Law Firm A has been hired by a County Planning Commission for the purpose of representing the County Board of Zoning Appeals and the County Planning Commission. Fees for this representation come from county funds, and representation includes all functions of the Board of Zoning Appeals, e.g., applications for variances and contempt hearings.

Law Firm A also represents hospital clients who, from time to time, commence legal proceedings against the County Department of Public Welfare of the same county, for the purpose of collecting payments for services rendered to indigent patients. Such payments, when made, come from county funds.

The issue presented is whether this is a conflict of interest that prohibits Law Firm A from representing both the County Planning Commission and the hospitals in their actions against the County Department of Public Welfare.

Given the twin obligations of lawyers to represent clients both competently (Canon 6) and zealously (Canon 7), multiple client representation is impermissible when either obligation is compromised. Canon 5 requires, in general terms, that "a lawyer should exercise independent professional judgment on behalf of a client." With reference to potential conflicts arising out of multiple client representation, DR 1-105 provides:

(A) A lawyer shall decline proferred 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 proferred 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 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 interests 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.

DR 5-105(A) and (B) proscribe multiple client representation when, in fact, the lawyer's independent judgment is affected or likely to be affected by the
interest of another client. However, where the lawyer can actually maintain his/her independent professional judgment in the face of multiple client representation, DR 5-105(C) would permit the representation only upon full disclosure to and consent by the relevant clients.

In the instant case, the precise character of the potential conflict is not clear. The responsibilities of the County Planning Commission and the indigent medical payment responsibilities of the County Department of Public Welfare are unrelated. At the most, it can be said that Law Firm A has some interest in the integrity of the county fisc in that it is the source of its legal fees and the source of operating funds for its agency client, the County Planning Commission; whereas it asserts an interest on behalf of its hospital clients that will have a potentially negative impact upon the county fisc. The mere fact that there is a common source of government funds relating to both clients does not in and of itself create a conflict of interest. In order for a conflict or potential conflict to be created, there must be duties to multiple clients that conflict or may conflict with each other. Here, because of the entirely independent responsibilities of the County Planning Commission and the County Department of Public Welfare, Law Firm A is not placed at the intersection of conflicting duties to different clients. Accordingly, on these facts, there is no conflict of interest that would necessitate withdrawal and no foreseeable potential conflict of interest that would require disclosure to and consent from the clients.
The Legal Ethics Committee of the Indiana State Bar Association has been asked to give an opinion as to any ethical question based on the following fact situation:

Lawyers A and B are partners in a law firm. Lawyer A contemplates seeking the office of county prosecuting attorney in 1986. If elected, A would serve part-time. Presently, A is the lawyer for a city Board of Sanitary Commissioners in the same county.

The Sanitary District is a separate taxing unit. A, as lawyer for the Board, is paid from tax revenues collected from within the Sanitary District. The Sanitary District includes a city, but not all areas of the surrounding county. A is paid a monthly retainer, as well as an hourly rate for his legal services. A’s legal services for the Board include matters related to the sale of general obligation bonds for the purpose of financing sewer construction projects.

If A were elected prosecutor, it is planned that B would assume duties as lawyer for the Board of Sanitary Commissioners. B may be named deputy prosecuting attorney by A. A prosecutor’s salary is paid by the State of Indiana, however, a small portion of the salary is paid from county funds.

The above fact situation raises the following issues for the committee’s consideration:

Does a possible conflict of interest arise from B’s representation of a city Board of Sanitary Commissioners in the same county while A serves as county prosecuting attorney? May B also serve as deputy prosecutor under A?

I

The Committee in the past has addressed a question similar to the one raised by the above fact situation. In Opinion No. 6 of 1978, we considered whether a part-time prosecutor or deputy prosecutor or member of a firm may represent other governmental units. We concluded that Canon 5 of the Code of Professional Responsibility was relevant. Canon 5 set forth: A LAWYER SHOULD EXERCISE INDEPENDENT PROFESSIONAL JUDGMENT ON BEHALF OF A CLIENT.

We decided that if a part-time prosecuting or deputy prosecuting attorney represented other governmental units (i.e. city, county, state), the lawyer would "... clearly be placing himself in the position of representing multiple clients 'having potentially differing interests'". We indicated that it is possible for governmental units to have "differing interests"
both in litigation and non-litigation related matters. We considered the principles enumerated in EC 5-15 and 5-16 to be pertinent.

EC 5-15 states in pertinent part that:

If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests.

EC 5-16 provides that:

In those instances in which a lawyer is justified in representing two or more clients having differing interests it is nevertheless essential that each client be given the opportunity to evaluate his need for representation free of any potential conflict and to obtain other counsel if he so desires. Thus before a lawyer may represent multiple clients, he should fully explain to each client the implications of the common representation and should accept or continue employment only if the clients consent. If there are present other circumstances that might cause any of the multiple clients to question the undivided loyalty of the lawyer, he should also advise all of the clients of those circumstances.

In Opinion No. 6 we concluded that before a part-time prosecuting or deputy prosecuting attorney represents any other governmental unit, the implications of the common representation should be fully disclosed, explained, and meaningful consent secured from the state and the other governmental unit. We declined to answer the questions of how to obtain meaningful consent, stating that the question required a legal opinion which was outside the authority of the committee.

We also take note of our Opinion No. 4 of 1983. In that opinion we considered whether a part-time prosecuting attorney, whose salary was paid in part by the county, could represent a former client charged with civil contempt before a county Board of Zoning Appeals. We decided that lawyers who are paid by the county may represent clients before another county unit if: there is no use of inside information; there are no official duties performed by the prosecutor in behalf of the county; there is no request for criminal prosecution, and there is meaningful consent by all affected parties.
II

If A is elected prosecuting attorney, he will be a member of the State Constitutional Judicial System and a representative of the State of Indiana. The facts indicate that A and B practice law as partners. Knowledge of one member of a firm is imputed to the other member(s) of a firm. (See the Committee's Unpublished Opinion No. 1 of 1981; Schloetter v. Railoc of Indiana, Inc., 546 F. 2d 706 (7th Cir. 1976) and Westinghouse Electric Corp. v. Kerr-McGee Corp., 580 F. 2d 1311 (7th Cir. 1978).)

