

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OFFICE OF SECRETARY

OPINION 2003-1

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[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]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: In representing the seller of a business entity, a law firm may help locate a buyer and charge the seller/client a fee based upon a percentage of the transaction price; provided the fee is not illegal or clearly excessive and there is full disclosure by the lawyer to the seller/client and written informed consent by the seller/client. The lawyer should clearly inform the buyer, preferably both verbally and in writing, that the lawyer is representing the seller, not the buyer.

In representing a buyer of a business entity, a law firm may help locate a seller and charge the buyer/client a fee based upon a percentage of the transaction price; provided the fee is not illegal or excessive and there is full disclosure by the lawyer to the buyer/client and written informed consent by the buyer/client. The lawyer should clearly inform the seller, preferably both verbally and in writing, that the lawyer is representing the buyer, not the seller.

If a law firm uses a business broker to help locate either a buyer or seller of a business entity for a law firm client, it is improper for the law firm to share the law firm's fee with the business broker.

If a law firm introduces a buyer or seller of a business entity to a lender, it is improper for the law firm to receive from the lender a fee based upon the size of a loan transaction. The agreement between the lawyer and the lender for such a referral fee compromises the lawyer's exercise of independent professional judgment and involves the lawyer and law firm in improper business relationships with the lender, the buyer, and the seller.

Assistance by a lawyer or law firm to a buyer/investment group in locating a seller of a business entity and simultaneous representation of the seller (whether or not the seller is a longstanding client of the law firm) is improper because it is not obvious as required under DR 5-105(C) that a lawyer would be able to adequately represent the interests of both the buyer and the seller of a business entity.

It is proper for a law firm to establish an ancillary business to locate buyers and sellers of business entities and for the law firm's ancillary business to charge clients of the ancillary business a percentage of the transaction price, provided such fee is legally proper. An ancillary business must heed any applicable state laws, including the laws regulating the sale of real estate and securities. Opinion 94-7 provides guidance to lawyers regarding ethical issues related to ancillary businesses.

OPINION: This opinion addresses questions regarding a law firm's legal representation of buyers or sellers of business entities, a law firm's assistance in locating buyers and sellers of business entities either through the law firm or through an ancillary business, the use of business brokers, referrals to lenders, and fees for such services.

1. In representing a seller of a business entity, is it proper for a law firm to help locate a buyer and to charge the seller/client a fee based upon a percentage of the transaction price?
2. In representing a buyer of a business entity, is it proper for a law firm to help locate a seller and to charge the buyer/client a fee based upon a percentage of the transaction price?
3. If a law firm uses a business broker to help locate either a buyer or seller of a business entity for a law firm client, is it proper for the law firm to charge the client a fee based upon a percentage of the transaction price and share the fee with the business broker?
4. If a law firm represents neither a buyer nor a seller of a business entity, is it proper for the law firm to introduce either the buyer or seller to a lender and to receive from the lender a fee based upon the size of a loan transaction?
5. If an investment group asks a law firm to locate a seller of a business entity, is it proper for the law firm to receive a percentage of the transaction price from the buyer/investment group and is it proper for the law firm to represent the seller?
6. Is it proper for a law firm to establish an ancillary business to locate buyers and sellers of business entities and for the law firm's ancillary business to charge its clients a percentage of the transaction price?

Introduction

The purchase or sale of a business entity involves a wide range of legal services that vary in complexity. For example, the purchase or sale of a business entity may involve only the purchase or sale of assets; or it may also involve the negotiation of the purchase, sale, lease, exchange, or assignment of an interest in real estate. A purchase or sale of a business entity may also involve the purchase or sale of securities.

When the sale of a business entity involves the purchase or sale of real estate or securities, lawyers must consider the application of Ohio real estate laws (Chapter 4735 of the Ohio Revised Code) and securities laws (Chapter 1707 of the Ohio Revised Code). This Board does not have authority to advise lawyers as to legal issues, including whether the proposed activities require licensure under the laws governing real estate or securities. A lawyer with questions regarding what constitutes regulated real estate and securities transactions may contact the Department of Commerce for guidance. This opinion advises lawyers only as to ethical issues under the Ohio Code of Professional Responsibility.

Question One

In representing a seller of a business entity, is it proper for a law firm to help locate a buyer and to charge the seller/client a fee based upon a percentage of the transaction price?

The law firm proposes to represent the seller, to locate a buyer, and to charge the seller/client a fee based upon a percentage of the transaction price. Three ethical concerns exist. Is it proper for a law firm to provide law related services, such as assisting a client in locating a buyer of a business? Is there a reasonable possibility that the law firm's professional judgment on behalf of the seller of a business entity may be adversely affected by the law firm's financial interest in receiving a percentage of the transaction price? Is the law firm's fee of a percentage of the transaction price illegal or clearly excessive?

