

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OFFICE OF SECRETARY

OPINION 2002-12

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[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]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: It is improper under DR 5-107(C)(1), Gov. Bar R. III § 3(B), and DR 3-102(A) for an attorney to transfer his or her shares in a legal professional association to an irrevocable trust for the benefit of individuals not licensed to practice law even if the trustee who holds the share in trust is a licensed attorney.

OPINION: This opinion addresses an attorney's proposed transfer of his or her shares in a legal professional association to an irrevocable trust for beneficiaries who are individuals not licensed to practice law.

Is it proper for an attorney to transfer his or her shares in a legal professional association to an irrevocable trust for the benefit of individuals not licensed to practice law if the trustee who holds the share in trust is a licensed attorney?

For estate planning purposes, an attorney proposes to transfer shares in his or her legal professional association to an irrevocable trust whose beneficiaries are the attorney's minor children who are not licensed attorneys. The attorney would transfer legal title to the shares of stock to the trustee of the trust. The trustee of the irrevocable trust would be an attorney licensed to practice law in Ohio. The trust instrument would require each successor trustee to be an attorney licensed in Ohio. The trustee would not have access to client files.

According to the requester, the trust would have provisions such that for an initial time, the Internal Revenue Code would treat the attorney/settlor as the owner of the trust for income tax purposes. During that time, the attorney/settlor would report the income from the trust on his or her own individual tax return. After that time, the attorney/settlor no longer would be the owner of the trust for income tax purposes. The trustee would receive and retain in the trust the income from the shares of stock. The trustee would distribute income from the shares of stock to the beneficiaries at the sole discretion of the trustee.

Upon the attorney/settlor's death, the stock would continue to be held by the trustee until one of the following events occurred. The trustee would sell the shares to another member of the legal professional association pursuant to a buy-sell arrangement, the legal

professional association would buy back the shares held by the trust, or possibly the legal professional association would dissolve. Once the trustee receives the proceeds from the shares, the trustee would distribute assets of the trust to the non-lawyer beneficiaries and the trust would be terminated.

Rule III of the Supreme Court Rules for the Government of the Bar of Ohio (adopted, effective July 1, 1983 and amended several times since) expressly authorizes attorneys to practice law in Ohio as a legal professional association formed under Chapter 1785 of the Ohio Revised Code. An attorney who organizes his or her law practice as a legal professional association must heed state law governing professional associations as well as the rules of the Supreme Court of Ohio governing attorney conduct—the Ohio Code of Professional Responsibility and the Supreme Court Rules for the Government of the Bar of Ohio.

Thus, the question presented involves both legal issues under Chapter 1785 of the Ohio Revised Code and ethical issues. This Board's advisory authority is limited to advising upon the ethical issues under the Supreme Court Rules for the Government of the Bar of Ohio and the Ohio Code of Professional Responsibility. However, for proper consideration, the Board must review, while not advising upon, state law.

State law restricts the issuance of stock in a professional association to persons licensed to render the same professional service as that for which the association was organized.

A professional association may issue its capital stock only to persons who are duly licensed, certificated, or otherwise legally authorized to render within this state the same professional service as that for which the association was organized or, in the case of a combination of professional services described in division (B) of section 1785.01 of the Revised Code, to render within this state any of the applicable types of professional services for which the association was organized.

Ohio Rev. Code Ann. § 1785.05 (West Supp. 2002).

State law also restricts the subsequent transfer of shares in a professional association to licensed professionals.

A shareholder of a professional association may sell or transfer that shareholder's shares in the association only to another individual who is duly licensed, certificated, or otherwise legally authorized to render within this state the same professional service as that for which the association was organized or, in the case of a combination of professional services described in division (B) of section 1785.01 of the Revised Code, to render in this state any of the applicable types of professional services for which the association was organized.

Ohio Rev. Code Ann. § 1785.07 (West Supp. 2002).

As advised upon by the Office of the Ohio Attorney General in Op. 90-072 (1990) and Op. 85-065 (1985), there is no legal impediment to the transfer of stock in a professional

association into trust for the benefit of individuals who are not duly licensed to render the professional services for which the association was organized, provided the trustee in whose legal name the share of stock is held is licensed to render the professional services.

