

# *The Supreme Court of Ohio*

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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## **OPINION 92-17**

Issued October 16, 1992

*Withdrawn by Adv. Op. 2023-10*

*[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]*

*[Not current-subsequent rule amendments to DR 2-103(A), DR 2-104(A); 2-103(B); expressing the rules in gender neutral language.]*

**SYLLABUS:** A corporation's lawyer may not provide private legal representation to the corporation's clients on matters relating to issues on which the corporation has worked. A corporation's attorney available to privately represent the corporation's clients adds value to the corporate services and thus improperly compensates the corporation for a recommendation of professional employment. A lawyer must not allow a corporation to serve as an improper intermediary between a lawyer and a client.

**OPINION:** The question presented is whether a lawyer employed as general counsel for a business corporation providing tax consulting services may, on occasion, privately represent clients of the corporation in legal proceedings with tax officials concerning matters relating to issues on which the corporation has worked. The question raises multiple ethical issues--potential conflicts of interest, improper division of fees, unauthorized practice of law, and improper recommendation of professional employment.

### Conflicts of Interest

Two types of conflicts of interest could occur as a result of the proposed conduct. First, a lawyer's loyalty to the corporation could impair his or her representation of a corporate client. Second, a corporate lawyer's own interests could impair his or her representation of the corporate client's interests.

A lawyer employed or retained by a corporation owes allegiance to the corporation, not to a corporate client. See Code of Professional Responsibility, EC 5-18. This allegiance to the corporation makes multiple representation of the corporation and its clients difficult due to the potentially differing interests and loyalties. However, multiple representation is not prohibited by the Code of Professional Responsibility. Under Disciplinary Rule 5-105 (A), (B), and (C), multiple representation is permitted under two conditions: 1) it must

be "obvious" that the lawyer can adequately represent the interest of each client and 2) each client must "consent" to the representation after "full disclosure" of the implications of the multiple representation. Under Disciplinary Rule 5-101 a lawyer cannot accept employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own interest, except with client consent after full disclosure. The proposed representation would have to meet these conditions in order to be proper under Disciplinary Rules 5-105 and 5-101.

#### Division of Fee

A concern is that a corporate attorney might improperly share legal fees with the corporation. Under Disciplinary Rule 3-102, with exceptions not applicable here, a lawyer may not share legal fees with a non-lawyer. However, this concern could be overcome by a corporate lawyer billing the corporate client directly for private legal services. In so doing, there would not be a sharing of legal fees with the corporation and thus, there would be no violation of the rule prohibiting division of fees with a non-lawyer.

#### Unauthorized Practice of Law

Another concern is that the business corporation would practice law through the corporation's attorney. Under Disciplinary Rule 3-101, "[a] lawyer shall not aid a non-lawyer in the unauthorized practice of law." However, according to the requester, the corporation does not engage in the practice of law, nor does it hold itself out as engaging in the practice of law. The requester notes that the private representation would occur only occasionally, and is not a routine service offered to corporate clients. Nevertheless, if such representation occurred routinely there could arise questions regarding whether the corporation was in essence engaging in the practice of law.

A related concern is whether a corporation would try to control or influence a corporate lawyer's judgment in his or her private representation of a corporate client. Under Disciplinary Rule 5-107 (B) "[a] lawyer shall not permit a person who recommends, employs, or pays him [her] to render legal services for another to direct or regulate his [her] professional judgment in rendering such legal services." Thus, it would be improper for the lawyer to allow this type of interference from a corporation. Further, a lawyer could be assisting in the unauthorized practice of law if non-lawyers in the corporation are involved in rendering legal advice to the company's client or in directing or regulating the lawyer's professional judgment.

Recommendation

Improper recommendation of professional employment is another potential problem that could occur if a business corporation's lawyer becomes involved with legal representation of corporate clientele. The Code contains several key provisions governing the recommendation of professional employment. DR 2-103(A) states:

A lawyer shall not recommend employment as a private practitioner, of himself [herself], his [her] partner, or associate to a layperson who has not sought his [her] advice regarding employment of a lawyer, except as provided in DR 2-101 [a rule governing advertising].

Disciplinary Rule 2-104(A) states:

A lawyer who has given unsolicited advice to a layman that he [she] should obtain counsel or take legal action shall not accept employment resulting from that advice, except that [exceptions not applicable to this opinion].

