

INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE

OPINION NO. 1 OF 1993

QUESTION PRESENTED

An attorney desires to form a corporation, with the attorney and one or more non-attorneys as shareholders, officers, and directors, whose purpose would be to operate a collection agency formed under the laws of the State of Indiana. Among the non-attorney shareholders and/or employees would be account executives who would solicit business on behalf of the collection agency. The attorney's primary responsibility would be the collection of debts via demand letters and lawsuits.

The attorney would be treated as an employee of the corporation, although he/she would also continue to operate a law practice entirely separate from the collection agency. The attorney would be paid by the collection agency, which would take a fee and reimburse the attorney based on the income of the collection agency.

As the business of the collection agency increases, other attorneys would be hired to assist in the collection of debts. These other attorneys would either be employees of the corporation or outside counsel paid on an hourly or contingency fee basis. The attorney forming the corporation may start out as a part-time employee of the Corporation and be employed full-time later if the agency develops sufficient business.

Collection suits would be brought in the name of the client of the collection agency.

The attorney asks: "Does such a proposal adhere to the Rules of Professional Conduct? I am aware of a number of collection agencies which, as agent for their clients, retain attorneys to assist them in the collection of accounts, and, in fact, Indiana Code Section 25-11-1-13 authorizes such employment of attorneys. . . . A collection agency organized in such a manner would be beneficial to its clients, since having an attorney handling the collections from the beginning should increase the amount recovered on behalf of the clients, and make recovery more timely. In addition, having an attorney so closely associated with the collection process would help to better ensure that the collection agency adheres to the Fair Debt Collection Practices Act. . . ."

ANSWER

Yes, the attorney can form such a corporation with non-attorneys, subject to the caveat that the lawyer will continue to be subject to the Rules of Professional Conduct, as discussed below.

DISCUSSION

The attorney in the situation presented by this inquiry should consider issues relating to conflicts of interest (R.P.C. 1.7, 1.8, 1.9), professional independence (R.P.C. 5.4), and solicitation of professional employment (R.P.C. 7.3).

1. On the issue of conflicts of interest, the attorney would, of course, have to screen potential adverse parties in cases he would be handling for the collection agency. (R.P.C. 1.7) In addition, in a situation where the attorney would not actually represent the collection agency client against a client of his law firm, but the collection agency stands to gain a fee from pursuing a client of his law firm, the attorney should consider R.P.C. 1.8(b): "A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation."

If the non-attorney shareholders of the proposed corporation are current clients of the attorney's firm, R.P.C. 1.8(a) would apply: "A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless: (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client; (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and (3) the client consents in writing thereto."

2. On the issue of professional independence, R.P.C. 5.4(a) provides that a lawyer shall not share legal fees with a non-lawyer. Rule 5.4(d) provides that:

a lawyer shall not practice with or in the form of a professional corporation or association authorized to practice for a profit, if;

- (1) a nonlawyer owns any interest therein . . . ;
- (2) a nonlawyer is a corporate director or officer thereof; or
- (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

There have been many questions raised about what constitutes the practice of law and the improper sharing of legal fees. In this committee's Opinion No. 5 of 1991, a lawyer proposed to open a law firm and to offer the management of real estate as the primary service of the firm. It was the committee's opinion that although the activities he intended to perform would be a hybrid of legal and non-legal functions, the lawyer was in actuality holding himself out as a lawyer practicing law.

Furthermore, while "he could delegate to his employees certain (non-legal) functions," he would be "bound by the requirements of Rule 5.3, R.P.C., Responsibilities of Non-Lawyer Assistants." There was no indication that a non-lawyer would have an ownership interest in the firm or that non-lawyers would share in attorneys' fees. See also, Indiana State Bar Association Legal Ethics Committee Opinion No. 7 of 1991 and the Opinions referenced therein, specifically Standing Committee on Legal Ethics for the Virginia State Bar, Opinion #835 (1986) (lawyer who was president and manager of a retail sales corporation who represented the corporation in collection cases may not remit any fees to the corporation) and New York County Lawyers' Association Committee of Professional Ethics, Opinion #670 (1989) (permissible for lending institution to charge borrower a proportionate share of lawyer's salary and overhead proportionate to the lender's expenses in making the loan, noting that one proper method of determining the proportionate salary would be to divide the attorney's salary by the average number of hours per year the attorneys are expected to work and thereby determine an hourly billing rate, and noting that overhead would include salary of secretaries and clerk, rent, heat, utilities, library, depreciation on the building, furnishings, and similar expenses). See also, Indiana State Bar Association Legal Ethics Committee Opinion No. 5 of 1984 (division of fees for collection of bad checks).

Frequently, collection cases include attorneys' fees as an element of damages. The attorney would need to ensure that no part of any fees paid over to the collection agency represented an amount in excess of that necessary to recoup the agency's overhead and any salary attributable to the lawyer. In addition, the attorney would need to comply with the provisions of the Uniform Consumer Credit Code, which prohibits the collection of an attorney's fee by a salaried employee under certain circumstances.

Assuming for the sake of discussion that a collection agency would constitute the practice of law, the concern about a nonlawyer directing or controlling the professional judgment of a lawyer (i.e., a non-attorney shareholder, officer, or director directing the representation of the client of the collection agency by the attorney) is obviated somewhat by Indiana Code Section 25-11-1-13(a) (3), which provides:

. . . .

(3) at the direction of an assignor or assignors:

(A) employ an attorney to represent an assignee in the filing of action to collect the debt

The committee recommends that the collection suits be brought in the name of the collection agency, which will be the assignee of the debt, and not in the name of the assignor.

