The Legal Ethics Committee has been asked whether a lawyer who is a part-time deputy prosecutor, in a law firm where another more senior member of the firm is prosecuting attorney, has a conflict of interest when acting as a mediator in child custody disputes in the same county, where possible criminal sanctions may be imposed if visitation or custody rights are violated. The Committee is also asked whether a mediation role for such a lawyer sets up a conflict of interest because of the duty on the prosecuting attorney to represent Title IV-D petitioners in support cases. Finally, the Committee is asked whether a client already represented by counsel should be required to meet with another attorney, acting as mediator, in that attorney's office.

The last question does not appear to raise any ethical issue, as a court is free to order the parties to engage in mediation, and the fact that the place of mediation is a particular lawyer's office ought not by itself to raise questions about influence or potential damage to the existing attorney-client relationship, nor to raise any ethical concerns.

However, the Committee believes that there is a conflict of interest when a lawyer purports to act as mediator while at the same time he is, himself, a deputy prosecutor and another lawyer in his firm is the county prosecutor. The role of mediator requires that an individual, whether lawyer or not, be devoid of bias and free of actual or potential conflicts of interest.

The Committee has been asked to give opinions regarding similar matters before. Particularly close is Opinion No. 7 of 1981, which concluded that if a part-time prosecutor handled a support collection matter, there would be a violation of the predecessor Code of Professional Responsibility because the attorney might later be required to prosecute the same party.

Similarly, in cases involving child custody and visitation rights, there is the potential for criminal sanctions, particularly under Indiana Code 35-42-3-3. It is quite possible that the mediator-lawyer or his firm might later be asked to prosecute one of the parties to the mediation proceeding for violation of a child custody order, and for that reason the Committee believes there is unquestionably a conflict of interest.

Prosecuting attorneys, by nature of their office, also represent Title IV-D welfare petitioners in support cases. The prosecution of such cases, under an arrangement with the Child Support Division of the
Indiana State Department of Public Welfare, in itself raises concerns that have been previously addressed by the Committee (see Opinion No. 3 of 1981). However, it would seem that once again, there is at least an appearance of impropriety in a situation where, on the one hand, a lawyer would be acting as mediator, and on the other hand, the lawyer or his firm could possibly end up subsequently prosecuting one of the mediating parties in a Title IV-D sanction of collection of support.
INDIANA STATE BAR ASSOCIATION  
LEGAL ETHICS COMMITTEE  
OPINION NO. 2 OF 1991

ISSUE AND FACTS

The issue presented to the Committee is whether the Indiana Rules of Professional Conduct permit an Indiana attorney to participate in a "Personal Injury Hotline." The inquiring attorney received a letter regarding his or her desire to participate in a "Personal Injury Hotline." The letter had been discarded prior to the attorney's making the inquiry and, thus, has not been provided to the committee. The attorney provided the following facts. The so-called "hotline" would solicit alleged accident victims to call an 800 number. The callers would then be referred to participating attorneys in the geographic area of the caller. The solicitation of accident victims would be done through general advertisements with no specific attorney names mentioned. Further facts were not provided, but it is assumed that such an operation is private and some sort of monetary payment is made by participating attorneys for the referral system. It is unknown how the payment is structured.

ANSWER

In the view of the committee, a "Personal Injury Hotline" as described to the committee does not conform to the advertising standards contained in the Indiana Rules of Professional Conduct in that it is potentially misleading and deceptive and is not done in a dignified manner. An Indiana lawyer may not participate in a "hotline" described herein without risking violation of Rule 7.1(b) and Rule 7.2(a), in that such a "hotline" is likely to be false, fraudulent, misleading, deceptive, self-laudatory or an unfair statement of a claim under Rule 7.1(c) and in particular Rule 7.1(c)(2). Further, Rule 7.1(d) may be transgressed because the use of the phrase "hotline" may imply a quality of service, which is not allowed by this Rule. Participation therein may also violate Rule 7.2(b) as it relates to practicing under a name that is misleading as to identity, responsibility or status or that does not conform to Rule 7.1. In addition, under Rule 7.3(e) an Indiana lawyer is likely to be prohibited from accepting referrals from the "hotline" described. Under Rule 7.3(f) an Indiana lawyer may not compensate the "hotline" or give it anything of value.

DISCUSSION

Since 1977, lawyers have been permitted to advertise their services in the public media. In Bates v. State Bar of Arizona, 433 U.S. 350
(1977), the United States Supreme Court essentially held that the only lawyer advertising which may be legally prohibited is advertising which is false, fraudulent, deceptive or misleading. Recently, in Shaper0 v. Kentucky Bar Association, 100 L.Ed. 2d 475 (1988), the United States Supreme Court reaffirmed this premise when it held that lawyers may solicit potential clients known to face particular legal problems by sending truthful and nondeceptive letters. With that brief legal background, the ethical issues under Indiana's Rules of Professional Conduct are considered next.

The following Indiana Rules of Professional Conduct are relevant to this issue: Rule 7.1, Publicity and Advertising; Rule 7.2, Professional Notices, Letterheads, Offices, and Law Lists; and Rule 7.3, Recommendation or Solicitation of Professional Employment. The first two rules are relevant for context, and Rule 7.3 seems to precisely address this inquiry.

Under Rule 7.1(b) a lawyer may advertise "so long as said advertising is done in a dignified manner." The committee has determined that participation in a "hotline" as described is likely to be found to not be advertising in a dignified manner.

Rule 7.1 is an affirmative rule providing examples of "permissible areas" for a lawyer to advertise. Rule 7.1(b) prohibits all misleading and deceptive statements and claims, while also providing examples of permissible areas. Further, Rule 7.1(c) lists categories which will be included within the scope of misleading and deceptive statements. Rule 7.1(c)(2) states:

(c) Without limitation a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim includes a statement or claim which:

   . . .

(2) omits to state any material fact necessary to make the statement, in light of all the circumstances, not misleading; . . . .

