and should decline employment or withdraw unless the client consents to the continuance of the relationship after full disclosure.

Notably, "[t]he consent provision of DR 5-101 (A) has been questioned (1) as having an undermining effect on the aspirational suggestions and underlying policies expressed in EC 5-1 and EC 5-2 and (2) as placing an undue burden on the client to make a decision about the exercise of professional judgment which properly belongs to the attorney." ABA, Annotated Code of Professional Responsibility 196 (1979) (citing Comment, Full Consent: An Invitation to Conflicts of Interests in the Attorney-Client Relationship, 1972 Law & Soc. Ord. 435, 441, 445 (1972)). Nevertheless, the bottom line is that a lawyer should not allow related business interests to affect representation; further, client consent is required when a lawyer's independent professional judgment will be or reasonably may be affected by a financial, business, property, or personal interest.

The Board found no opinions from Ohio or other states addressing the precise issue of whether it is proper for a lawyer who represents criminal defendants to acquire an ownership interest in a corporation that provides house arrest programs used by courts as sentencing alternatives. The Standing Committee on Legal Ethics of the Virginia State Bar considered a related question of whether a prosecutor or a criminal defense lawyer may serve on boards that were set up for the purpose of providing the judicial system with sentencing alternatives for non-violent offenders and did not find such membership to be per se improper. Virginia State Bar, Op. 1268 (1989). However, when serving on a policy making body, the lawyer was advised to be mindful of the potential perception of gaining unfair advantage for a client. When serving on a quasi-adjudicatory board, the lawyer was advised not to participate in diversion decisions pertaining to any individual whom the lawyer prosecuted or represented in the underlying charge. Id.

Several committees have addressed the issue of lawyer with an ownership interest in a business referring a client to the business. These committees have advised that there be client disclosure and consent. See Virginia State Bar, Op. 1198 (1989) (ownership in court reporting service); Maryland State Bar Ass'n, Op. 88-80 (1988) (interest in medical clinic); Philadelphia Bar Ass'n, Op. 87-8 (1987) (partnership in company that supplies medical equipment); Ohio State Bar Ass'n, Informal Op. 90-1 (1990) (ownership in a health care facility); South Carolina Bar, Op. 83-13 (undated) (ownership in a reporting service rendering services in connection with discovery matters).

Even though lawyers are not prohibited from acquiring business and financial interests, they should carefully consider the nature of the interest and the relationship if any to their law practice.

Anytime a lawyer's financial or property interests could be affected by advice the lawyer gives a client, the lawyer had better watch out.

While lawyers, either individually or in groups, are certainly not barred from entering into personal business deals, the further removed these deals are from the lawyers' legal practices the better. Whenever a client gets near to a lawyer's business interest, red flags ought to start going up in the lawyer's mind.

ABA/BNA Lawyers' Manual on Professional Conduct §51:405 (1990) (citations omitted).

An attorney with ownership in a house arrest program has a personal interest in the success of the program, which in part is dependent upon having participants in the program. During the representation of a criminal defendant, a lawyer may advise a client as to the appropriate plea and may make recommendations to the court as to an appropriate sentence. Thus, a relationship does exist between a lawyer's business interest in a house arrest program for criminal offenders and a lawyer's representation of criminal defendants.

Although a lawyer's interest in a house arrest program could be viewed as being consistent with a criminal defendant's interest in obtaining the most lenient sentence, there is also the potential that the interest could affect a lawyer's judgment on behalf of a client. It is conceivable that an attorney could encourage a client to plead guilty when not appropriate and be less zealous in representation because of the attorney's potential financial gain from the client's conviction and sentencing to a house arrest program. If ownership interest in a house arrest program could influence an attorney's independent judgment on behalf of a client, then there must be compliance with Disciplinary Rule 5-101(A).

In conclusion, it is the Board's opinion that an attorney engaged in the general practice of law with an emphasis on criminal practice may acquire an ownership interest in a corporation that sells and provides house arrest programs for various courts in Ohio, including courts in which the attorney represents criminal defendants whose sentences might include house arrest as an alternative to incarceration. However, since a lawyer's independent professional judgment on behalf of a client could be affected by such business interest, the attorney must obtain the consent of the client after full disclosure as required by Disciplinary Rule 5-101 (A).

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.