Confidential information possessed by A, acting as prosecuting attorney, will be imputed to B. B should not reveal or misuse the confidential information. (See Canon 4 of the Code of Professional Responsibility: A LAWYER SHOULD PRESERVE THE CONFIDENCES AND SECRETS OF A CLIENT.) Because B is a partner of A and knowledge of confidential information is imputed to him, he should not accept employment that requires him to act in a manner that is in conflict with the confidential information or A's representation of the State of Indiana as prosecutor.

Consistent with our reasoning in Opinion No. 6 of 1978, we agree that it is possible for governmental units to have "differing interests". We consider a Sanitary District to be a "governmental unit" which may have "differing interests" from the State of Indiana. If B represents the Sanitary Board, he may be required to assist in the sale of general obligation bonds concerning the financing of sewers, or other matters which may directly or indirectly, involve the State of Indiana. B will place himself in a position of representing multiple clients with "potentially differing interests" if he represents the Board of Sanitary Commissioners during the time period that his partner, A, acts as prosecuting attorney. B must guard against the disclosure or use of information gained or imputed to him thereby. He must be loyal to his client, the Sanitary Board, and exercise independent judgment on its behalf.

III

The committee reaffirms the position set forth in Opinion No. 6 of 1978 and concludes, based on the facts before the committee, that B may represent the Board of Sanitary Commissioners during the time period that A serves as prosecuting attorney, provided that:

a. Pursuant to the principles enumerated in EC 5-15 and prior to accepting the Board as a client, B must carefully weigh the possibility that his judgment may be impaired or his loyalty divided if he agrees to represent the Board. B should decline the employment if the exercise of his independent professional judgment on behalf of the Board will be or is likely to be adversely affected by acceptance of the employment while his partner serves the State of Indiana as prosecuting attorney. (See DR 5-105 (A).)
b. If B decides that there are "differing" interests and also concludes that he can adequately represent the Board, then he should disclose and fully explain to the Board the implications of his representation. B should disclose to the Board that his law partner, A, represents the State of Indiana as prosecuting attorney and thus B's representation of the Board will be limited accordingly. The Board of Sanitary Commissioners and the State of Indiana should consent to B's representation of the Board. (See DR 5-105 (C).)

c. The mere fact of common funding is not conclusive that there may be "differing interests" or a conflict of interest. Rather the test is whether there is a duty owed to a client which would be compromised by representation of another client. If B determines there are no differing or conflicting interests, then there is no obligation to secure client consent(s).

d. Since we have concluded that with the proper restraints and disclosures, B may serve as lawyer for the Sanitary Board while A is prosecuting attorney (relevant information privy to A, as prosecutor, being imputed to B), B will be in no different stance if he also serves as deputy prosecuting attorney and Sanitary Board lawyer.
INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE

OPINION NO. 3 OF 1986

The Legal Ethics Committee has been requested to consider whether there exists an ethical question based on the following situation:

An attorney wishes to disseminate to various priests and ministers a letter identifying himself as an attorney specializing in Social Security Disability law and as a member of the National Association of Social Security Representatives. The proposed letter further suggests that certain citizens are being denied disability benefits by the unlawful actions of the Social Security Administration. The letter suggests that the receiver of the communication may know a large number of persons whose claim for disability benefits has been denied or whose claims are presently being processed. The attorney suggests that he can provide information to these people that may be beneficial to them including the acquisition of disability benefits they would not otherwise receive. The letter then makes reference to the attorney's business phone number, lists office hours, and lists residence phone number. The letter further suggests that we can set up meetings to inform persons of their rights. The letter indicates no charge will be made for such meetings. The letter concludes with comment about the regulation of attorney fees by the Social Security Administration. This letter is written on the professional letterhead stationery of the attorney.

QUESTION

Whether the above communication is permitted by the Code of Professional Responsibility.

DISCUSSION

Disciplinary Rule 2-101, Publicity and Advertising, DR 2-103, Recommendation or Solicitation of Professional Employment, and DR 2-104, Limitation of Practice must be examined. The desire to afford the public access to information relevant to legal rights has resulted in relaxation of former restrictions against advertising by attorneys. The non-lawyer is best served if advertisements contain no misleading information or emotional appeal and emphasizing the necessity of an individualized evaluation of the situation.

The attorney in this inquiry wishes to contact numerous third persons for the purpose of acquiring a forum to gain access to a segment of disabled persons for eventual employment of this particular attorney.

Under DR 2-103(C), a lawyer may request referrals from a lawyer referral service operated, sponsored or approved by a bar association or cooperate with any other qualified legal assistance organization. The Committee does
not perceive the target of the attorney's letter, ministers and priests, to be a lawyer referral service or other qualified legal assistance organization. Further, under DR 2-103(D), if contact were to be made directly with prospective clients for purpose of obtaining professional employment, such contact or written communication is not to be based on the happening of a specific event. DR 2-104, Limitation of Practice, permits a lawyer who practices in certain areas of the law to hold himself out as practicing in those areas, but he may not hold himself out as a specialist.

CONCLUSION

The proposed letter is considered to be a form of impermissible solicitation.
The Legal Ethics Committee has received an inquiry from an Indiana law firm that is considering participating as a provider law firm, otherwise known as a referral attorney, under a group and prepaid legal services plan. The plan works this way. Company X, a for-profit corporation, designs, markets and administers group and individual legal services plans nationally. Within each state in which Company X does business, there is a designated law firm, called the state legal office, which directs the delivery of legal services in that state under the various plans and makes referrals of plan beneficiaries to referral attorneys. Referral attorneys are individual lawyers or law firms who agree to provide legal services to plan beneficiaries who are referred by the state legal office. All charges for services provided are to be in conformity with a uniform schedule of fees. The fee schedule, although not available to the committee, apparently sets specified fees for some typical legal problems and, in other cases, sets maximum fee amounts.