Providing law related services.

Providing legal representation to a client who wishes to buy or sell a business entity may naturally lend itself to assistance by the law firm in helping to locate a seller or buyer for the client. Through social, business, or professional connections, a lawyer may know of a potential buyer or seller to introduce to a law firm client. Assistance by a law firm in locating a buyer or seller of a business entity for a law firm client is a service related to the lawyer's legal representation of the client.

Lawyers may provide law-related services. The text of Opinion 2000-4 bears repeating.

The Ohio Code of Professional Responsibility does not prohibit attorneys from providing law-related services. In fact, the Ohio Code of Professional Responsibility contains no direct reference to the provision of law-related services, other than to broadly acknowledge in an advertising rule, DR 2-102(E), that an attorney who engages in both the practice of law and another profession or business is subject to certain advertising restrictions. [DR 2-102(E) "A lawyer who is engaged both in the practice of law and another profession or business shall not so indicate on the lawyer's letterhead, office sign, or professional card, nor shall the lawyer identify himself or herself as a lawyer in any publication in connection with his or her other profession or business."]

Unlike the Ohio Code of Professional Responsibility, the ABA Model Rules of Professional Conduct address law-related services.

Rule 5.7 Responsibilities Regarding Law-Related Services

- (a) A lawyer shall be subject to the Rules of Professional conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

- (1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or
 - (2) by a separate entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist.
- (b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

Although Model Rule 5.7 does not govern Ohio attorneys, the ABA rule provides guidance. *See e.g., Disciplinary Counsel v. Ball*, 67 Ohio St. 3d 401, 404 (1993) (discussing ABA Model Rules 5.1 and 5.3). ABA Model Rule 5.7(a) acknowledges that lawyers may provide law-related services either in circumstances that are not distinct from the lawyer's provision of legal services to clients or through a separate entity. The rule identifies law-related services as services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services. The rule requires that lawyers who provide law-related services must comply with professional rules of conduct. This Board agrees.

In Opinion 94-7, this Board addressed the provision of law-related services through a separate entity. The Board advised that "[a]n attorney or several attorneys within a law firm may own an ancillary business that provides law-related services, for example, a Workers' Compensation Service Company that provides claims administration services for employers. 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." Ohio Sup Ct, Bd of Comm'rs on Grievances & Discipline, Op. 94-7 (1994).

Consistent with Opinion 94-7, it is this Board's view that in the absence of a prohibitive rule, Ohio attorneys may, as they have by tradition and perhaps by unspoken rule, provide law-related services as part of the practice of law to legal clients of the law firm. The provision of law-related services through a law firm must comport with professional rules of conduct and to any applicable laws governing the law-related service.

As to the question presented, a law firm representing a seller of a business entity may assist the seller/client by helping to locate a buyer.

Exercising Independent Professional Judgment

The test of DR 5-101(A)(1) is not merely whether a lawyer's judgment *will be affected* by the lawyer's interest, but also whether a lawyer's judgment *reasonably may be affected* by the lawyer's judgment.

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.

It is the Board's view that a lawyer's independent professional judgment on behalf of a client *may reasonably be affected* by a lawyer's financial interest in receiving a percentage of the transaction price in the sale of a business entity. To comply with DR 5-101(A)(1) a lawyer must give full disclosure to the client of the conflict and obtain informed consent.

Charging a reasonable fee

Even with full disclosure and informed consent, fees for legal services must not be illegal or clearly excessive under DR 2-106 of the Ohio Code of Professional Responsibility,

DR 2-106. FEES FOR LEGAL SERVICES

- (A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.
- (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 as guides in determining the reasonableness of a fee include the following:
 - (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
 - (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
 - (3) The fee customarily charged in the locality for similar legal services.
 - (4) The amount involved and the results obtained.
 - (5) The time limitations imposed by the client or by the circumstances.
 - (6) The nature and length of the professional relationship with the client.
 - (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
 - (8) Whether the fee is fixed or contingent.

- (C) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

A determination of whether a lawyer's fee of a percentage of a transaction price in the sale of a business entity is illegal or clearly excessive involves considerations outside the scope of this opinion.

Whether a fee is illegal depends upon law. As to the sale of a business entity involving the sale of real estate and or securities, it is beyond this Board's authority to advise upon whether it is legal for an attorney not licensed as a real estate broker or a securities dealer to charge a percentage of the transaction price.

Whether a fee is clearly excessive depends upon all the factors listed in DR 2-106(B)(1) through (8). A lawyer's percentage of the sale of a business entity may range from a small amount of money to a huge amount of money. The amount of time involved and the novelty and difficulty of the sale or purchase will vary. An amount based upon a percentage of the transaction price may or may not be reasonable under the factors provided in DR 2-106(B)(1).