The committee has determined that the "hotline" described is likely to be found misleading.

Although it is not a binding ethical consideration, the Indiana State Bar Association's pamphlet, "Suggestions For Lawyer Advertising -- Avoiding Deceptive and Unprofessional Ads," addresses "hotline" operations. Under the sub-heading "Examples of unprofessional ads," the pamphlet discusses and provides examples of "... ads, or phrases in ads, which are deemed distasteful and unprofessional, thus not presented in a dignified manner ...." The first example of "distasteful and unprofessional" ads or
phrases in ads is:

A. "24-hour legal hotline." A telephone line in a law office is not a hotline but is a phone for answering legal questions and/or giving legal advice. The term "hotline" implies the phone is something more than it really is and is simply offensive to the notion of giving legal advice. The more appropriate term is "24-hour answering service."

The pamphlet latter characterizes this as "mere sales hype and promote(s) nothing but hucksterism." While this position may be more applicable to a "hotline" phone operation "in a law office," the committee believes it is also applicable to a multi-attorney referral system.

It is unknown what the referral operation would state about attorneys. Thus, an evaluation of "all the circumstances" contemplated by Rule 7.1(c)(2) cannot be done without more complete information on the "hotline." In the view of the committee, however, it is a material omission for a referral system to exclude listing the specific name of the attorneys involved unless the referral system comes within the scope of Rule 7.3(e), which is discussed below.

Rule 7.1(d) prohibits participation in a public communication which "contains ... (an) implication regarding the quality of legal services." The committee believes that the use of the word "hotline" may imply a quality of the services, namely responsiveness and accessibility. Thus, it appears that "hotline" may conflict with Rule 7.1(d).

Rule 7.2 is relevant because it states that it is inherently misleading for a lawyer in private practice to practice under a trade name. This is relevant to the extent that the referral service fails to provide specific attorney names; and, therefore, the participating attorneys would be practicing under the "trade name" of the referral service. See, generally, Matter of Sekerez, 458 N.E. 2d 229, 242-44.

Finally, it appears to the committee that the essence of the inquiry is whether such a "Personal Injury Hotline" referral system is an ethically appropriate method of client solicitation. Rule 7.3(e) seems to precisely address this issue. Rule 7.3 generally addresses recommendations or solicitations of professional employment. Rule 7.3(e) describes those referral services from which Indiana lawyers may accept referrals. The text of Rule 7.3(e) is as follows:

(e) A lawyer shall not accept referrals from any lawyer referral service unless such service falls within subparts 1-4 of this Rule 7.3(e). A lawyer or his partner or associates or any other lawyer
affiliated with him or his firm may be recommended, employed or paid by, or may cooperate with, one of the following offices or organizations that promote the use of his services or those of his partner or associates or any other lawyer affiliated with him or his firm, if there is no interference with the exercise of independent professional judgment on behalf of his client:

(1) A legal office or public defender office:

   (A) operated or sponsored on a not-for-profit basis by a law school accredited by the American Bar Association Section on Legal Education and Admissions to the Bar;

   (B) operated or sponsored on a not-for-profit basis by a bona fide non-profit community organization;

   (C) operated or sponsored on a not-for-profit basis by a governmental agency; and

   (D) operated, sponsored, or approved in writing by the Indiana State Bar Association, the Indiana Trial Lawyers Association, the Indiana Defense Lawyers Association, any bona fide county or city bar association within the State of Indiana, or any other bar association whose lawyer referral service has been sanctioned for operation in Indiana by the Indiana Disciplinary Commission.

(2) A military legal assistance office.

(3) A lawyer referral service operated, sponsored, or approved by any organization listed in Rule 7.3(e)(1)(D).

(4) Any other non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, but only if the following conditions are met:

   (A) The primary purposes of such organization do not include the rendition of legal services;

   (B) The recommending, furnishing, or paying for legal services to its members is incidental and reasonably related to the primary purpose of such organization;
(C) Such organization does not derive a financial benefit from the rendition of legal services by the lawyer; and

(D) The member or beneficiary for whom the legal services are rendered, and not such organization, is recognized as the client of the lawyer in the matter.

The "Personal Injury Hotline" as posited by this inquiry fails to qualify as permissible under any of these categories of 7.3(e). It seems the first step for such a referral operation to gain acceptance would be to obtain sponsorship or approval by one of the groups mentioned in 7.3(e)(1)(D) and then request the sanction of the Indiana Disciplinary Commission. The inquiry does not state whether such sponsorship and sanctioning have been obtained, and the committee has assumed they have not. Nonetheless, compliance would still be difficult because this "Personal Injury Hotline" presumably has a for-profit basis to it, and that would prohibit its approval under 7.3(f) which states:

(f) 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 communication permitted by Rule 7.1 and the usual and reasonable fees or dues charged by a lawyer referral service falling within the provisions of Rule 7.3(e).

The committee previously has issued three opinions that discuss this area generally (Opinion No. 8 of 1986, Opinion No. 4 of 1986, Opinion No. 3 of 1985). None of these opinions, however, discuss the issue of a for-profit referral operation where participating attorneys pay the operation for referrals. The inquiry did not indicate whether a payment is made for the "Personal Injury Hotline," but the committee believes it is reasonable to assume that the "hotline" described will charge a fee for inclusion in its referral network.

The most relevant of the ISBA Opinions is No. 4 of 1986. It discusses an extensive factual situation of a referral operation run on a for-profit basis -- yet with no payment from participating attorneys to the referral operation. Apparently, this referral operation, since it is "for-profit," receives a fee from potential clients. In that sense, it would be more of a screening service for legal service consumers rather than a referral operation.

Opinion No. 4 of 1986 largely applies repealed disciplinary rules to the situation. The disciplinary rules were repealed in January of 1984. It
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).)