Part One of the Syllabus of Ohio Attorney General Opinion 90-072 (1990) states:

Shares of the capital stock of a professional association organized under R.C. Chapter 1785 for the sole purpose of rendering the dental services authorized under R.C. Chapter 4715 may be transferred into trust for the benefit of individuals who are not duly licensed or otherwise legally authorized to render those dental services, provided the trustee in whose name legal title to those shares of stock is held is duly licensed or otherwise legally authorized to render those dental services. (1985 Op. Att’y Gen. No. 85-065, followed.)

The Syllabus of Ohio Attorney General Opinion 85-065 (1985) states:

R.C. Chapter 1785 does not prohibit the stock of a professional association from being held in trust, for the benefit of nonprofessionals, by an individual who is duly licensed or otherwise legally authorized to render the professional service for which the association was organized, and the fact that stock is so held provides no basis for cancellation of the articles of incorporation of that association by the Secretary of State. Since the trustee is a professional, however, he may not carry out any acts or exercise any powers which conflict with the performance of his professional responsibilities or exceed the authority granted to him under applicable law. (1978 Op. Att’y Gen. No. 78-066, modified).

These opinions by the Attorney General of Ohio, however, are not a “green light” for attorneys to proceed in transferring shares in a legal professional association into a trust whose beneficiaries are individuals not licensed to practice law. As stated by the Attorney General in the footnote 2 of Op. 85-065, “I [the Attorney General of Ohio] am not considering whether statutes or ethical provisions governing members of particular professions might operate to make particular trust arrangements impermissible in certain circumstances.” In that footnote, the Attorney General, gave as an example of other provisions to consider, DR 5-107(C) of the Ohio Code of Professional Responsibility.

For attorneys, there are several ethical rules, in particular, DR 5-107(C) and Gov. Bar R. III § 3(B), that countervail these opinions. As explained in Gov. Bar R. III § 3(A), “[p]articipation in a legal professional association . . . shall not relieve an attorney of or diminish any obligation under the Ohio Code of Professional Responsibility or under these rules [the Supreme Court Rules for the Government of the Bar of Ohio].”

One of the obligations under DR 5-107(C) of the Ohio Code of Professional Responsibility is that an attorney shall not practice in a legal professional association in which a non-attorney has an interest. The rule provides one exception, permitting the stock or interest of a lawyer to be held for a reasonable time by the fiduciary representative of the estate of a lawyer. That exception is not applicable herein.

DR 5-107 (C) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

1. A non-lawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
2. A non-lawyer is a corporate director or officer thereof; or
3. A non-lawyer has the right to direct or control the professional judgment of a lawyer.

One of the obligations under Gov. Bar R. III § 3(B) is that an attorney is prohibited from participating in a legal professional association in which a member, partner, or other equity holder is a person not authorized to practice law in Ohio or elsewhere.

Gov. Bar R. III § 3(B) An attorney shall not use a legal professional association, corporation, legal clinic, limited liability company, or registered partnership to share legal fees with a person not authorized to practice law in Ohio or elsewhere, except as permitted by DR 3-102 of the Code of Professional Responsibility. An attorney shall not participate in a legal professional association, corporation, legal clinic, limited liability company, or registered partnership in which a member, partner, or other equity holder is a person not authorized to practice law in Ohio or elsewhere, except as permitted by DR 5-107 of the Code of Professional Responsibility.

It is this Board's view that the ethical obligations under DR 5-107(C)(1) and Gov. Bar R. III § 3(B) are not met by an attorney who transfers shares of his or her legal professional association to a trust whose beneficiaries are persons not licensed to practice law.

In Ohio Attorney General Opinion 85-065 (1985), the Attorney General referred to the rights of the beneficiary as an equitable interest. In Ohio Attorney General Opinion 90-072 (1990), the Attorney General stated, "[t]his arrangement [the transfer of shares of stock into trust for the benefit of individuals who have not obtained licenses to practice dentistry] will, accordingly, grant an interest in the transferred shares of stock to the trust beneficiaries."