Thus, the Board advises as follows. In representing the seller of a business entity, a law firm may help locate a buyer and charge the seller/client a fee based upon a percentage of the transaction price; provided the fee is not illegal or clearly excessive and there is full disclosure by the lawyer to the seller/client and written informed consent by the seller/client. The lawyer should clearly inform the buyer, preferably both verbally and in writing, that the lawyer is representing the seller, not the buyer.

Question Two

In representing a buyer of a business entity, is it proper for a law firm to help locate a seller and to charge the buyer/client a fee based upon a percentage of the transaction price?

The law firm proposes to represent the buyer, to locate a seller, and to charge the buyer/client a fee based upon a percentage of the transaction price. Based upon the Board's response to Question One, the Board advises as follows. In representing a buyer of a business entity, a law firm may help locate a seller and charge the buyer/client a fee based upon a percentage of the transaction price; provided the fee is not illegal or excessive and there is full disclosure by the lawyer to the buyer/client and written informed consent by the buyer/client. The lawyer should clearly inform the seller, preferably both verbally and in writing, that the lawyer is representing the buyer, not the seller.

Question Three

If a law firm uses a business broker to help locate either a buyer or seller of a business entity for a law firm client, is it proper for the law firm to charge the client a fee based upon a percentage of the transaction price and share the fee with the business broker?

A lawyer may not share legal fees with a business broker. Under DR 3-102(A), “[a] lawyer or law firm shall not share legal fees with a non-lawyer.” Four exceptions are listed in DR 3-102 (A)(1) through (4), but none is applicable herein.

Regardless of how the law firm bases its fee, hourly or as a percentage of a transaction price, a business broker’s fee may not come from the law firm’s legal fee. If the services of a business broker are used, the broker’s fee must be independent of the legal fee.

The Board advises as follows. If a law firm uses a business broker to help locate either a buyer or seller of a business entity for a law firm client, it is improper for the law firm to share the law firm’s fee with the business broker.

Question Four

If a law firm represents neither a buyer nor a seller of a business entity, is it proper for the law firm to introduce the buyer or seller to a lender and to receive from the lender a fee based upon the size of a loan transaction?

The context in which a law firm would introduce a buyer or a seller, not represented by the law firm, to a lender is unclear. For purposes of this opinion, the Board assumes that the buyer or seller sought assistance from the law firm because the buyer or seller knows, through personal, business, or professional contacts, that the law firm provides legal representation to business entities. The Board also assumes that the law firm did not improperly solicit the buyer or seller.

In Opinion 2000-1 this Board addressed a lawyer accepting a referral fee from a financial services group for referring clients in need of financial services. In Op. 2000-1, the Board advised:

It is ethically improper for a lawyer to accept a fee from a financial services group for referring clients in need of financial services. The referral fee agreement involves an improper business relationship with clients and non-lawyers under DR 3-103(A) and DR 5-104(A). The referral fee agreement creates a financial interest that will affect or reasonably may affect the professional judgment of a lawyer under DR 5-101(A)(1) and DR 5-107(A)(1) and (2). Full disclosure and consent do not resolve the conflict. While DR 5-101(A)(1), DR 5-104(A), and DR 5-107(A)(1) and (2) provide a full disclosure and consent exception, DR 3-103(A) does not. Because of the joint application of these rules, the full disclosure and consent exception does not apply.

Herein, the law firm questions the propriety of receiving a fee from a lender for referring a buyer or seller whom the law firm purports not to represent. Nevertheless, the advice offered in Opinion 2000-1 provides guidance. When a law firm provides a law-related service through the law firm, but does not provide other legal services to the person for whom the law-related service is performed, the rules governing professional conduct apply. *See e.g.*, ABA, Model Rule 5.7, Comment 2.

An agreement that a law firm will receive from the lender a fee based upon a loan transaction with a buyer or seller referred by the law firm may reasonably affect a lawyer's independent judgment regardless of whether the lawyer considers the buyer or seller to be represented by the law firm. Even if a law firm provides no other legal representation to a buyer or seller who has sought assistance from the law firm, the lawyer has exercised professional legal judgment in deciding to introduce a buyer or seller to a lender.

In addition, a law firm should not enter such agreements with a lender for other reasons. Agreements to receive a fee from a lender based upon a loan made to a buyer or seller referred by a law firm improperly involve a lawyer in a business transaction with the lender and the buyer or seller who has sought assistance from the law firm. The referral fee agreement creates an improper business relationship with a non-lawyer lender. For further discussion of these ethical issues, see Opinion 2000-1.

The Board advises as follows. If a law firm introduces a buyer or seller of a business entity to a lender, it is improper for the law firm to receive from the lender a fee based upon the size of a loan transaction. The agreement between the lawyer and the lender for such a referral fee compromises the lawyer's exercise of independent professional judgment and involves the lawyer and law firm in improper business relationships with the lender, the buyer, and the seller.