This opinion was also careful to distinguish between referral operations and group legal service plans, which are fully and extensively addressed in Admission and Discipline Rule 26. Finally, the opinion provides several "reservations" about any referral operation, e.g. clients should not be referred on a "take it or leave it" basis; the agreement should recognize the attorney's right and sometimes duty to decline representation; and the plan must be on file and periodic reports filed with the Clerk of the Supreme Court and Court of Appeals.

CONCLUSION

The committee has determined that the "Personal Injury Hotline" is not likely to comply with the advertising mandates of Rule 7.1 and that an Indiana lawyer may not participate in such a "hotline" without violating Rules 7.2 and 7.3.

Res Gestae - August, 1991
ISSUE AND FACTS

The Legal Ethics Committee of the Indiana State Bar Association is presented with two issues from the inquiring attorney. They are:

I. Whether a former in-house associate counsel who, among his duties, managed employment discrimination suits may represent a new client in an employment discrimination suit against this former employer.

II. Whether information gained while in-house counsel, such as personalities and negotiating styles, would be "generally known" information under Rule 1.9 of the Rules of Professional Conduct.

These issues, although overlapping to a limited extent with other Rules of Professional Conduct, primarily invoke Indiana Rule of Professional Conduct 1.9, "Conflict of Interest: Former Client".

The inquiring attorney states that from 1982 until 1987 he was employed as an associate counsel for a company. He engaged in a wide variety of matters, including managing employment discrimination matters. In 1987, he left the company and engaged in solo practice, concentrating in business and employment law.

An individual now wishes to retain him as legal representative against his former client, the company. The potential client wishes to retain him in an employment discrimination matter, which would be a position adverse to his former client.

ANALYSIS

The Indiana Rule of Professional Conduct 1.9, "Conflict of Interest: Former Client," states:

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents
after consultation; or

(b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.


Even after termination of the attorney-client relationship, a lawyer remains bound by the Code to preserve these confidences. The current client's interest in a vigorous representation potentially threatens the former client's interest in maintaining the confidentiality of all disclosures made to his attorney during the prior representation.

Id. at 1315. See also In Re Chantilly Const. Corp., 39 B.R. 466, 468, n. 2 (Bkrtcy. 1984) ("The Code and the Rules of Professional Conduct remain very similar . . ." The Code, however, has no counterpart to Rule 1.9.)

The widely accepted test for whether a former representation disqualifies an attorney from representing a new client was enunciated in T. C. & Theatre Corp. v. Warner Bros. Pictures. It is:

(T)he former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client. The Court will assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the representation. It will not inquire into their nature and extent.

113 F.Supp. at 268 (emphasis added); Westinghouse Elec. Co. v. Gulf Oil Corp., 588 F.2d 221, 223 (7th Cir. 1978). This "substantially related" rule carries with it an irrebuttable presumption that the attorney received confidential information. The rule applies regardless of whether the attorney is absolutely ignorant of any client confidences.
susceptible to abuse.

The reasons for this rule are many. Primarily it is because any inquiry into the nature of the former client's secrets defeats the underlying purpose of the rule, especially since the burden would be upon the former client to divulge such secrets to disqualify the attorney. See 94 Harv.L.Rev. at 1329. Therefore, once an attorney-client relationship is found, the irrebuttable presumption is triggered. Id.

Some courts have strayed from this irrebuttable presumption when the representation involves a significant departure from the traditional conception of the attorney-client relationship. Id. at 1330. One court has adopted a highly permissive standard for the substantial relationship test. The Second Circuit in Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751, 754 (2d Cir. 1975), overruled on other grounds, held that a substantial relationship existed only if the relationship between issues involved is "patently clear". The court further explained this in Government of India v. Cook Industries, 569 F.2d 737, 740 (2d Cir. 1978) by stating that disqualification would be granted only if the issues involved in the two representations were "identical" or "essentially the same".

Indiana courts have never discussed Rule 1.9. The Commentary that supplements this Rule does provide some guidance. The Commentary states:

When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client.

Prof. Cond. Rule 1.9 (Emphasis added).

The Commentary further states:

The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

Prof. Cond. Rule 1.9 (Emphasis added).

The Commentary's understanding of Rule 1.9 seems to suggest the more permissive approach is to be taken in Indiana under the Rules of

In the facts presented to the committee, it does not seem that a sufficient involvement with any prior representation exists to preclude his representation of the new client. It is posited that the new client's case did not even exist while the attorney represented his former client, the company. The issue presented to the committee seems to be fairly characterized as "a type of problem (employment discrimination)" that he handled for his former client, and the new client has brought him a "wholly distinct problem of that type."

That more permissive understanding of Rule 1.9(a), expressed in the Commentary to Indiana's Rule, places a greater burden on the attorney under Rule 1.9(b). Even if the attorney may proceed with his representation, he is still barred from using information relating to the representation to the disadvantage of the former client, except as Rule 1.6 would permit with respect to a client or when the information has become "generally known." See Prof. Cond. Rule 1.9(b).

The second issue presented to the committee is whether "personalities and negotiating styles" would be "generally known" under Rule 1.9(b). The Commentary to the Indiana Rules of Professional Conduct fails to explain in any way the meaning of "generally known."

The court in In Re Chantilly Const. Corp., 39 B.R. 466, 478 (Bkrtcy. 1984) discussed this issue:

Kraftson may have learned something of the personality of the debtor's officers and employees during this prior representation. Such a familiarity with the workings of a corporation or the personality of its representatives, however, is totally insufficient as a basis for disqualification.

Id. at 471. The reason this kind of information is found insufficient is because this is not information that a client submits to an attorney as confidential under the attorney-client relationship. It seems personalities and negotiating styles as posited in this situation are not the kinds of information that a client has a "reasonable belief that it was submitting (as) confidential information." See International Paper Co. v. Lloyd Mfg. Co., Inc., 555 F.Supp. 125, 132 (N.D.Ill. 1982). A personality or a negotiating style seem particularly within the exception as "generally known" because of their lack of substance and their easily
discoverable nature. Many attorneys may know the personalities and negotiating styles of the company. They would not have had to gain this information out of a privileged relationship with the client.