Referral attorneys pay nothing to Company X or the state legal office in exchange for their participation, nor does Company X or the state legal office pay anything to the referral attorneys. A referral attorney's sole compensation for services to a plan beneficiary is the fee charged to and collected directly from the plan beneficiary. Company X and the state legal office undertake no obligation to refer any particular matters or numbers of matters to the referral attorneys, and the referral attorneys are free to conduct an unlimited practice of law with respect to non-plan clients.

There are several other elements to the agreement between Company X and its referral attorneys that warrant mention. The agreement states:

"This agreement is subject to the Rules of Professional Responsibility now in effect and from time to time promulgated by the Courts of the subject state and the Bar Association of the subject state as well as all state and federal regulations, rules and statutes of any type."

Further, the agreement recognizes that Company X is not a law firm or a professional corporation, and cannot engage in the practice of law. The agreement also recognizes that the plan beneficiary is the referral attorney's client and that neither Company X nor the state legal office will "interfere with, influence, control, direct, advise, and/or participate" in the attorney/client relationship. Finally, the agreement requires that the referral attorney enter into a written retainer agreement with each plan beneficiary client and provide a copy of the retainer agreement, a record of time spent on the matter, services expended and total fees charged to
Company X or the state legal office upon request of either.

The inquiry asks what guidance exists in the Code of Professional Responsibility to assist in evaluating the ethical propriety of such an arrangement. In general, the inquiry asks whether any actual or potential ethical violations are presented, and specifically, whether such an arrangement constitutes a violation of the ethical limitations upon third-party recommendations of professional employment. Specific guidance is rather sparse. DR 2-103(C) addresses the point as follows:

"A lawyer or his partner or associate or any other lawyer affiliated with him or his firm may request referrals from a lawyer referral service operated, sponsored, or approved by a bar association or with any other qualified legal assistance organization."

In Opinion No. 3 of 1985, we commented upon the dearth of guidance in this rule. We further noted that more detailed guidance was available to lawyers prior to January 14, 1984, when DR 2-103(D) described in great detail the types of referral entities or other intermediaries with which a lawyer could ethically associate. Specifically, repealed DR 2-104(D)(4) outlined seven considerations in evaluating the ethical propriety of group legal services plans. However, all of this detailed guidance was lost with the substantial changes that occurred in Disciplinary Rule 2, effective January 14, 1984. Since the group legal services plan here under consideration is clearly not operated, sponsored, or approved by a bar association, we are left to consider whether acting as a referral attorney under the above-described circumstances constitutes permissible cooperation with "any other qualified legal assistance organization." In the event that it is, we still must ask whether there are any other ethical concerns raised by the subject plan.

In Opinion No. 3 of 1985, in discussing a proposed referral service to be operated by a non-profit association of Christian attorneys, we looked to the criteria set out in the repealed DR 2-103(D)(4) as being a guide to the evaluation of whether an organization is qualified under DR 2-103(C) to make referrals to lawyers or law firms.

The considerations outlined in repealed DR 2-103(D)(4) focus upon the primary ethical issue in this area: What impact will the existence of an intermediary (the referral organization) have on the lawyer/client relationship and the delivery of legal services? This issue raises a number of subsidiary questions. Is the lawyer imposed upon the beneficiary or does the beneficiary have some degree of control over the selection or, at least, the de-selection of the lawyer? (See repealed DR 2-103(D)(4)(a) and (e)). Does the lawyer have a pecuniary interest in the operation of the program beyond the value of his or her service to the individual beneficiary? (See repealed DR 2-103(D)(4)(b) and (c)). Is the beneficiary viewed as the client of the lawyer and is the referral organization unable to control, direct, or otherwise influence the acts of the lawyer on behalf of the beneficiary? (See repealed DR 2-103(D)(4)(a) and (d)). Finally, is the referral system otherwise operated legally, ethically, and in compliance with all reporting
requirements? (See repealed DR 2-103(D)(4)(f) and (g)).

In addition, repealed DR 2-103(D)(4)(a) suggests that a for-profit organization will have a higher burden in proving a lack of interference in the attorney/client relationship than a not-for-profit organization. The significance of this distinction was clarified in comments to the parallel provision of the ABA Model Code of Professional Responsibility.

DR 2-103(D)(4)(a)

This provision is premised upon the connection between the realization of profit by a lay organization from the rendition of legal services by a lawyer and the potential for interference with the independent exercise of the lawyer's professional judgment to enhance that profit. It is so drafted, however, as to embrace profit-making organizations where the lawyers rendering the service are free of such control by the organization as might result in interference with the independent exercise of professional judgment. Thus, profit-making organizations providing legal services to members or beneficiaries could not do so through lawyers employed by them, but they could recommend lawyers provided that they did not direct or supervise them. The provision recognizes and provides for a closer relationship between the profit-making organization and the lawyer in those situations in which the profit-making organization has an independent stake in the outcome of the presentation [sic]. This provision is not intended to bar service under employers' plans for employees; it simply induces such plans to be effected through non-profit organizations.

American Bar Association Ad Hoc Study Group, Section and Committee Reports to the House of Delegates, Report No. 110, Appendix A, February 24-25, 1975, Chicago.

Prepaid and other group legal services plans are a part of the landscape of modern legal practice. See, e.g. United Transportation Union v. State Bar of Michigan, 401 U.S. 576, 91 S. Ct. 1075 (1971) and cases discussed therein. They have played a significant role in the expansion of the availability of affordable legal services to persons of moderate means. As long as such plans leave the lawyer free to act independently and zealously on the client's behalf, and as long as they otherwise do not impede the lawyer's duty to act ethically, they should not be disapproved.

In general, the arrangement described in the inquiry withstands this scrutiny. The agreement between Company X and the referral attorneys clearly recognizes the independence of the lawyer in representing the plan
beneficiary and precludes the company or the state legal office from interfering in that relationship. Further, the referral attorney receives no pecuniary gain other than that furnished directly by the client in the form of a fee. Thus, the economics of the arrangement reinforces the lawyer's fealty to the plan beneficiary. As well, the referral lawyers have not been involved in the creation, promotion, or marketing of the plan.

