

# ***The Supreme Court of Ohio***

## BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OFFICE OF SECRETARY

### **OPINION 2002-1**

Issued February 1, 2002

***Withdrawn by Adv. Op. 2020-09***

***[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]***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 2-103(B), DR 2-103(C), DR 3-103(A), DR 5-101(A)(1), and DR 5-104(A) of the Ohio Code of Professional Responsibility for a law firm to enter a business agreement to pay an annual fee to a real estate agency and to offer discounted legal services to customers of the real estate agency in exchange for the real estate agency promoting the law firm as a service provider in a real estate benefits program.

**OPINION:** This opinion addresses the propriety of a law firm entering a business agreement with a real estate agency to promote the law firm as a service provider in a real estate benefits program.

Is it proper under the Ohio Code of Professional Responsibility for a law firm to enter a business agreement to pay an annual fee to a real estate agency and to offer discounted legal services to customers of the real estate agency in exchange for the real estate agency promoting the law firm as a service provider in a real estate benefits program?

A law firm has been approached by a real estate agency to enter a business agreement to participate in a real estate benefits program. Under the agreement, the real estate agency would agree to market and advertise the law firm as a service provider in its real estate benefits program. To become a service provider in the real estate benefits program, the law firm would agree to pay the real estate agency an annual fee and to offer a discount of certain legal services to customers of the real estate benefits program. The company labels the agreement as a “strategic partnership agreement” between the real estate agency and the law firm.

A variety of service providers would enter into similar agreements with the real estate agency and would be listed in the agency’s service provider directory. The categories in the service provider directory include appliances, appraisers, automobile, contractors, designers, home products, home services, inspections, legal services, lenders and financial, movers and storage, outdoor products, outdoor services, personal services, pest control, temporary housing, title companies, travel, and utilities. It is anticipated that one or more law firms would participate as providers of legal services.

The real estate benefits program is comprised of a concierge program, a relocation program, and employee benefits program. The real estate agency promotes the law firm and other service providers through service provider directories, through informational mailings, and through live presentations offered through the real estate benefits program.

Through its concierge program, potential or actual customers who contact the real estate agency or visit the agency's Web site are given access to a printed or online service provider directory. The directory lists the name and address of the service providers and gives a description of the discount, if any. Access to the service provider directory appears to be a free service offered by the real estate agency to potential and actual customers of the real estate agency.

Through its relocation program, the agency mails relocation packages to individuals moving to the geographic area of the real estate agency and includes a copy of the service provider directory. The agency also makes presentations to corporate relocation executives and in the presentations includes information about the service providers.

Through its employee benefits program, the agency sells an employee benefits program to companies. Companies purchase the program from the agency as a way of offering employee benefits. To market the program, the real estate agency makes presentations to the companies and to human resource benefits personnel. The presentations include information about the service providers. The agency invites service providers to participate in employee seminars for member companies who have purchased the program.

In addition, the real estate agency agrees to invite service providers to attend a minimum of one meeting of the real estate agency per year to distribute materials and inform agents of special promotions. The agency agrees that its staff will distribute literature or promotional items of the service provider to the real estate agents' mail boxes. The real estate agency agrees that the benefits of the real estate benefit program would be available to employees of the service providers at no charge.

The proposed agreement between the real estate agency and the law firm does not obligate the law firm to use the services of the real estate agency, nor does it obligate the law firm to recommend law firm clients to the real estate agency. The law firm and other service providers must agree not to enter other programs that offer services at discounts to local companies as part of a benefits package.

Under the proposed agreement, the law firm would offer \$100 off attorney fees in real estate closings for customers in the concierge program. The law firm would offer \$100 off attorney fees in real estate closings or free initial consultation for other legal services to recipients of the employee benefits program.

It is the Board's view that a lawyer's participation in the proposed agreement would violate DR 2-103(B), DR 2-103(C), DR 3-103(A), DR 5-101(A)(1), and DR 5-104(A).

DR 2-103(B) A lawyer shall not compensate or give any thing of value to a person or organization to recommend or secure the lawyer's employment by a client, or as a reward for having made a recommendation resulting in

the lawyer's employment by a client, except that the lawyer may pay the usual and reasonable fees or dues charged by any of the organizations listed in DR 2-103(D) [a legal aid office or public defender office; a military legal assistance office; a lawyer referral service that complies with DR 2-103(C), or any bona fide organization that recommends, furnishes, or pays for legal services to its members or beneficiaries and satisfies the conditions in DR 2-103(D)(4)(a through g)].

DR 2-103(C) A lawyer shall not request a person or organization to recommend or promote the use of the lawyer's services or those of the lawyer's partner or associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, as a private practitioner, except that: [a lawyer may request referrals from and participate with lawyer referral services that conform to the conditions in DR 2-103(C)(1)(a through j) and a lawyer may cooperate with legal service activities of offices or organizations enumerated in DR 2-103(D)].

DR 3-103(A) A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law.

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.