Although the analysis of this advisory opinion of Rule 1.9 applied to the facts present indicate that the inquiring attorney may proceed with his representation, that may not be a complete response. Issues other than those specifically presented must be considered. Obviously, secrets or confidences that were gained while in the employ of the former client still may not be revealed to the disadvantage of the former client. See Prof. Cond. Rules 1.6 and 1.9. Furthermore, if the attorney is knowledgeable of such secrets or confidences, he must then consider whether he is still able to vigorously and competently represent the new client while preserving any of his former client confidences. An additional consideration is whether the attorney participated in or rendered advice in connection with the preparation or implementation of any policies or procedures for the prior employer/client which may be implicated in the issues affecting the new client. If so, this new representation may not be "a wholly distinct problem." Prof. Cond. Rule 1.9. Besides the Rules of Professional Conduct, a lawyer is also guided by personal conscience. See Prof. Cond. R. "Preamble: A Lawyer's Responsibilities".
The Legal Ethics Committee of the Indiana State Bar Association has been asked to render an opinion as to whether the following matter constitutes the taking of a contingent fee in a criminal defense matter in violation of the Indiana Rules of Professional Conduct:

A lawyer wishes to represent a client in defending a criminal charge and in litigating a civil action that the client might have as the result of a false arrest. The fee arrangement for such representation would provide that, in the event there is no recovery in the civil action, the client would be responsible for payment of the criminal defense fees, and if there is a recovery in the civil action, the legal fees for both the civil and criminal representations would be paid from the recovery from the civil action.

In Rule 1.5 of the Indiana Rules of Professional Conduct, it provides in part that:

(d) a lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof, or

(2) a contingent fee for representing a defendant in a criminal case.

The question presented for this Committee's opinion is whether the above described fee arrangement would be considered the taking of a contingent fee in a criminal defense matter and thus prohibited by Rule 1.5. Assuming the fee is reasonable and in writing pursuant to the requirements of Rule 1.5, the Legal Ethics Committee of the Indiana State Bar Association finds this fee arrangement not to be the taking of a contingent fee and, therefore, there is no ethical violation.

While Rule 1.5 prohibits contingency fees in criminal defense representations, this Committee believes that the fee for the criminal defense work in the present matter is not contingent upon the successful accomplishment of that defense, but rather on a recovery in the civil proceeding if one is instituted, and the fee is not contingent at all if a civil action is not brought.
The inquirer requests an opinion on basically two matters summarized below. Firstly, he indicates that he will be opening a law firm and the primary service he intends to offer is the management of real estate. Such activities he intends on performing are the following: preparing lease agreements, showing property of various clients to prospective tenants, advertising the availability of the property for lease, managing the property, collecting rents, and taking the legal steps necessary to collect monies owed to clients or to evict defaulting tenants. He questions whether these activities constitute the practice of law. He then indicates that he intends to charge a flat fee and then an initial percentage of the gross monthly rent. He also questions whether this is a permitted fee structure or whether he is required to charge an hourly rate.

Secondly, he requests our opinion regarding an advertising proposal which basically would consist of the following: His letterhead will state his name and the fact that he is an attorney. His advertisement would state his name, the fact that he is an attorney, and directly below that designation would be "Property Management Services." He intends to prepare a brochure to send to area property owners and indicates that it will be dignified and will not be false, fraudulent or misleading. He also indicates that he will keep the brochure on file for six (6) years after its dissemination.

The question posed by the inquirer regarding the property management services he intends to offer is whether these activities constitute the practice of law. He also notes he will be holding himself out as an attorney on letterhead, by advertisement, and by his own statement that he intends to open a law firm.

The Preamble to the Rules of Professional Conduct defines a lawyer's responsibility and itemizes the functions that a lawyer performs. These functions may be summarized as follows: A lawyer may act as an advisor, an advocate, a negotiator, an intermediary, and an evaluator. Furthermore, the definitions contained in the Preamble denote firm or law firm as "a lawyer or lawyers in a private firm . . . etc." Although the list that the inquirer sets forth as activities he intends to perform on behalf of clients may in some respects be a hybrid (a combination of
lawyer and lay person functions), it is apparent that he is holding himself out as a lawyer practicing law. Therefore, it would be this Committee's opinion that, although some functions he performs may be proper for a lay person, other functions would constitute the practice of law. Furthermore, he could delegate to his employees certain functions such as showing the rental property and performing other basic clerical tasks such as collecting the rents. The inquirer is bound by the requirements of Rule 5.3, R.P.C., Responsibilities of Non-Lawyer Assistants. This opinion, however, does not address the inquirer's compliance with real estate laws.

The compensation schedule that he proposes must conform to Rule 1.5 of the Rules of Professional Conduct. The basic requirements are that the lawyer's fee shall be reasonable. The basic or rate of fee shall be communicated to the client in writing before or within a reasonable time after commencing the representation. This Committee believes that any fee structure should be agreed upon by the client and then should be reduced to writing in conformity with Rule 1.5.

The inquirer's questions regarding advertising are governed by Rules 7.1, 7.3 and 7.4. The Committee sees no difficulty in designating the fact that the attorney will conduct property management services so long as such a statement does not violate 7.1(c)(4) which implies that a lawyer may not hold himself out as a certified or recognized specialist other than what is permitted by Rule 7.4.

Furthermore, the Committee states that if the attorney sends the written communication, as he proposes, he must comply with Rule 7.3(c) and his brochure must include the words "advertising material" and a copy of the communication must be filed with the Indiana Supreme Court Disciplinary Commission at or prior to its dissemination.

III. CONCLUSION

In summary, the Committee believes that the inquirer would be functioning as a practicing attorney in his own law firm performing hybrid functions related to the practice of law and property management. This opinion does not address the inquirer's compliance with real estate laws. Furthermore, the Committee believes that the fees charged by the attorney must be reasonable and should be in writing with the prospective client.

