

# ADVISORY ETHICS OPINION 91-12

## SYNOPSIS:

A lawyer who serves as an officer and director of a consulting company may not provide legal services to clients of the consulting company without the clients becoming the lawyer's clients. The lawyer may not avoid liability for services to clients by practicing as a representative of a corporation.

## FACTS:

A lawyer, employed as a full time associate in a law firm, is also a member of the board of directors and secretary of a corporation providing, *inter alia*, general business consulting services. The lawyer performs services of the general counsel type and is also involved in consulting, seminars and sales. As part of the corporation's general business consulting, the lawyer performs legal services for clients of the corporation. The lawyer informs the clients that the lawyer is employed by the corporation and is not their legal counsel, and that should they desire to fully protect their legal rights they should retain their own lawyer. The lawyer also participates in matters such as setting up a corporation or partnership for two or more people, drafting contracts, filling out tax returns, or completing forms required by the government. Some of the clients are start-up companies that are not charged for the corporation's services until the client company shows a profit. The lawyer notifies the clients that the services are being performed as counsel for the corporation employing the lawyer, not for the clients directly. These clients are also informed that they may hire their own counsel to fully protect their rights and they sign an acknowledgement of this advice. The lawyer has inquired as to the ethical implications of his involvement with the consulting firm. The facts raise concerns in the areas of conflicts of interest, fee-splitting and confidentiality.

## DISCUSSION:

Contrary to the lawyer's statement to the company's clients that he is representing the company, not the clients, the Committee is of the opinion that, in the fact situation posed by the lawyer, the company's clients for whom he performs services are his clients and he is subject to all the requirements of any practicing lawyer.

There seems to be an assumption on the part of the requesting lawyer that the practice he has been engaging in is not the practice of law. The committee believes that the lawyer cannot insulate himself against liability to clients of the company that he performs services for, even with a disclaimer.

Aside from the ethical areas mentioned above, it appears that other provisions of the Code of Professional Responsibility may be implicated by the proposed course of action. For example, the unauthorized practice of law is a consideration here. The Code prohibits the practice of law in a corporate context where any of the owners, directors or officers are not lawyers. DR 5-107(C). By inference, the only type of corporation that can properly practice law is one made up solely of lawyers.

There is no clear definition of what constitutes the "practice of law." It may, therefore, be extremely difficult to differentiate between purely business advice and legal advice which may be rendered by the company. Moreover, the consulting firm may be entering into the practice of law by marketing the lawyer's services as part of a total business package, if the lawyer's role as a lawyer is not clearly delineated.<sup>1</sup>

Since the consulting company will be identifying legal problems for the clients and then referring the clients to in-house counsel for resolution of those problems, the lawyer may run afoul of the prohibition against solicitation which is provided in DR 2-103(C) (A lawyer shall not give anything of value to a person for recommending the lawyer's services, . . .).

In considering potential conflicts of interest, one must always ask the question whether a lawyer who undertakes a representation will be able to render his or her advice to the client independently of any third party. DR 5-107(B) provides:

A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

As an employee and officer of the consulting firm, the lawyer's interests would be so closely bound with those of the company that it may be difficult to render clearly independent legal advice to clients of the company in all circumstances. The lawyer's client may become involved in a legal dispute with the consulting company arising out of the business relationship. Since the

---

<sup>1</sup> See Maine Board of Bar Overseers Professional Ethics Committee, Opinion 79, 5/6/87.

lawyer would have a duty of loyalty to the client, the situation may put the lawyer in an untenable position with respect to the company. There is, in addition, the possibility of a legal dispute between two client companies.

While DR 5-107(A) permits a lawyer to accept compensation for his legal services from one other than his client only with the consent of the client after full disclosure, the committee is reluctant, however, to find disclosure and client consent an adequate remedy for all conflicts of interest. This rule, of course, requires that the lawyer's independence and professional judgment be upheld and that the client consent after full disclosure of the circumstances. However, DR 3-102 prohibits a lawyer from sharing legal fees with a non-lawyer, except under circumstances not relevant to the present inquiry. Accordingly, extraordinary care must be taken to insure that the consulting company does not receive more compensation from the client for legal services than is paid to the lawyer.

Moreover, the courts are sensitive to the issue of fee-splitting between lawyers and non-lawyers. In *Grassman v. State Bar*<sup>2</sup>, the Court opined that "prohibited fee-splitting between lawyer and laymen . . . poses the possibility of control by the lay person, interested in his own profit, rather than the client's fate."

The Committee understands that the consulting firm wishes to offer the lawyer's services as a lawyer together with the services of the company as business consultants, and thereby present an attractive arrangement to potential clients. However, the Committee feels that it is the very nature of the "package deal" that causes a number of difficulties with respect to the Code.

---

<sup>2</sup> *Grassman v. State Bar*, 553 P.2d 1147 (Calif. Sup. Ct. 1976)