First, the proposed agreement violates DR 2-103(B) and DR 2-103(C). Under DR 2-103(B) a lawyer shall not compensate or give any thing of value to a person or organization to recommend or secure the lawyer's employment by a client, or as a reward for having made a recommendation resulting in the lawyer's employment by a client. The only exceptions to the rule are that lawyers may pay fees and dues to a legal aid office or public defender office; a military legal assistance office; a lawyer referral service that complies with DR 2-103(C), or any bona fide organization that satisfies the conditions in DR 2-103(D)(4)(a through g). A real estate agency does not fit within the exceptions.

Under DR 2-103(C), a lawyer is prohibited from requesting that an organization promote the lawyer's services. The only exceptions to the rule permit participation and cooperation with a lawyer referral service that complies with the rule, a legal aid office or public defender office, a military legal assistance office, or any bona fide organization that satisfies the conditions in DR 2-103(D)(4)(a through g). A real estate agency does not fit within the exceptions.

An agreement by a law firm to pay an annual fee to a real estate agency for promoting the law firm as a service provider in its real estate benefits program is the giving of a thing of value to an organization to recommend or secure a lawyer's employment. Likewise, a law firm's agreement to reduce attorney fees for certain legal services to customers of the real estate benefits program is the giving of a thing of value.

This view is consistent with the Board's view in Op. 88-012 (1988). In Op. 88-012, the Board advised that DR 2-103(C) prohibits an attorney from providing a free consultation to a surviving spouse or surviving children as part of a funeral package offered by a funeral director. The Board stated that even if the lawyer did not request the funeral director to recommend his or her services, the lawyer's one hour of free consultation was compensation to the funeral director for recommending the lawyer's services because the legal services add to the value of the funeral package.

Further, the recommendations by the real estate agency of the lawyer's services are not disinterested recommendations for the law firm has paid for inclusion as a recommended service provider. As noted in Ethical Consideration 2-8, disinterested recommendations do not serve the public.

EC 2-8 Selection of a lawyer by a layman often is the result of advice and recommendation of third parties—relatives, friends, acquaintances, business associates, or other 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. A lawyer should not compensate another person for recommending him [her], for influencing a prospective client to employ him [her], or to encourage future recommendations.

Second, the proposed agreement violates DR 3-103(A). Under DR 3-103(A), a lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law. The Board has consistently interpreted DR 3-103(A) to apply not only to partnerships formed in accordance with state law, but also to business relationships and associations between lawyers and non-lawyers. *See e.g.*, Ohio SupCt, Bd of Comm'rs on Grievances and Discipline, Op. 2000-1 (2000). The real estate agency labels the agreement as a "strategic partnership agreement" even though there is no joint ownership of a business, nor is there an agreement to share the business profits or losses. Nevertheless, while the agreement may not be a partnership in the true legal sense of the word, the proposed agreement between the lawyer and the real estate agency is a business agreement that involves the practice of law and is prohibited under DR 3-103(A).

Third, the proposed agreement violates DR 5-101(A)(1). 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 financial, business, property, or personal interests. A law firm that pays a real estate agency for promoting the services of the law firm as a recommended service provider has a business interest that may reasonably affect the lawyer's independent professional judgment. The law firm may perceive subtle pressure to perform legal services to clients in a manner that pleases the real estate agency to avoid any risk of being excluded as a service provider.

Fourth, the proposed agreement violates DR 5-104(A). DR 5-104(A) prohibits a lawyer from entering a business relationship with a client when there are differing interests therein. As proposed, the law firm enters an agreement with a real estate agency. The real estate agency offers a real estate benefits program to customers of the agency and to companies that provide employee benefits. The customers of the real estate agency and the employees of companies that purchase employee benefits are eligible for discounted services from the law firm. Circuitously, the law firm is entering a business relationship with clients. Differing interests exist. The client expects the lawyer to exercise independent professional judgment free of compromise, but the lawyer may have business or financial interests that influence his or her independent professional judgment. The lawyer may be influenced by his or her interest in receiving as many referrals as possible or in making enough money from the referrals to cover or exceed the annual membership fee paid by the law firm to the real estate agency.

Both DR 5-101(A)(1) and DR 5-104(A) provide an exception when there is client consent after full disclosure. Neither DR 2-103 nor DR 3-103 provides a similar exception. Since all four rules apply to the question raised, the ethical conflict cannot be alleviated through full consent and disclosure.

In addition to the above ethical issues, the lawyer's participation might also violate rules regulating lawyer advertising. This would depend upon the type and content of the publicity provided. This issue is not addressed further herein.

In conclusion, the Board advises that it is improper under DR 2-103(B), DR 2-103(C), DR 3-103(A), 5-101(A)(1), and 5-104(A) of the Ohio Code of Professional Responsibility for a law firm to enter a business agreement to pay an annual fee to a real estate agency and to offer discounted legal services to customers of the real estate agency in exchange for the real estate agency promoting the law firm as a service provider in a real estate benefits program.

**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.**