Finally, the Committee states that the attorney may advertise himself as offering property management services so long as he complies with Rules 7.1, 7.3 and 7.4.
Duty to Notify Bankruptcy Trustee of Inheritance by a Debtor

FACTS

An attorney is the personal representative of a decedent who died November 4, 1991. Among the legatees is a nephew who lives in Texas and stands to inherit in excess of Twenty-Five Thousand Dollars ($25,000).

On December 31, 1991, the nephew filed a No Asset Chapter 7 bankruptcy proceeding in Texas. The decedent was a guarantor on the nephew's car loan with an Indiana bank. The Indiana bank notified the attorney that it had received notice of the bankruptcy filing, but the attorney has received no direct notice from the bankruptcy court or the nephew.

ISSUE

Is the attorney obligated to notify the bankruptcy trustee of the inheritance?

DISCUSSION

Rule 1.15(b) of the Indiana Rules of Professional Conduct provides as follows:

"Upon receiving funds or other property in which the client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property."

The Comment to Rule 1.15 provides in part as follows:

"Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable"
law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.

"The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction."

CONCLUSION

The Committee expresses no opinion as to the legal question of whether the bankruptcy trustee has an interest in the nephew's inheritance. However, for the purposes of this opinion, it is assumed that the bankruptcy trustee does have an interest in the inheritance. The attorney is aware of the bankruptcy proceeding and the bankruptcy trustee's interest in the funds by virtue of the bank's notification. Rule 1.15(b) is not invoked only when a creditor claims an interest in a fund held by the attorney. The Rule is invoked when the interest exists and is known to the attorney. Thus, the attorney must promptly notify the bankruptcy trustee of the inheritance.
FACTS

Company RDC is a research and development company incorporated under Indiana law. Company RDC is a wholly-owned subsidiary of a parent corporation ("Parent Company") which controls several companies which are sister corporations ("Sister Companies") of Company RDC.

Some of Sister Companies have minority shareholders who are officers and employees of Sister Companies. All remaining stock of Sister Companies is held by Parent Company. Parent Company, RDC, and Sister Companies file a consolidated financial statement and a consolidated tax return.

Corporate counsel for Company RDC ("RDC Counsel"), who is a full-time salaried employee, is admitted to the practice of law in the State of Indiana and also admitted to practice before the United States Patent and Trademark Office in patent cases. His duties include the consideration of intellectual property issues.

Company RDC performs a variety of research and development services for Sister Companies for which it charges them three times the hourly salaried rate of its employees performing the services, plus expenses and a nominal "handling fee."

ISSUES

The following inquiries, as consolidated and restyled, have been represented to the Committee:

1. May Company RDC receive reimbursement from Sister Companies at three times the hourly salaried rate of RDC Counsel, plus expenses and a nominal handling fee for his time devoted to preparing and prosecuting patent applications, rendering legal opinions, conducting intellectual property searches and studies, providing legal consultation and providing business consultations?

2. Would the above conduct constitute the unauthorized practice of law?

3. Would the answers to Issues 1 or 2 be different if RDC Counsel were instead an employee of Parent Company and rendering services to Sister Companies?
CONCLUSIONS

1. As to Issue One: Yes, provided that confidentiality and conflict of interest concerns are addressed by RDC Counsel and provided that RDC Counsel exercises independent professional judgment.

2. As to Issue Two: No, the conduct would not constitute the unauthorized practice of law.

3. As to Issue Three: No, the answers to 1 or 2 would not change if the counsel for RDC Company were, instead, counsel for Parent Company.

DISCUSSION

Rule 5.4 of the Indiana Rules of Professional Conduct provides as follows:

"(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer; and

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) 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.

(d) 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 nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(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."

The Comment to Rule 5.4 reads as follows:

"The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment."

Rule 5.5(b) provides as follows:

"A lawyer shall not assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law."

The rationale for the prohibition against fee splitting with a non-lawyer is the possibility of control by a lay person who is interested in profit, rather than the client's interests, and control by a person who is unregulated by the profession. The prohibition precludes the possibility of a non-lawyer's interference with a lawyer's professional judgment and the charging of an unreasonably high fee. See ABA/BNA Lawyers' Manual on Professional Conduct 41:801-808.

A number of arrangements have been found to violate the provisions against sharing fees with a non-lawyer or assisting a person in the unauthorized practice of law. See National Treasury Employees Union v. United States Department of Treasury, 656 F. 2d 848 (D.C. Cir. 1981) (recovery by union which provided counsel to union members of attorneys' fees exceeding the cost to the union of supplying legal services, would constitute the unauthorized splitting of fees with a non-lawyer); ABA Standing Committee on Ethics and Professional Responsibility, Informal Opinion No. 86-1519 (1986) (rationale for fee-sharing prohibition with non-lawyers is that clients are best represented by lawyers who are members of a regulated profession and who are not subject to conflicting
interests or divided loyalties; it is assisting the unauthorized practice of law for a lawyer to enter into a contractual relationship under which a corporation provides a lawyer with legal research services in exchange for a percentage of contingent fees); Ethics Committee of the Massachusetts Bar Association, Opinion No. 84-1 (1984) (improper division of fees with a non-lawyer when bank charged mortgagor an amount in excess of the bank's actual cost for the staff attorney, but no opinion as to whether the arrangement would constitute the unauthorized practice of law because such issue was beyond the authority of the Ethics Committee to determine); Standing Committee on Legal Ethics for the Virginia State Bar, Opinion No. 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).