We express some reservations. First, the arrangement, as described, gives the committee no assurance that the plan beneficiary has some degree of control over the choice of the lawyer. Especially when the organization administering the plan is a for-profit entity, the beneficiary should not be given a referral on a "take it or leave it" basis. Thus, any prospective referral attorney will want to be assured that the plan permits some degree of beneficiary choice in selecting a lawyer, or minimally, in obtaining new counsel through the plan in the event the client is dissatisfied with the propriety or quality of representation. See repealed DR 2-103(D)(4)(c).

Second, while the agreement explicitly references and incorporates the Code of Professional Responsibility as a contract term, we believe the agreement should specifically recognize the referral attorney's right and duty to decline representation in referral cases when ethically required to do so. Examples of such cases would be when the lawyer has a conflict of interest or does not have the time or competence to take on the matter presented.

Third, the agreement calls for the referral attorney to provide Company X or the state legal office, upon request, a copy of the retainer agreement with the client and a record of time spent on a matter, services expended, and total fees charged. Absent explicit client consent, we believe such disclosures would constitute a violation of the confidentiality and secrecy provisions of Disciplinary Rule 4. The prospective referral attorney will want to be assured that such disclosures will only be made when the client consents.

Finally, the prospective referral attorney should be assured that the group legal services plan from which he or she is to receive referrals has developed and filed a written plan and periodic written reports with the Clerk of the Supreme Court and Court of Appeals of Indiana pursuant to Admission and Discipline Rule 26.

Res Gestae - June, 1987
INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE
OPINION NO. 5 OF 1986

The Committee has been asked whether a Juvenile Court Referee, appointed by the Judge of the Circuit Court, who has exclusive jurisdiction over juvenile matters can perform ethically the following functions.

1. May the Juvenile Court Referee practice criminal defense law in other courts within the county?

2. May the Juvenile Court Referee practice civilly in the Circuit Court?

3. May the associates of the Juvenile Court Referee practice criminal law and/or civil law in the Circuit Court?

4. May the associates represent juveniles before the Circuit Court Judge?

5. May the associates practice criminal law in the other courts in this county?

6. Does the Juvenile Court Referee have a conflict of interest due to his position as a school board member of one of the school corporations in the county?

The Committee believes it clear that the Juvenile Court Referee, or associates of the Juvenile Court Referee, may not practice civilly in the Circuit Court nor may the Associates practice criminal law or represent juveniles before the Circuit Court Judge. The Committee finds no basis to restrict the Juvenile Court Referee or Associates from the practice of civil or criminal law in other courts within the county.

The position of the Juvenile Court Referee also serving in the capacity of a school board member creates no problem per se. Care must be taken by the Juvenile Court Referee to avoid particular circumstances which would expose him to making decisions as a school board member and/or referee concerning particular student matters which may be processed through the Juvenile system.

Res Gestae - June, 1987
INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE

OPINION NO. 6 OF 1986

Facts

A Missouri lawyer has been requested by another lawyer associated with the same firm to represent him in connection with a tort claim that may be filed in an Indiana court. The plaintiff/lawyer will be called upon to testify in his own case. The committee has been requested to decide whether DR 5-101(B) prohibits acceptance of this employment by the firm's schedule.

Analysis

DR 5-101(B) requires that an attorney shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness. (emphasis added). DR 5-105(B) then gives four specific exceptions when the lawyer may act as advocate/witness: in matters of informality or in uncontested matters, to establish attorney fees, or if the lawyer's refusal would work a "substantial hardship" on the client.

The rationale underlying DR 5-101(B) and DR 5-102(A) relates largely to the problems arising from the dual role of lawyer acting as an advocate and witness: the common financial interest of the attorney-witness and his law firm in the outcome of the litigation, the possibility of the appearance of impropriety to the public who may suspect attorney of distorting the truth to further his case, prejudice to opposing party by inhibiting cross-examination of lawyer-witness, and protection of the integrity of the advocates' role. Cottonwood Estates, Inc. v. Paradise Builders, Inc., 624 P. 2d 96 (1981), Enker, The Rationale of the Rule that Forbids a Lawyer to be Advocate and Witness in the Same Case, Am. Bar Foundation Research J. 455 (1977). EC 5-9 also provides some guidance, "... If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively." See also ABA Formal Opinion 339 (1975).

Balanced by the proscriptions in DR 5-101(B) to preclude attorneys from testifying when they "ought to be called as a witness" are considerations of an attorney-client's right to counsel of his or her choice.1 Such a right is an important interest which requires that any curtailment of the client's right to counsel shall be approached with great caution.
A conflict of interest may arise when a member of the firm is a necessary witness (satisfying the "ought to be called as a witness" test) and another member of the firm acts as advocate. Vicarious disqualification of the firm of the testifying advocate is technically required under DR 5-102, unless the exceptions of DR 5-105(B)(1)-(4) are met. Some courts have applied this requirement stringently. Boling v. Gibson, 266 Ark. 310, 584 S.W. 2d 14 (1979). Other courts have adopted a "restrained approach" and look at the circumstances of each case to determine if disqualification is warranted. Bottaro v. Hatton Associates, 680 F. 2d 895 (1982). Indiana cases on imputed disqualification apply different standards in the criminal and the civil areas. For example, where lawyers as witnesses are challenged to continue their role as advocates in civil matters, Indiana courts have found that their conduct falls under one of the four enumerated exceptions in DR 5-105(B)(1)-(4) and have permitted the representation. See Consolidated Rail Corporation v. Thomas, 463 N.E. 2d 315 (1984); Indiana-Kentucky Electric Corporation v. Green, 476 N.E. 2d 141 (1985). In the criminal area, recusation of the entire staff is mandatory when the prosecuting attorney himself is named a witness. State v. Tippecanoe County Court, 432 N.E. 2d 1377 (1982). However, if a deputy prosecuting attorney had become a witness, the Code of Professional Responsibility does not require a recusation of the entire staff of the prosecutor. See State ex rel. Goldsmith v. Superior Court of Hancock County, 386 N.E. 2d 94 (1979). Indiana courts, in applying the different disqualification standards in the criminal and civil areas, state that the lawyers in a law firm have a common financial interest in the outcome of the case, and the prosecuting attorney's office has an independent duty by law to represent the state in criminal matters. State ex rel. Goldsmith, supra.

