

# *The Supreme Court of Ohio*

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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## **OPINION 97-5**

Issued October 10, 1997

*[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]*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 for attorneys to form an ancillary business to serve small and medium sized businesses by conducting negotiations of legal fees between each business and its retained counsel. By conducting negotiations of legal fees through the ancillary business, the attorneys would be improperly attempting to exert influence upon the attorneys retained by the businesses and would be interfering with existing fee contracts between attorneys and clients.

**OPINION:** This opinion addresses whether it is ethically proper for attorneys to form an ancillary business to serve small and medium-sized businesses by negotiating legal fees on their behalf with the attorneys who already represent the businesses in legal matters. Upon forming the ancillary business, the attorneys would advertise the legal fee negotiation services to small and medium sized businesses. If hired, they would contact the attorneys representing the businesses and would conduct legal fee negotiations. The attorneys would not solicit or accept legal work from the businesses served.

Is it proper for attorneys to form an ancillary business to serve small and medium sized businesses by conducting negotiations of legal fees between each business and its retained counsel?

Legal fees are established as a matter of agreement between each lawyer and client. A fee agreement sets forth the details of the compensation, the services to be rendered, the identity of the client, and the client's responsibilities toward payment. *See* ABA/BNA Lawyers' Manual on Professional Conduct 41:101 (2/19/97). In reaching such agreement, the lawyer and the client gain a mutual understanding regarding the scope of the attorney-client relationship.

The underlying ethical requirement of all fee agreements is that attorney fees must be reasonable. Under DR 2-106 (A) "[a] lawyer shall not enter into an agreement for, charge, or collect an illegal or excessive fee." Under DR 2-106(B) "[a] fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee." Factors to be considered in determining reasonableness are listed within the rule.

An attorney must not only determine how much is reasonable to charge a business client, but also how to charge. Hourly billing is the traditional method of billing, but there are other methods such as blended hourly rates, contingent or modified contingent rates,

fixed fees, and unit billing. These alternate methods of billing are of emerging interest to cost-conscious clients.

The terms of a proposed fee agreement should be explained to each client. This duty is expressed in Ethical Consideration 2-18: “A lawyer should be mindful that many persons [businesses] who desire to employ him [her] may have had little or no experience with fee charges of lawyers, and for this reason he [she] should explain fully to such persons [businesses] the reasons for the particular fee arrangement he [she] proposes.”

This Board has already advised in Opinion 94-7 that Ohio attorneys may form ancillary businesses to provide law-related services. “Attorneys who operate such law-related businesses must do so in a manner consistent with the Ohio Code of Professional Responsibility. The ancillary business must not engage in activities that would be prohibited as unauthorized practice of law.” *See* Ohio SupCt, Bd of Comm’rs on Griev & Disc, Op. 94-7 (1994).

Now, the Board must determine whether an attorney comports with the Ohio Code of Professional Responsibility by forming an ancillary business to conduct negotiations of legal fees between a business and its retained counsel. Does an attorney who forms an ancillary business to negotiate legal fees on behalf of small and medium sized businesses become an improper intermediary between the business clients and their attorneys?

The applicable rule is DR 5-107. Under the broad rubric of DR 5-107, an attorney has a duty of “Avoiding Influence By Others Than The Client.” Ethical Consideration 5-1 supports this mandate: “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 [her] loyalty to his [her] client.”

While the stated purpose of assisting small and medium-sized businesses in decreasing their legal fees may be laudable, the attorney’s proposed method of forming and using an ancillary business to directly negotiate legal fees between an attorney and client is objectionable under the above cited rule. The attorneys who form the ancillary business to conduct the fee negotiations would be improperly attempting to exert influence upon the attorneys who represent the businesses and would be interfering with a fee contract between attorneys and clients.

Through the negotiation of fees for another, the ancillary business becomes an improper intermediary in an attorney-client relationship. In conducting negotiations of a legal fee, the ancillary business becomes directly involved in the businesses’ legal matters. This is so, for such frank and thorough negotiation of legal fees would require candid discussion of the subject matter of the representation. The ancillary business would be involved in decisions regarding the fee agreement that would be inappropriate for a non-lawyer to make on behalf of another. In its efforts to decrease the legal fee, the ancillary business would be attempting to influence the professional judgment of the lawyer as to the

reasonableness of the existing fee. The ancillary business becomes a third party interfering with an existing fee contract between an attorney and client.

In conclusion, this Board advises that it is improper for attorneys to form an ancillary business to serve small and medium sized businesses by conducting negotiations of legal fees between each business and its retained counsel. By conducting negotiations of legal fees through the ancillary business, the attorneys would be improperly attempting to exert influence upon the attorneys retained by the businesses and would be interfering with existing fee contracts between attorneys and clients.

The advice within this opinion is not to be construed as prohibiting attorneys from forming ancillary businesses to provide other consulting services to small and medium-sized businesses. *See* Ohio Sup Ct, Bd of Comm'rs on Griev & Disc, Op. 94-7 (1994).

**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.**