On the other hand, other arrangements have been held not to constitute the unauthorized practice of law with a non-lawyer or unauthorized fee splitting with a non-lawyer: See Virginia State Bar Standing Committee on Legal Ethics, Opinion No. 490 (1983) (in-house counsel may render services to subsidiary in-house counsel if he receives fees or amount charged is direct reimbursement for the cost to the parent company). See also Legal Ethics Committee of the Dallas Bar Association, Opinion No. 1982-3 (1982) (attorney employed by corporation may provide legal services for the corporation, individual shareholder and another corporation so long as the corporation does not reap a benefit, reward or profit from the attorney's legal services to third parties); New York State Bar Association Committee on Professional Ethics, Opinion No. 618 (1991) (in-house corporate counsel also serving as attorney for corporation's pension plan may remit compensation as plan's counsel only to the extent it constitutes reimbursement for allocated portion of salary and overhead expenses); New York County Lawyers' Association Committee of Professional Ethics, Opinion No. 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).

Given that the rationale for the prohibition against fee splitting with a non-lawyer is the concern of control by an unregulated lay person who is interested in profit, rather than the client's interests, the rationale would not be served by concluding that the conduct proposed by RDC Counsel is impermissible. The fact that Company RDC is a research and development company performing services for the group of companies as a whole, suggests that the arrangement has as its purpose efficiencies and conveniences which serve the general interests of a group of companies. To the extent the attorney's salary and other expenses are understood to constitute no more than reimbursement of attorneys' fees and expenses
(including overhead, and so forth) of Company RDC, there would more clearly be no ethical prohibition.

To the extent the amount charged by Company RDC to Sister Companies exceeds what can reasonably be understood to be reimbursement, there would seem no harm in the arrangement inasmuch as the arrangement constitutes an efficient mechanism for sharing an expense common to the group of companies and presumably reflects no more than the market value of RDC Counsel's services. It may well be that RDC Counsel's services are more valuable to Sister Companies than the direct cost to Company RDC because of RDC Counsel's expertise and working knowledge of Sister Companies' business which would make RDC Counsel more efficient in providing services. In other words, it could be far more expensive for Sister Companies to obtain like services elsewhere.

RDC Counsel must be wary of any conflicts of interest and confidentiality concerns which may arise during the representation and exercise independent professional judgment in advising Sister Companies. RDC Counsel should not continue the arrangement if a shareholder objects to the arrangement or if the amount charged appears to unreasonably exceed direct expense inasmuch as it may then be that Parent Company is unfairly attempting to maximize profit of Company RDC to the prejudice of minority shareholders in Sister Companies.
FACTS

Two lawyers, AB and CD, formed a law partnership in the early 1940's and initially practiced under the firm name of "B & D". Thereafter, additional firm members were added, including AB's son, EB, CD's son, FD, and AB's grandson, GB. Other firm members were also added over the years who were unrelated to either AB or CD. AB, CD and EB have all been deceased for some years, although there have always been lawyers in the firm, most recently GB and FD, whose surnames have been the same as the two founders, B and D. The names of AB, CD and EB are shown as deceased firm members on the firm's letterhead. In recent years, the firm has practiced under the name "B, D, R & J".

Recently, GB left the firm in order to assume a judicial post. With GB's departure, there are no longer any firm members with the surname of "B". The firm wishes to continue to practice law under the name "B, D, H & J".

ISSUE

May "B, D, H & J" retain the name "B" in the firm name under the factual circumstances outlined above?

DISCUSSION

Rule 7.2(b) of the Indiana Rules of Professional Conduct provides:

A lawyer shall not practice under a name that is misleading as to the identity, responsibility, or status of those practicing thereunder, or is otherwise false, fraudulent, misleading, deceptive, self-laudatory or unfair within the meaning of rule 7.1, or is contrary to law . . . . (1) If otherwise lawful a firm may use as, or continue to include in, its name the name or names of one or more deceased or retired members of the firm or if (sic) a predecessor firm in a continuing line of succession. A lawyer who assumes a judicial, legislative, or public executive or administrative post or office shall not permit his name to remain in the name of a law firm or to be used in professional notices of or public communications by the firm during any significant period in which he is not actively and regularly practicing law as a member of the firm and during such period other members of the firm shall
not use his name in the firm name or in professional notices of or public communications by the firm.

In Opinion No. 12 of 1965, this committee held that retention in a firm's name of the name of a former member of the firm who became a full-time judge would be unethical. Accord, Opinion 13, Grievance Commission of the Maine State Bar, ABA BNA Lawyers' Manual on Professional Conduct, Ethics Opinions 1980-1985, 801:4201.

The present inquiry presents a question that is not so easily resolved inasmuch as "B" is both the surname of a founding, deceased partner and of a firm member who has departed to assume a judicial post. It is the opinion of this committee that if the clear referent for "B" in the firm name is AB, the deceased, founding partner, the continued use of "B" in the firm name is permissible. However, if the clear referent for "B" in the firm name is the member who departed to become a judge, the continued use of "B" in the firm name is impermissible.

The inquirer has indicated that the law firm considers the "B" in the firm name to refer to AB. If the test is the subjective intent of the firm, that should be dispositive. However, if the test is an objective one, it is far less clear. It is at least arguable that "B" in the firm name may refer to the departed partner (now judge). This is so because "J" in the firm name refers to IJ, who joined the firm after GB. Thus "B" in the firm name referred exclusively to AB, upon the addition of IJ's surname to the firm name, GB's surname would presumably also have been added thus: "B, D, H, B & J". It could be contended that in adding the name "J" to the firm name without adding a second "B" in the firm name to refer to GB, or more likely, to serve a dual purpose of referring to both AB and GB, and even EB. Yet there is certainly no rule, although it is customary, that firm members' names must appear in firm names in strict order of firm seniority. We belabor the point only to suggest that it is far from clear who the referent for "B" is.

When, as is common, a firm name contains only surnames, there is inevitable ambiguity surrounding who is the referent for a particular name when others having the same surname join and leave the firm, die, and retire. In the committee's view, it is not material that AB and GB were related. The significant point is that they share a common surname. It is also the committee's view that it is not material whether "B" is an unusual or commonplace surname.