Furthermore, there is no provision in DR 5-101 or DR 5-102 for client waiver of the attorney-witness disqualification provisions. It could be argued that the Indiana Model Rules of Professional Conduct Rule 3.7 "substantial hardship exception" may be applied in such a way as to eliminate the need for waiver. However, most courts have basically decided that client's waiver or the client's wish to not be required to obtain outside counsel was inapplicable in the light of DR 5-101 and DR 5-102. See MacArthur v. Bank of New York, 524 F. Supp. 1205 (1983). Also see Note, The Advocate Witness Rule: If Z, Then X, Why?, 52 N.Y.U.L. Rev. 1365 (1977).

Attorneys who are parties and witnesses are treated differently in the courts from attorneys who are advocates and witnesses. The Second Circuit Court of Appeals permitted a firm to represent a former partner who was a party defendant in International Electronics Corp. v. Flanzer, 527 F. 2d 1288 (1975). The Court noted that DR 5-101(B) and DR 5-102(A) applied to current partners in a firm and not to former partners. Yet, in Bottaro, the court permitted an attorney's current law firm to represent him in a case where he was named a party defendant, so long as the attorney would not himself play an advocate role in the case. The Court found important that there was no confusion of roles "where the lawyer-witness's lack of
disinterestedness is evident from his status as a party litigant." The Court adopted a restrained approach to disqualification that calls for disqualification "only upon a finding that the presence of a particular counsel will taint the trial by affecting his or her presentation of an issue." Bottaro, supra.

The Massachusetts Supreme Court placed weight on the attorney's right for self-representation. If stated, "To apply DR 5-102 when the testifying advocate is a litigant miscomprehends the thrust of the rule. DR 5-102 regulates lawyers who would serve as counsel and witness for a party litigant. Any perception by the public or determination by a jury that a lawyer has twisted the truth surely would be due to his role as litigant and not, we would hope, as a lawyer." Borman, supra.

Courts have generally been hesitant to require disqualification if it appears that the motion for disqualification is being used as a tactical tool. Bottaro, supra; Borman, supra; International Electronics Corp., supra.

Conclusion

This committee has recognized an attorney's right of self-representation. In our Unpublished Opinion No. U2 of 1979, we permitted an attorney to testify on his own behalf as to material facts before the Alcoholic Beverage Commission without acquiring his own representation.

The committee does not believe that a strict and mechanical approach to disqualification is mandated by DR 5-105(B). In that regard, we adopt the "restrained approach" of the Second Circuit Court of Appeals and the Massachusetts Supreme Court that calls for disqualification "only upon a finding that the presence of a particular counsel will taint the trial by his or her representation." We have sufficient information to give an opinion on whether the proceedings could be tainted.

Furthermore, in order to preserve the integrity of the adversary system, the committee believes it is mandatory that the attorney-client play no advocacy role in the case whatsoever. This may mean shielding the attorney from the litigation by building a "Chinese wall."2 Thus, in summary if the law firm's representation of client does not taint the proceedings, the attorney-client does not take any advocacy role, this committee believes under these circumstances there is no violation of DR 5-105(B).

FOOTNOTES

1 This inquiry has insufficient facts upon which to determine what the attorney-client may testify about. It may well be that such testimony would fall within the enumerated exceptions of DR 5-101(B). However, courts in some jurisdictions have interpreted whether a lawyer "ought to be called as a witness" by using the following tests: 1) Whether an attorney's testimony could be significantly
useful in order for he/she to be called. Borman v. Borman, 381 N.E. 2d 847 (Mass. 1979); and 2) The significance of the matters to which he might testify, the weight his testimony may have in resolving such matters, and the availability of other witnesses or documentary evidence by which these matters could be independently established. Cowden v. Superior Ct., 576 P. 2d 971; 143 Cal. Rptr. 9, cert. denied, 439 U.S. 961 (1978). See also Report of Code of Conduct Study Committee of ISBA October 31, 1985, and Model Rules of Professional Conduct 3.7(a) which disqualifies a lawyer when there is a likelihood that the lawyer will be a "necessary" witness.

2 "Chinese wall" is a term which has been used by our Seventh Circuit to describe an effort to segregate attorneys within the same firm to avoid an "imputation of knowledge" allegation arising under Canon 5. Westinghouse Electric Corp. v. Kerr-McGee Corp., 580 F. 2d 1311, 1321 (7th Cir. 1978).
The Committee has been presented with a question involving the following fact situation:

95% of the stock in Corporation X is owned by individual F. The remaining 5% is owned by F's daughter S, her husband, and X's business manager. X in turn owns all of the stock in Corporations A, B and C.

The members of the Board of Directors of the most active subsidiary, C, include S, her husband, and another of F's daughters, L. L has recently been admitted to the Indiana Bar, and she has been asked to represent corporation C as general counsel.

**ISSUE**

Is L prohibited from acting as general counsel to C because she is a member of C's Board of Directors?

**RESPONSE**

L is permitted to accept employment as legal counsel for C only if she is convinced that her independent legal judgment on behalf of her client will not be impaired by her activities as a board member (or, for that matter, by her feelings as a family member). She must consider the potential conflicts of interest and other ethical problems which may arise and make full disclosure of them to the other corporate officials. DR 5-101(A).

L should not, however, be involved in the decision to choose herself as counsel for the corporation. She also should not, as a member of the Board, pass upon the issue of her compensation for legal services. DR 5-101(A); EC 5-18.
This committee has been presented with an inquiry pertaining to two separate issues.

The first issue raised by the inquiry is: May a law firm at the request of a church or charitable organization engage in a "Will Day" wherein members of the firm are made available a certain day at the church or headquarters of the charitable organization to write wills at a set reduced fee?

The second inquiry seeks an answer as to whether or not a law firm can solicit, by mail, pastors of churches or heads of charitable organizations in order to encourage them to sponsor a "Will Day" for their members?

It is the opinion of this committee that neither practice outlined in the inquiry is acceptable.

DR 2-103 distinctly sets out the fact that certain types of solicitation are unethical. DR 2-103(A) states as follows:

A lawyer shall not seek or recommend, by in-person contact (either in the physical presence of, or by telephone), the employment, as a private practitioner, of himself, his partner, or associate, to a non-lawyer who has not sought his advice regarding employment of a lawyer, or assist another person in so doing.

