

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 94-7

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[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

[Not current-subsequent rule amendments to Gov. Bar R. III, eff. Nov. 1, 1995 and to DR 2-103, eff. Jul. 1, 1996.]

SYLLABUS: 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.

OPINION: This opinion addresses the propriety of attorneys within a law firm owning an ancillary business that provides law-related services. Three questions are presented.

1. May an attorney or several attorneys within a law firm own a business that provides law-related services, for example, a Workers' Compensation Service Company that provides claims administration services for employers?
2. Is it proper 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?
3. Must the attorney or attorneys' ownership interest in the ancillary business be disclosed to customers of the business who may be in need of legal services?

Question 1

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

The Board begins by noting that the Board of Commissioners on Grievances and Discipline is not a rule-making body and thus the Board will not attempt to fashion an ancillary business rule within this opinion. The Board will only offer an interpretation of the Ohio Code of Professional Responsibility as it applies to the issues raised.

Traditionally, law-related services have been provided by attorneys to their clients. Examples of law-related services include title insurance, financial planning, trust services, tax return preparation, legislative lobbying, and other types of consulting. More recently law firms, whether for economic or client service reasons, have sought involvement in the provision of law-related services through business entities separate from the practice of law, commonly called ancillary businesses.

Nevertheless, within the legal profession there has been much debate over whether a lawyer or law firm should be involved in providing law-related services through ancillary businesses. Some argue that lawyers' involvement in ancillary businesses facilitate the practice of law, others argue it undermines the practice of law. Opponents point to the ethical concerns of a non-lawyer's interference with a lawyer's professional judgment, conflicts of interest, and threats to the preservation of client confidences and secrets. Proponents suggest that lawyers' involvement in law-related businesses enhance the range and quality of client services. See generally, ABA/BNA Lawyers' Manual on Professional Conduct, 91:401-418 (5/18/94); Stephen R. Ripps, Law Firm Ownership of Ancillary Businesses in Ohio -- A New Era?, 27:1 Akron L. Rev.1-17 (1993); and Cindy A. Carson, Under New Mismanagement: The Problem of Non-Lawyer Equity Partnership in Law Firms, Geo. J. Legal Ethics, 7:593-635 (1994).

Ohio's Code of Professional Responsibility is silent as to a lawyer's involvement in a law-related business. The Code's "silence" as to law-related businesses is in contrast to the "noise" surrounding ABA Model Rule 5.7, initially adopted in August 1991, rescinded in August 1992, then adopted in February 1994. The first adopted version of ABA Model Rule 5.7 essentially prohibited ancillary businesses. The current version permits, but regulates ancillary businesses.

Although not controlling in Ohio, ABA Model Rule 5.7 is set forth below as an example of the organized bar's most recent approach to the issue of law-related services.

M.R. 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 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 non lawyer.

In Ohio, there is no rule within the Code of Professional Responsibility that expressly prohibits a lawyer's ownership of an ancillary business, nor is there a rule that comprehensively governs such activities. The issue of a lawyer's ownership of an ancillary business is sometimes confused with the related yet distinct issue of a non-lawyer's partnership in the practice of law. Both are controversial issues within the legal profession. Ohio's disciplinary rules expressly prohibit the latter, not the former. Under Disciplinary Rule 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." Under Disciplinary Rule 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 . . .; (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." Under Governing Bar Rule III Section 1 of the Supreme Court Rules for the Government of the Bar of Ohio, a non-lawyer may not be a shareholder, director, or officer of a legal professional association or legal clinic organized to practice law pursuant to the provisions of Chapter 1785 of the Ohio Revised Code. Also, under Governing Bar Rule III Section 1, a legal professional association or legal clinic is authorized "to engage in the practice of law in Ohio and in such other activities only as are essential to the practice of law."