The purposes underlying the rules do not aid in the resolution of this conflict. The purpose underlying the permissible retention of the surnames of deceased or retired members is to allow a law firm to benefit from the good will established in a community by a firm whose heritage includes those distinguished lawyers. On the other hand, the rule requiring that the name of a firm member be removed from the firm name upon leaving to accept public office is intended to guard against the inappropriate suggestion to the public that the firm has any special
influence with the former firm member or that the former firm member is susceptible to such influence. The problem here is that surnames are not unique. "B" is not uniquely GB's name any more or less so that it is (or was) AB's or any number of other people in the world who identify themselves with the surname "B".

CONCLUSION

The committee is of the opinion that the result should not turn exclusively on the subjective intent of the law firm. Nor should the result require a microscopic dissection of the evolutionary history of the firm's name. As long as the law firm can reasonably support its contention that the "B" in the firm name refers to a deceased or retired partner, its continued use of "B" in the firm name should be permitted, subject to the following limitation. The limitation is that if, as here, there is any possibility that the public could identify the surname in the firm name with the departed lawyer, the lawyer who leaves the firm to assume a public or judicial office should have his surname deleted from the firm name. The Indiana Rules of Professional Conduct place a special burden directly upon the lawyer who left the firm to assume judicial office. That lawyer, in this case GB, is in the best position to evaluate the possibility of confusion leading to an inappropriate, albeit unwarranted, assumption by the public that he is subject to special influence by the law firm.

FOOTNOTES:

1/ Although the inquiry does not so state, the committee assumes that the firm has removed, as it must, the name of GB from its firm letterhead and all other communications made by the firm to the public. Opinion No. 12 of 1965.

2/ So for example, if there had been a period of time during which there were no "B's" in the firm and "B" had been removed from the firm name, it could not reasonably be contended that "B" in the firm name referred to anyone but GB had "B" again been added to the firm name upon GB's association with the firm.

Res Gestae - June, 1992
FACTS
Attorney A represented a client in a personal injury matter. After some work on the case, Attorney A referred the matter to Attorney B. The client then entered into an employment agreement with Attorney B which provided that Attorney A and Attorney B would be jointly responsible for the representation. The same day the contract was signed, Attorney A was disbarred by the Indiana Supreme Court.

A second similar employment contract, apparently with a different client, was signed with Attorney B five days following the disbarment. Presumably, the second contract did not refer to joint representation inasmuch as Attorney A was disbarred by that time.

About a year after the contracts were signed, the cases were settled.

ISSUE
The inquiry presented to the Committee is as follows:

May Attorney B divide fees with Attorney A, who was disbarred at the time of settlement and disbursement of the settlement proceeds?

CONCLUSION
Attorney B may not divide fees with Attorney A; however, Attorney B ethically may pay Attorney A on a quantum meruit basis for services provided prior to disbarment.

DISCUSSION
Rule 1.5(e) provides as follows:

"A division of fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;

(2) the client is advised of and does not object to the participation of all the lawyers involved; and
In addition, Rule 5.4(a) provides as follows:

"A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer; and

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement."

Finally, Rule 5.5(b) provides as follows:

"A lawyer shall not assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law."

An attorney who has been disbarred ipso facto can no longer represent the client. "A lawyer who has been suspended or disbarred from practice has a duty to notify clients of that fact and advise them to seek other representation." ABA/BNA Lawyer's Manual on Professional Conduct 31:1201 (citing Oklahoma Bar Association v. Peveto, 620 P. 2d 392 (Okla. 1980)). Attorney A's lawful representation of either client, therefore, necessarily terminated on the date of his disbarment.

In Estate of Forrester v. Dewault, 562 N.E. 2d 1315 (Ind. Ct. App. 1990), the Indiana Court of Appeals adopted the modern rule in holding that an attorney discharged by a client, with or without cause, is limited to recovery of the reasonable value of services rendered before discharge on the basis of quantum meruit, any contract between the attorney and client notwithstanding. Assuming termination of representation occurred on the date of disbarment, Attorney A may be entitled under the law of Indiana to the reasonable value of services rendered to the date of his disbarment (the Committee takes no position, however, as to the legal issue).
Any fee Attorney A receives on a quantum meruit basis must be in accordance with the reasonableness requirements set forth in Rule 1.5. Such fee may well be less than any amount stated in the fee agreements inasmuch as representation apparently was prematurely terminated due to the disbarment.

Payment of the fee on a quantum meruit basis would not violate Rule 1.5(c), Rule 5.4(a) or Rule 5.5(b) because Attorney B would not be dividing a fee with Attorney A; rather, Attorney A would only be paid a fee for the reasonable value of services rendered to the date of termination, in this case the date of disbarment.
FACTS

Law firm representing a credit union wants to formulate a plan whereby the law firm would provide legal services to credit union members based on specified fees for particular services performed. The credit union would distribute information about the plan to its membership. The credit union approached the law firm about putting in place such a service to answer questions which are received frequently from credit union members.

ISSUE

Whether or not a legal service is required to be established in order to accomplish the goals and objectives of the credit union and the law firm?

DISCUSSION

First, Rule 7.3, Recommendation or Solicitation of Professional Employment, must be implemented as it relates to the credit union, especially, 7.3(e)(4).

ABA Formal Opinion 87-355, Lawyers Participation in For-Profit Prepaid Legal Service Plan, provides:

Participation of a lawyer in a for-profit prepaid legal service plan is permissible under the Model Rules, provided the plan is in compliance with the guidelines in this opinion. The plan must allow the lawyer to exercise independent professional judgment on behalf of the client, to maintain client confidences, to avoid conflicts of interest, and to practice competently. The operation of the plan must not involve improper advertising or solicitation or improper fee sharing and must be in compliance with other applicable law. It is incumbent upon the participating lawyer to ensure that the plan is in compliance with Admission and Disciplinary Rule 26.