DR 5-107(C)(1) proscribes a non-lawyer from owning "any interest" in a legal professional association. For purposes of DR 5-107(C)(1), it does not matter that legal title to the shares of the legal professional association would be held in trust by a trustee licensed to practice law, for the benefit of individuals who are not licensed to practice law. Individuals not licensed to practice law, who are the beneficiaries of a trust whose assets are shares of a legal professional association, would have what DR 5-107(C)(1) identifies as "any interest" in a legal professional association.

Gov. Bar R. III § 3(B) prohibits an attorney from participating in a legal professional association in which a member, partner, or other equity holder is a person not authorized to practice law in Ohio or elsewhere. For purposes of Gov. Bar R. III § 3(B), a beneficiary of an irrevocable trust in which the trust assets are the shares of a legal professional association is an “equity holder” in a legal professional association. Thus, an attorney’s proposed transfer of shares in a legal professional association to an irrevocable trust for the benefit of individuals not licensed to practice law is improper under Gov. Bar R. III § 3(B) as well as under DR 5-107(C)(1).

The preservation of the professional independence of attorneys is the underlying ethical basis of these rules. This ethical concern is expressed directly in Ethical Consideration 5-25 of the Ohio Code of Professional Responsibility: “To assist a lawyer in preserving his [her] professional independence, a number of courses are available to him [her]. For example, a lawyer should not practice with or in the form of a professional legal corporation, even though the corporate form is permitted by law, if any director, officer, or stockholder of it is a non-lawyer.”

Under DR 5-107(C)(1) and Gov. Bar R III § 3(B), attorneys are not to practice in a legal professional association in which a non-attorney has an interest and are not to participate in a legal professional association in which a member, partner, or other equity holder is a person not licensed to practice law. As to the proposed situation, an attorney should not participate in a legal professional association in which a licensed attorney who does not practice law with the legal professional association would hold legal title to the shares of the legal professional association in an irrevocable trust for beneficiaries not licensed to practice law.

A further ethical hurdle is that DR 3-102(A) prohibits lawyers from dividing legal fees with non-lawyers, unless one of four exceptions fit.

DR 3-102 (A) A lawyer or law firm shall not share legal fees with a non-lawyer, except that:

1. An agreement by a lawyer with his [her] firm, partner, or associate may provide for the payment of money, over a reasonable period of time after his [her] death, to his [her] estate or to one or more specified persons.
2. A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer.
3. A lawyer or law firm may include non-lawyer employees in a retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.
4. A lawyer participating in a lawyer referral service that satisfies the requirements of DR 2-103(C) may pay to the service a fee calculated as a percentage of legal fees earned by the lawyer in

his or her capacity as a lawyer to whom the service has referred a matter. This percentage fee is in addition to any reasonable membership or registration fee established by the service.

Estate planning by a lawyer is an exception identified in DR 3-102(A)(1), but it is a narrow exception. The DR 3-102(A)(1) exception permits agreements by a lawyer with his firm, partner, or associate, to pay money over a reasonable period of time after the attorney's death to his estate or to one or more specified persons. The exception does not permit an attorney's *intervivos* transfer of shares in a legal professional association into an irrevocable trust to be held by a trustee for non-attorney beneficiaries to receive income during and after the life of the attorney. A lawyer's transfer of shares in a legal professional association to a licensed attorney to hold in an irrevocable trust for a non-attorney beneficiary does not fall within any of the exceptions found in DR 3-102(A) (1) through (4).

Further, under DR 1-102(A)(2) a lawyer is not permitted to circumvent the disciplinary rules through the action of another. A lawyer in a legal professional association does not shed his or her responsibility for compliance with the rules governing attorney conduct by transferring shares in the legal professional association to another licensed attorney to hold in an irrevocable trust for the benefit of non-attorneys.

In conclusion, this Board advises it is improper under DR 5-107(C)(1), Gov. Bar R. III § 3(B), and DR 3-102(A) for an attorney to transfer his or her shares in a legal professional association to an irrevocable trust for the benefit of individuals not licensed to practice law even if the trustee who holds the share in trust is a licensed attorney.

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.