Thus, while these rules clearly prohibit a non-lawyer from becoming a partner in a law firm, they do not necessarily prohibit a lawyer from owning a business that provides services related or "ancillary" to the practice of law. In fact, in the past this Board has found it proper for attorneys to own businesses that perform law-related services. See Ohio SupCt, Bd of Comm'rs on Grievances and Discipline, Op. 90-23 (1990) (two Ohio attorneys may own shares in a business venture to provide lawyers or law firms with temporary lawyers); Ohio SupCt, Bd of Comm'rs on Grievances and Discipline Op. 88-018 (1988) (an attorney may provide litigation support services, namely, a legal research and writing service for lawyers and law firms). See also, Ohio State Bar Ass'n, Formal Op. 37 (1989) (advising on various matters relating to the impact of the Code of Professional Responsibility on lawyers who are also engaged in the issuance of title insurance).

Yet, attorneys who operate such law-related businesses must do so in a manner consistent with the Code of Professional Responsibility. Under Disciplinary Rule 2-103 there must be no improper referrals or improper compensation for referrals -- this is discussed further under Question Two. Under Disciplinary Rule 3-101(A) a lawyer shall not aid a non-lawyer in the unauthorized practice of law -- the services of the ancillary business may be related to the provision of legal services but not prohibited as unauthorized practice of law. Under Disciplinary Rule 3-102(A) a lawyer or law firm shall not share legal fees with a non-lawyer. As mentioned above, under Disciplinary Rule 3-103(A) a lawyer may not form a partnership with a non-lawyer if the partnership activities consist of the practice of law. Under Disciplinary Rule 4-101(B) a lawyer must preserve a client's confidences and secrets and may reveal them only as permitted under 4-101(C). Under Disciplinary Rule 5-101(A) a lawyer may not accept employment if the exercise of professional judgment will be or reasonably may be affected by the lawyer's business interest, unless there is client consent- this will be discussed further under Question Three. Under

Disciplinary Rules 5-107(A), (B), and (C) a lawyer must avoid influence by one other than the client. Under Disciplinary Rule 7-101 a lawyer must represent a client zealously. Under Disciplinary Rule 9-101 a lawyer must avoid even the appearance of impropriety.

It is the Board's view that the Ohio Code of Professional Responsibility does not contain an express rule that prohibits an attorney or attorneys from owning a business that provides law-related services. Thus, in conclusion, this Board advises that 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.

Question Two

Is it proper 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?

The answer to this question is no. The answer is governed by Disciplinary Rule 2-103.

DR 2-103(A) A lawyer shall not recommend employment, as a private practitioner, of himself [herself], his [her] partner, or associate to a non-lawyer who has not sought his [her] advice regarding employment of a lawyer, except as provided in DR 2-101.

(B) 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).

(C) A lawyer shall not request a person or organization to recommend or promote the use of his [her] services or those of his [her] partner or associate, or any other lawyer affiliated with him [her] or his [her] firm, as a private practitioner, except that [exceptions not applicable to this opinion].

The need for such a rule is explained within the Code. Ethical consideration 2-8 states that "[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."

Customers of an ancillary business must not be forced or pressured to utilize a particular attorney's services, particularly when the attorney owns the ancillary business. This violates a client's freedom to choose counsel of one's choice. It also encourages referrals that may or may not be in a client's best interest. Specifically, it violates Disciplinary Rule 2-103(A) by being a self-referral, 2-103(B) by providing legal services as a service of the business corporation, and 2-103(C) by requesting and in this case requiring the business corporation to make the referral. The reverse is also true -- clients of a lawyer must not be forced to use the services of an ancillary business owned by the lawyer.

In conclusion, this Board advises that 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.

Question Three

Must the attorney or attorneys' ownership interest in the ancillary business be disclosed to customers of the business who may be in need of legal services?

The answer to this question is an unqualified yes. The rule that governs is Disciplinary Rule 5-101(A).

DR 5-101(A) Except with the consent of his [her] client after full disclosure, a lawyer shall not accept employment if the exercise of his [her] professional judgment on behalf of his [her] client will be or reasonably may be affected by his [her] own financial, business, property, or personal interests.

A lawyer's ownership interest in an ancillary business is an interest that reasonably might affect a lawyer's professional judgment. Thus, under Disciplinary Rule 5-101(A) a lawyer's ownership interest in an ancillary business would require full disclosure and consent.

In conclusion, this Board advises that 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, must fully disclose the ownership interest in the ancillary business and obtain client consent.

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.