DR 2-103(E) sets out the following material:

A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client, except that he may pay for public communications permitted by DR 2-101 and the usual and reasonable fees or dues charged by a lawyer referral service operated, sponsored, or approved by a bar association.

In addition thereto, without quoting the section verbatim, we think that DR 2-103(D) also applies in this situation.

Also, as far as the second part of the inquiry is concerned, we are of the opinion that EC 2-2, 2-3 and 2-4 are relevant.

Lastly, we are of the opinion that according to Disciplinary Rule 9-101 lawyers should at all times avoid the appearance of impropriety.
Even in the absence of solicitation, being invited to "Will Day" wherein the apparent sole purpose of the attorney attending such function is to obtain potential clients and "sell his wares" at a reduced rate is in violation of the disciplinary rules.

Obviously, as the ethical consideration is set out, a lawyer has an absolute right and duty to help educate the public but the ethical considerations also conclude that a lawyer should not recommend himself nor should a lawyer be at an educational function solely for the purpose of increasing his own work load or clientele potential.

A law firm or an individual practitioner is not authorized to solicit business pursuant to the appropriate disciplinary rules cited above. Thus, when a lawyer or firm of lawyers attempts to solicit such people as pastors of churches or presidents of charitable organizations or other officers of a charitable organization, it is doing just that.

In addition, when a lawyer states that he is willing to write a will, in this instance, for a reduced fee on a particular day, it is much the same as a retail business having a "fire sale." We, for this reason, feel that this is a violation of DR 2-103(E).

Lawyers are prohibited from compensating or giving anything of value to anyone to secure employment. The writing of a will for a reduced fee would be doing that.

Because of the above-cited sections and argument set out herein, we are of the opinion that none of the conduct suggested in the inquiry is ethical.
PART-TIME COURT COMMISSIONER - CONFLICT

The Legal Ethics Committee of the Indiana State Bar Association has been requested to issue its opinion on whether a part-time domestic Commissioner (hearing officer) and members of his firm would be prohibited from practicing law.

The part-time Commissioner shall hear all support matters on non-contested dissolutions, citations and modifications. His decisions shall be subject to the approval of the Circuit and Superior Court Judges.

Our opinion is that a part-time Commissioner and partners and associates of his firm may practice law, both civil and criminal, in any courts except for the Circuit and Superior Courts that approve his decisions. As stated in Opinion No. 5 of 1981, as clarified, "The Indiana Code of Judicial Conduct provides that any officer of the judicial system performing judicial functions, including an officer such as a referee in bankruptcy, special master, court commissioner, or magistrate, is a judge for the purpose of the Code....and subject to the Code of Judicial Conduct, and shall not practice law in the court in which he serves...."

Also see Opinion No. 5 of 1978 in which the Committee stated partners and associates of a part-time judge may not do what the part-time judge himself may not do.
I. Facts

Attorneys forming a new partnership want to know what can be done about disseminating information regarding their new firm to the public. They would like to have the committee's opinion on the following marketing approaches, the parameters of their use, and to whom each approach may be directed: firm brochures, legal seminars, direct mail, and newsletters. The firm would anticipate that a legal seminar would be without charge to the person attending, and it would be designed for the sole purpose of educating the audience on those areas of law in which they expressed some interest. Furthermore, the attorneys state that the newsletters would be confined to recent developments in Indiana law as they relate to certain general areas in which the addressee would be known or reasonably expected to have an interest. The gist of the attorneys' inquiry is whether the marketing approaches outlined above would conform to DR 2-103(A) and (D) and EC 2-2 and EC 2-5 of the Code of Professional Responsibility, and whether their decisions to use the above-noted marketing techniques would be prudent.

II. Analysis

The attorneys and this inquiry must be guided by the precepts contained in the newly amended Canon 2 of the Code of Professional Responsibility, particularly DR 2-101. This disciplinary rule provides that "subject to the requirements of 2-101, a lawyer may advertise services through public media such as a telephone directory, legal directory, newspaper or other periodical, radio or television, or through other public communication." DR 2-101 then goes on to detail a fairly specific list of what the advertisement may contain so long as it is done in a dignified manner without a false, fraudulent, misleading, deceptive, self-laudatory, or unfair statement of claim. See DR 2-101(C).

The gist of the attorneys' inquiry in this situation appears to be at what point does the lawyer advertising become more solicitational than informational? DR 2-103 sets forth the proscriptions against lawyer solicitation. In pertinent parts, the rule is set forth as follows:

"(A) A lawyer shall not seek or recommend, by in-person contact (either in the physical presence of, or by telephone), the employment, as a private practitioner, of himself, his partner, or associate, to a non-lawyer who has not sought his advice regarding employment of a lawyer, or assist another person in so doing."
"(D) A lawyer shall not contact, or send a written communication to, a prospective client for the purpose of obtaining professional employment if:

(1) The contact or written communication is based upon the happening of a specific event;

(2) The lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer;

(3) The person has made known to the lawyer a desire not to receive communications from the lawyer; or

(4) The communication involves coercion, duress, harassment."

The ethical considerations, particularly EC 2-2 and EC 2-5, admonish lawyers to assist lay persons in recognizing legal problems and to participate in seminars and public programs to educate the public to an awareness of legal needs and to provide information relevant to the selection of an appropriate attorney. Furthermore, the attorney who participates in these educational and informational programs must carefully refrain from giving or appearing to give a general solution applicable to all apparently similar individual problems, and the lawyers need to caution lay people not to attempt to solve individual problems on the basis of the information contained therein.

Distilled down into its simplest format, Canon 2 encourages attorneys to educate and provide information about legal services available to the general public, to refrain from providing general solutions to individual problems, to avoid self-laudatory and misleading information, and to prohibit attorneys from soliciting in person or by telephone specific clients.