Question Five

If an investment group asks a law firm to locate a seller of a business entity, is it proper for the law firm to receive a percentage of the transaction price from the buyer/investment group and is it proper for the law firm to represent the seller?

The context in which a law firm would assist an investment group to locate a seller of a business entity is unclear. For purposes of this opinion, the Board assumes that the investment group sought assistance from the law firm because the investment group knows through personal, business, or professional contacts, that the law firm provides legal representation to business entities. The Board also assumes that the law firm did not improperly solicit the investment group.

The law firm exercises professional independent judgment on behalf of the investment group when the firm provides assistance in locating a seller of a business entity. As stated in Question Four, when a law firm provides a law-related service through the law firm, but does not provide other legal services to the person or entity for which the law-related service is performed, the rules governing professional conduct apply.

If, as proposed, the law firm locates a potential seller who is a current client of the law firm, the law firm has a conflict of interest. The law firm owes the investment group uncompromised independent professional judgment and the law firm owes the potential seller/current client uncompromised professional judgment.

The rule that governs multiple representation is DR 5-105.

DR 5-105. REFUSING TO ACCEPT OR CONTINUE EMPLOYMENT IF THE INTERESTS OF ANOTHER CLIENT MAY IMPAIR THE INDEPENDENT PROFESSIONAL JUDGMENT OF THE LAWYER.

(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(C).

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

(D) If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or his firm may accept or continue such employment.

In an Ohio disciplinary case, the representation of both a buyer and seller of a business entity created an improper conflict of interest for a lawyer. *See e.g., Stark Cty. Bar Assn. v Ergazos* (1982), 2 Ohio St. 3d 59, 61. That case did not address whether waiver of the conflict was possible through full disclosure and consent.

This Board has never addressed whether the conflict of interest inherent in representing both a buyer and a seller of a business entity is surmountable through adequate disclosure of the conflict, informed consent, and the ability of the lawyer to exercise uncompromised independent judgment on behalf of each client. For opinions from other states, see e.g., Florida Bar, Op. 97-2 (1997) (It is a nonwaivable conflict for an attorney to be involved in negotiations of the parties to a sale of a business and then attempt to represent both parties to the transaction at closing of the sale.); Bd Overseers Bar of Maine, Op. 106 (1990) (It is not obvious that a law firm can advise both the buyer and seller of a business entity as to what documents they will need for closing and for the law firm to prepare the documents.); Connecticut Bar, Informal Op. 91-14 (A law firm may draft the sales contract and handle the closing of the sale of a business between two longstanding clients, where both parties who are long term clients of the attorney agree to the dual representation and the law firm does not participate in the negotiations regarding the sale and purchase.).

In the purchase and sale of a business entity, the interests of the buyer and the seller may unexpectedly diverge. Even when a purchase or sale is agreed upon for the most part, there is substantial room for negotiation and compromise favoring the buyer over the seller, or the seller over the buyer. Thus, it is the Board's view that assistance by a

lawyer or law firm to a buyer/investment group in locating a seller of a business entity and simultaneous representation of the seller (whether or not the seller is a longstanding client of the law firm) is improper because it is not obvious as required under DR 5-105(C) that a lawyer would be able to adequately represent the interests of both the buyer and the seller of a business entity.

Question Six

Is it proper for a law firm to establish an ancillary business to locate buyers and sellers of business entities and for the law firm's ancillary business to charge its clients a percentage of the transaction price?

In Opinion 94-7, this Board addressed lawyers owning ancillary businesses. The Board advised:

An attorney or several attorneys within a law firm may own an ancillary business that provides law-related services, for example, a Workers' Compensation Service Company that provides claims administration services for employers. 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.

It is improper for attorneys who own an ancillary business to require that customers of the business agree to legal representation by the attorneys or their law firm as a condition of engagement of the services of the ancillary business. If customers of the ancillary business need legal services, they may be informed that the attorneys can provide the legal representation, but they must also be informed of the ownership interest and encouraged to seek legal counsel of their own choice.

An attorney's ownership interest in an ancillary business must be disclosed to customers of the business who may be in need of legal services. An attorney, before accepting employment by a client who is also a customer of the business, must fully disclose the ownership interest in the ancillary business and obtain client consent.

In keeping with Opinion 94-7, this Board advises as follows. It is proper for a law firm to establish an ancillary business to locate buyers and sellers of business entities and for the law firm's ancillary business to charge clients of the ancillary business a percentage of the transaction price, provided such fee is legally proper. An ancillary business must heed any applicable state laws, including the laws regulating the sale of real estate and securities. Opinion 94-7 provides guidance to lawyers regarding ethical issues related to ancillary businesses.

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.