3. An additional concern raised by this inquiry is whether there would be the potential for the attorney to use his existing legal clients as a feeder for business of the collection agency (See R.P.C. 1.7, Comment, "A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.") or to use the collection agency as a method of indirect solicitation for his other legal activities (R.P.C. 7.3). See also, Indiana State Bar Association Legal Ethics Committee Opinion No. 8 of 1965. (In an opinion rendered before the adoption of the Rules of Professional Conduct, the committee opined that a lawyer may engage in a business that is clearly unconnected with the practice of law, so long as the conduct of such business is completely separate and distinct from the practice of law, is conducted from a completely different location with a totally different name, and is carried on with no reference to the lawyer or law firm, in such a manner that there can be no feeding of law business to the lawyer or law firm.)

LIMITATION OF OPINION

This opinion is limited to the specific fact situation presented. The Committee is not commenting on other situations where a lawyer may be a shareholder of a corporation, including, but not limited to, title insurance companies and insurance agencies.

INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE

OPINION NO. 2 OF 1993

FACTS

The Committee has been presented with the following hypothetical situation: An FBI agent contacts inquiring attorney (herein known as attorney) to get the location of his client (herein known as client "A". "A" has been in flight since he failed to appear for a hearing after his conviction on a state criminal charge, but not in Indiana. Attorney had not represented "A" in his defense of that criminal charge, but did give advice on a petition for removal from state to federal court. "A" did not hire attorney to file the removal, but appeared pro se.

Attorney had contacted a second client (herein know as client "B") prior to the FBI's inquiry and "A" answered the telephone at "B's" location. Attorney verified it was "A". He advised "A" to turn himself in, but "A" refused. Attorney refuses to give FBI any information. Attorney queries the committee on two issues:

1. Whether the confidentiality privilege prohibits attorney from revealing the location of "A" to the FBI agent?
2. Whether the confidentiality privilege prohibits attorney from revealing identity and location of "B" to FBI agent?

DISCUSSION

I.C. 34-1-60-4 provides in part that: ". . . It shall be the duty of an attorney . . . to maintain inviolate the confidences and at every peril to himself, to preserve the secrets of his client."

The confidentiality privilege protects communications between the attorney and his client when that attorney is consulted on a matter within the scope of his profession. Colman v. Heidenreich, 381 N.E. 2d 866 (1978). The privilege has a long tradition rooted in ethics law which requires client confidentiality be protected.

The confidentiality privilege is also codified in Indiana's Rules of Professional Conduct Rule 1.6:

- (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation . . .

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

- (1) prevent the client from committing any criminal act . . .

The comment to Rule 1.6 indicates that a lawyer has "professional discretion" to reveal information regarding the client's intended prospective conduct and further notes the attorney must avoid assisting a client in criminal or fraudulent conduct under 1.2(d).

Under Rule 1.6(b), an attorney in certain circumstances can reveal information "to the extent he reasonably believes necessary." Under Rule 1.6(b)(1) which grants an attorney discretion to disclose information "to prevent the client from committing any criminal act," the attorney in this hypothetical situation would be clearly authorized to reveal the first client's location, because the attorney knows "A" has been charged with criminal flight. The attorney, therefore, would be justified in invoking this exception to the general rule of confidentiality.

We then must examine the situation with client "B". "B", judging from the facts, is engaged in an ongoing attorney-client relationship with attorney. Attorney may have discretion to reveal "B's" whereabouts because "B's" location is probably not "related to the representation of a client." Rule 1.6(a). "B's" identity definitely cannot be revealed. See also Colman v. Heidenreich, 381 N.E. 2d 866 (1978).

Neither do we address the situation which evaluates "A's" status as a "client". We presume for this answer that client "A" is a current client, and attorney did receive confidential information about client "A" in the limited context which attorney describes in his hypothetical situation.

CONCLUSION

The committee believes that attorney probably can reveal the location of "A" and "B", because that information fits within the enumerated exceptions to Rule 1.6(b)(1).

INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE

UNPUBLISHED OPINION NO. U1 OF 1993

FACTS

An attorney is being considered for appointment by a Superior Court as a Public Defender. The attorney practices in a law firm, another member of which regularly represents the Sheriff and Deputy Sheriffs of the county of the appointment.

ISSUE

Would the service by the first attorney as a Public Defender be ethically permissible?

ANSWER

Service as a Public Defender in a criminal case in which the Sheriff or a Deputy Sheriff gives testimony against the accused would constitute an ethical violation. In anticipation that such relationships likely would arise, the appointment would be ethically impermissible.

DISCUSSION

The inquiry raises considerations under Rule 1.10 (Imputed Disqualification) and Rule 1.7 (Conflicts of Interest).

In the Comment to Rule 1.10, the imputation issue is characterized:

"The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated."

Thus, your relationship to other lawyers of your firm is as though a single lawyer of the firm were simultaneously representing the Sheriff (and Deputies) and a criminal defendant, against whom the Sheriff may be called upon to give adverse testimony. While the Sheriff would not be represented in such hypothetical situation, the Public Defender would be

required to adopt a zealously adversarial posture toward an ongoing client, perhaps including impeachment.

Rule 1.7 (b) prohibits the representation of a client "if such representation may be materially limited by the lawyer's responsibilities to another client" The material limitation standard includes a consideration of compromising influences and loyalties:

"The professional judgment of a lawyer should be exercised solely for the benefit of his client and free of compromising influences and loyalties."
In the Matter of Robert A. Burns (1987) Ind.,
516 N.E. 2d 35, 36.

A variety of examples of compromising influences and loyalties is cited in the Annotations to Model Rules of Professional Conduct (ABA), Rule 1.7, p. 123, under the commentary captioned "Lawyers Employed by Government Entities."