**A. Newsletters**

Our committee has had the opportunity to discuss proposed communications and lawyer advertising in our Opinion No. 4 of 1982. In this opinion, the committee was requested to review newsletters prepared by an accounting firm which the inquiring attorneys proposed to present to their clients which concerned subjects of interest to the clients, particularly tax and estate planning areas. The inquiry focused on a dignified publication which was not self-laudatory and concentrated on providing new developments of significance in areas of law the clients should be informed about. The committee concluded that in this case the brochure submitted was proper and could be distinguished from a self-laudatory brochure. The standard regarding the newsletter that the committee adopted as being applicable in
our Opinion No. 4 of 1982 was set forth in the Illinois State Bar Association Opinion No. 623, and the Illinois State Bar Association found the attorney may communicate in such a manner with his or her own current and regular clients.

It would appear that the recently amended Canon 2 of the Code of Professional Responsibility does not restrict the attorney to present or send newsletters or publications of informational interest solely to past or present clients. However, our Supreme Court in The Matter of James J. Frank, 440 N.E. 2d 676 (1982), found that an attorney who recommended employment of himself to lay persons who had not sought his advice violated DR 2-103(A) of the Code of Professional Responsibility. In that case, the solicitation was blatant and obvious, as the attorney sent a letter to approximately 20 persons after having obtained the names of those who were charged with driving under the influence to advertise his successful experience in plea bargaining such cases and his fee for the service. The Court held the attorney's actions violated the precepts contained in Canon 2 and, even under the newly-revised disciplinary rules, this fact situation would constitute a violation. The United States Supreme Court in Ohralick v. Ohio State Bar Association, 436 U.S. 447 (1978), found that rules prohibiting in-person solicitation of clients by attorneys are permissible. See DR 2-103(D)(1)-(4).

The committee sees no apparent problem with newsletters targeted to the general public because of their informational and educational benefit, so long as they comply with DR 2-101. The communications cannot be based on the happening of a specific event. See DR 2-103(D)(1)-(4).

B. Brochures

Some brochures could also be made available to the general public; however, the attorneys would have to exercise extreme caution to make sure that the brochures would come within the requisites of advertising that is permitted by DR 2-101 and DR 2-103(D). The committee's concern in the past has been with self-laudatory statements. Statements based on past performance and prediction of future success must also be avoided. See our Opinion No. 3 of 1980. The committee is always willing to take a more definitive position on this if it has the proposed materials in hand to evaluate.

C. Legal Seminars

Finally, the committee has no difficulty in seeing that the arrangements for legal seminars are made by following the appropriate authority in Canon 2 and also EC 2-2 and EC 2-5. The attorneys are cautioned that in any presentation of informational or educational benefit to the public, they may not solicit services nor offer unsolicited information targeted at specific clients unless requested to do so by that particular person. Regardless of this opinion, the Ohio State Bar Association has restricted a firm's sponsorship of legal seminars to invitees who are clients, former clients, or family and friends. However, the decision was supported by the intricacies of Ohio Code of Professional Responsibility, which may vary from the Indiana Code of Professional Responsibility.

Res Gestae - July, 1987
INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE
OPINION NO. 11 OF 1986

FACTS

Attorney was employed to represent husband and wife in personal injury action arising out of what attorney was told was an incident at the home of husband's brother where husband's brother negligently operated a motor vehicle and injured wife. A claim was presented to the insurer of husband's brother which disputed liability but agreed to make $5,000 payment under medical coverage. From that payment the attorney received some portion as fee. Husband and wife were then divorced (neither was represented by the attorney). The dissolution decree declared that the cause of action was the sole property of the wife.

Attorney then filed suit against husband's brother for the wife. After interrogatories addressed to wife were filed, wife confided to attorney that she was not injured in automobile accident as previously claimed but, rather, fell down some stairs. Her husband and his brother had involved her in a scheme to defraud the insurer by fabricating the story about the automobile accident.

There is no indication that the insurer has any idea that the claim of the husband and wife was a fabrication.

Attorney has advised wife to dismiss her action and she has agreed to do so. Wife will not permit attorney to reveal the facts of the fraud to the insurer.

QUESTIONS

Is attorney obligated or permitted to reveal to the insurance company what has occurred?

Is attorney obligated to return to the insurer the amount he received as fee from the medical coverage payment?

OPINION

The dismissal of the wife's action will prevent the continued perpetration of a fraud on the court and should satisfy the attorney's obligations under DR 7-102(A) to not advance an unwarranted claim or assist his client in conduct known to be fraudulent and avoids the need under DR 7-102(B) to reveal a fraud to the tribunal where the client refuses to rectify a fraud perpetrated on the tribunal.
It is clear (assuming the truth of wife's current story) that attorney's present client, the wife, and his former client, the husband, and husband's brother perpetrated a fraud on the insurer. The terms of DR 7-102(B)(1) require that an attorney shall:

(first) call upon his client to rectify the [fraud]
and if his client refuses or is unable to do so,
[then] (second) reveal the fraud to the affected person....

This must be read in conjunction with DR 4-101 which provides that a lawyer may reveal client confidences and secrets only with the consent of the affected client or clients. This committee, in Opinion No. 1 of 1979, held that DR 7-102 should be read as including at the end of (B)(1) the language added by amendment to the ABA version of it even though that language was not added by our Supreme Court. That language is: "except when the information is protected as a privileged communication."

The privileged communication concept in Indiana is contained in I.C. 34-1-14-5 which provides that attorneys are not competent witnesses "as to confidential communications made to them in the course of their professional business, and as to advice given in such cases." The competency statute poses questions of law which are beyond the writ of this committee, but, for ethical considerations, the communications by the wife can be considered privileged.

Under this analysis, attorney could not reveal to the insurer what he has been told by wife without her consent. He does have an obligation to call upon her to rectify the fraud upon the insurer. He would also have an obligation to call upon his former client, husband, to rectify the fraud upon the insurer, except that to do so would cause him to reveal the communication from his present client, the wife, which he may not do without her consent.

Whether or not the attorney has an obligation to return to the insurer the portion of the medical coverage payment paid over to him as fee, poses questions of law this committee cannot address. Any payment by him to the insurer that implied the reason for the payment would compromise attorney's obligation not to reveal the communication from his client, wife, without her consent.