Disciplinary Rule 2-103(B) states:

A lawyer shall not compensate or give any thing of value to a person or organization to recommend or secure his [her] employment by a client, or as a reward for having made a recommendation resulting in his [her] employment by a client, except that he [she] may pay the usual and reasonable fees or dues charged by any of the organizations listed in DR 2-103(D).

Under these rules, three things are improper: 1) it is improper for the lawyer to recommend employment of himself or herself to a layperson when the layperson has not sought the lawyer's advice; 2) it is improper to accept employment arising from unsolicited advice to a layperson that he or she should obtain counsel, and 3) it is improper to compensate or give a thing of value to a person or organization to recommend or as a reward for recommending the lawyer's employment by a client. It is the Board's view that it would be virtually impossible for a corporation's lawyer to accept employment to provide private representation on legal matters for a client of the corporation without there being a violation of these disciplinary rules.

In Ohralik v. Ohio State Bar Association, 436 U.S. 447, 449 (1978) the Supreme Court held that "the state--or the Bar acting with state authorization--constitutionally may discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent." Within the context of a corporation's lawyer seeking private representation of clients of the corporation, there exists the opportunity for undue influence, intimidation, overreaching, and other forms of vexatious conduct. Therefore, under Disciplinary Rule 2-103 (A), it would be improper for an attorney who serves as general counsel for a corporation to solicit corporate clients in person with regard to private representation on legal matters, including those matters relating to issues on which the corporation has worked.

Further, an attorney for a corporation could not request that the corporation recommend or promote the use of his or her services as a private practitioner, because to do so would violate Disciplinary Rule 2-103. Ethical Consideration 2-8 of the Code sagely reminds lawyers "[a] layman is best served if the recommendation is disinterested and informed. In order that the recommendation be disinterested, a lawyer should not seek to influence another to recommend his [her] employment."

Finally, the corporate attorney faces an ethical problem even if it is the corporate officer or employee, not the attorney, who makes the recommendation to the corporate client. Under Disciplinary Rule 2-103(B), an attorney must not reward or compensate the corporation for the referral.

Providing free services or even discounted legal services is considered reward or compensation. See Ohio SupCt Bd of Comm'rs on Grievances and Discipline, Op. 88-12 (1088) (Even if a lawyer does not request a funeral director to recommend the lawyer's services, by giving one hour of free consultation the lawyer compensates the funeral director for a recommendation because the legal services add value to the funeral package.). See also, Ohio Sup Ct Bd of Comm'rs on Grievances and Discipline, Op. 89-31 (1989) (An attorney may not be employed by a certified public accountant's firm to practice law for the firm's accounting clients.).

As to the facts presented, a corporation's attorney available to privately represent the corporation's clients adds value to the corporate services and thus improperly compensates the corporation for a recommendation of professional employment. A lawyer must not allow a corporation to serve as an improper intermediary between a lawyer and a client.

Conclusion

As a result of these multiple ethical concerns, several ethics committees advise that corporate counsel may not provide legal services to corporate clients. See Iowa State Bar Ass'n, Op. 80-46 (1980), Tennessee SupCt Bd of Professional Responsibility, Formal Ethics Opinion Nos. 84-F-74 (1984), 83-F-44 (1983) and 83-F-44 (a) (1983).

In contrast, an ethics committee permits a lawyer for a corporation to provide legal services to corporate clients so long as certain safeguards are imposed. See State Bar of Michigan, CI 740 (1982) (advising that corporate counsel may render legal services to clients of a corporation only after disclosure of potential conflicts of interest and consent, and provided these parties are billed directly by the attorney, and the attorney does not share fees with the corporation). However, one ethics committee has expressed "substantial concern" that a lawyer serving as in-house counsel for an engineering consulting company and giving legal counsel to company clients risks violations regarding professional independence, unauthorized practice of law, and conflicts of interest. See Philadelphia Bar Ass'n, Op. 89-1 (1989).

In conclusion, it is this Board's opinion that a corporation's lawyer may not provide private legal representation to the corporation's clients on matters relating to issues on which the corporation has worked. Although ethical concerns regarding potential conflicts of interest, improper division of fees, and unauthorized practice of law might be resolved through proper adherence to disciplinary rules, it would be impossible to comply with disciplinary rules regarding recommendation of professional employment. A corporation's attorney available to privately represent the corporation's clients adds value to the corporate services and thus improperly compensates the corporation for a recommendation of professional employment. A lawyer must not allow a corporation to serve as an improper intermediary between a lawyer and a client.

**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.**