In conclusion, the committee is of the opinion that, insofar as ethical considerations are involved, the attorney may not reveal the information received from wife to the insurer nor may he pay the insurer the fee he received in any manner that would communicate the reason for the payment.
PART-TIME PRIVATE JUDGES

This committee has been asked to examine the possible employment of selected law firm members as part-time special judges in select and complex litigation. Each party desiring a part-time private judge would pay one-half of said attorney's regular hourly compensation. The inquiry notes that the Code of Judicial Conduct Canon 3(C)(1)(b) and Canon 7 should be addressed and recognizes that presiding judges might be currently compensated at a lesser rate.

The committee notes that arbitrators basically perform the tasks which the part-time private judges also perform, except the method of review may differ. Coulsen "Private Settlement for the Private Good" 66 Judicature 7 (June - July 1982). There is a legal distinction in that judges must follow the law while arbitrators can disregard it, Kolb "Private Judging" Judges Journal 33 (Spring 1984). The evidence code applies to private judging, but not to private arbitration, and only partially to judicial arbitration, "Private Means to Private Ends: Implications of the Private Judging Phenomenon in California" 17 U.C. Davis L. Rev. 611, 620 (1984).


The statutory authority for private judges seems to limit the nominees to former judges of a circuit, superior, criminal, probate, municipal or county court; I.C. 33-13-15-1.

T.R. 53 indicates that the Supreme Court is responsible for the manner and amount of Special Master's compensation. According to the Supreme Court Administrator, only one former judge has placed his name on the private judge list, South Bend Tribune (5/23/84) p. 19.

Counsel and political activity limitation, there are other problems.

The Supreme Court has limited compensation of special judges; T.R. 79(14). The legislature has limited the compensation of temporary judges, I.C. 33-13-16-9. A public official has no right to claim compensation over and above that fixed by law; City of East Chicago, Ind. v. Seuberli (Ind. App.
1941) 31 N.E. 2d 71; c.f. I.C. 4-2-6-5; 5-7-2-1, 36-2-7-2; ABA Informal Opinion No. 547, 12 N.C.B. 17 (No. 2) Opinion 482 (April 16, 1965).

It has also been held that a justice of the peace is an instrumentality in the administration of justice and his advertising for business would lessen the dignity of the Court. Illinois State Bar Association Opinion No. 105 (8/45). A similar rule was applied where a justice of the peace solicited some 300 potential litigants, lawyers and collection agencies, S.B. Michigan Opinion 43 (2/39) which reads in material part as follows:

"Solicitation of litigation by a judge in the hope of increasing his fees would also, in our opinion, seem to risk the incurrence of inconsistent obligations to those who patronize his court in response to his advertising, in violation of Judicial Canon 24, which is as follows: 'He should not accept inconsistent duties, nor incur obligations, pecuniary or otherwise, which will in any way interfere or appear to interfere with his devotion to the expeditious and proper administration of his official functions,' and in violation of Judicial Canon 25, from which we quote in part as follows: 'nor should he enter into any business relation which, in the normal course of events reasonably to be expected, might bring his personal interest into conflict with the impartial performance of his official duties.'

"At the Committee hearing it was stated by the judge that most of the letters were sent to his good friends. The letter does not evidence the warmth or intimacy that usually characterizes communications between intimate friends. Notwithstanding any relationship which existed between sender and recipients, in our opinion such conduct was in violation of Judicial Canon 33, from which we quote in part as follows: 'He should, however, in pending or prospective litigation before him, be particularly careful to avoid such action as may reasonably tend to awaken the suspicion that his social or business relations or friendships, constitute an element in influencing his judicial conduct . . .'."

Care must be taken by any part-time judge from advertising as such, c.f. Assn. of the Bar of City of New York, Opinion No. 81-37 (letterhead reference) citing ABA Informal Opinion No. 1196, DR 2-101, 2-102, 9-101; Oregon State Bar Opinion No. 459 (4/81) (telephone salutation).

Accordingly, this committee feels that the proposed part-time private judging proposal, is ethically permissible, but we state no opinion as to its feasibility under Indiana law.
The Committee has been requested to render an opinion as to the ethical propriety of an attorney licensed by the State of Kentucky advertising in yellow page directories which are distributed in Indiana. The Kentucky attorney further states that his practice is primarily in the area of "maritime torts, personal injuries along the river and longshore cases." The Kentucky attorney further indicates that because of the peculiarities of federal maritime law, he is able to bring suit in Kentucky courts. Finally, the Kentucky attorney indicates that his proposed yellow pages ad will state that he is not a member of the Indiana Bar Association.

This inquiry raises two questions. The first is whether it constitutes the unlicensed practice of law for a Kentucky attorney to advertise in a medium disseminated in Indiana. This question is a legal question which the committee by its charter is not permitted to address. However, the committee is of the opinion that the content of the advertisement as discussed below may affect the determination whether the advertisement constitutes the practice of law in Indiana.

The second issue is what content is permissible or required in the advertisement. The committee has previously addressed the question of the content of yellow pages advertisements in Opinion No. 3 of 1979. The thrust of this opinion is that the advertisement should provide information useful to a lay person in selecting an attorney and must not contain self-laudatory, false, misleading, fraudulent, deceptive or unfair statements. DR 2-101(B).

In view of the fact that the proposed advertisement will be in an Indiana-based medium, the committee believes that to avoid any misleading inferences, the Kentucky attorney must disclose that he is not licensed to practice law in the State of Indiana. DR 2-101(C)(6). The statement that he is not a member of the Indiana Bar Association is insufficient because not all persons licensed to practice in Indiana are members of its voluntary bar association.

Finally, the Kentucky attorney may have a question as to what additional information he may include in his advertisement concerning the nature of his practice. He is permitted under DR 2-101(B)(2) to indicate "[o]ne or more fields of law in which the lawyer or law firm practices, using commonly accepted and understood definitions and designations." Thus, the Kentucky attorney may state that he practices in the areas of maritime torts, personal injury cases occurring along the river, and longshore cases so long as he does not indicate that he is a specialist in these areas. DR 2-104(B).

This opinion should not be construed as any statement concerning the applicable ethical standards of the State of Kentucky.