Commentary following this opinion cautions about the importance that neither the plan nor the participating lawyer permit the sponsoring entity to interfere with the lawyer's exercise of independent
professional judgment on behalf of a client or to direct or regulate the lawyer's professional conduct. The agreement between the plan and the participating lawyer should be in writing. Another serious concern about the ethical propriety of a lawyer's participating in a prepaid legal service plan involves the potential detrimental impact on lawyer-client confidentiality. Further, the plan must contain no requirement which would interfere with the lawyer's compliance with the conflicts of interest provisions. Also, a participating lawyer must ensure that the lawyer is competent in the covered areas of law to handle referrals in those areas and has the ability to limit the volume of matters that a lawyer can competently handle.

The ABA Model Rules prohibit the plan sponsor from engaging a sales force that would solicit members by telephone or in person.

The concept of group legal service plans is recognized and permitted on a broad basis. Compliance with respective state requirements is essential. Most plans provide for referral by the plan to an open or closed panel of attorneys.

The proposed procedure in the inquiry presented seems to perceive the panel of lawyers for referral to consist of a single law firm which certainly breeds a captive situation which may not be prohibited but it seems to impact on resolution of conflicts of interest, volume of workload, and competency issues.

CONCLUSION

The group legal service plan would seem to be available for establishment by the credit union. The limitation of referral to a single law firm seems to expose the firm to a multitude of potential conflicts and code violation circumstances, but no authority seems to specifically prohibit such activity.
I. Factual Summary

An attorney beginning a new practice has requested an opinion from the committee regarding two areas in advertising:

1. Whether becoming a member of the IBN Network Association is violative of Rule 7.3 of the Rules of Professional Conduct; and

2. Whether he is able to have an open house and mail out invitations to nearby businesses which contain a brief description of the areas of law that he practices.

II. Discussion

The inquirer has attached a pamphlet from the IBN Business Network. Basically this network is a group of individuals representing each profession who should be a key decision-maker in their company or have strong entrepreneurial skills. Furthermore, the pamphlet goes on to describe that the IBN Business Network is primarily concerned with opportunities for its members to network with each other and these networks being opportunities are provided through breakfast meetings. There are also additional facts about registration fees and dues.

The pertinent part of Rule 7.3 to which the inquirer refers is Rule 7.3(e): "A lawyer shall not accept referrals from any lawyer referral service unless such service falls within subparts (1)-(4) of this Rule." It is this committee's opinion that the IBN Business Network is not a lawyer referral service; and, therefore, by joining such organization, the lawyer would not violate Rule 7.3 of the Rules of Professional Conduct. The attorney is advised of the proscriptions of Rule 7.3(a) and (b) which basically prevent the attorney from seeking in-person contact or solicitation.

The attorney's request to send information regarding an open house is not violative of any of the advertising rules so long as the lawyer complies with Rule 7.1 and 7.3(a).
INDIANA STATE BAR ASSOCIATION  
LEGAL ETHICS COMMITTEE  
UNPUBLISHED OPINION NO. U3 OF 1991  

FACTS

Attorney A is a sole practitioner and part-time county attorney. Attorney B is a sole practitioner and part-time city attorney for a city within the same county. The county and city have adverse interests in matters from time to time.

Attorney A and Attorney B share office space. However, they do not share fees, except when they occasionally work together on a specific project. Their office-sharing agreement does not provide for shared liability, profits or responsibility. They do not hold themselves out as an association or partnership, do not share advertising and do not share letterhead, cards, announcements or law lists.

Attorneys A and B share all office expenses, including the cost of a receptionist, but they have separate practices, separate clients and signage that reflects: "Law Offices, Attorney A, Attorney B." They do not share client files, unless a client happens to hire them both to work on a project. Files are kept separate, and they exercise caution that client materials are not left in the library or at the copying machine.

There is one telephone number, but separate telephone lines and separate directory listings. One receptionist answers all calls by saying "Law Offices." Telephone conversations may not be accessed by employees of the other attorney's practice.

ISSUE

The inquiry presented to the Committee is as follows:

May Attorneys A and B continue their arrangement when their respective governmental clients might, from time-to-time, have interests adverse to one another?

CONCLUSION

Attorneys A and B may continue the arrangement as described so long as they obtain consent from their respective clients in matters involving a conflict of interest.

DISCUSSION

Rule 1.10, which addresses imputed conflicts of interest, provides as follows in pertinent part:
"(a) While lawyers are associated in a firm, none of them shall represent a client if he knows or should know in the exercise of reasonable care and diligence that any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.

(b) When a lawyer becomes associated with a firm, the firm may not represent a person in the same or a substantially related matter if it knows or reasonably should know that the lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(b) that is material to the matter."

If Attorneys A and B are "associated in a firm," they may not represent governmental clients which may have adverse interests. The inquiry focuses, then, on what constitutes a "firm." The Comment to Rule 1.10 addresses this issue:

"Whether two or more lawyers constitute a firm ... can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to confidential information concerning the clients they serve."

According to the Comment, the mere sharing of office space and occasional consulting or assisting do not, per se, cause the attorneys to be deemed a firm. However, if the attorneys hold themselves out to the public as a firm or operate as a firm, they may be deemed a firm for purposes of this Rule. An important inquiry is whether the attorneys have mutual access to the confidential client files of the other attorney.

In Opinion No. 8 of 1985, under Indiana's former Code of Professional Responsibility, the Indiana State Bar Association Legal Ethics Committee reviewed a similar situation and came to a similar conclusion. There, three attorneys shared a building and had common use of the library, lobby and copying machine. The attorneys carried on separate practices and maintained separate client files. The Committee was concerned that clients with adverse interests would wonder about the confidentiality of their affairs were they to be aware that another attorney sharing the same office was opposing counsel. The Committee ultimately concluded
that, so long as the telephone system was changed so that one attorney's office could not have access to the telephone line of the opposing attorney's office, and so long as the clients consented after being fully apprised of the situation, that two attorneys sharing office space could represent clients on opposite sides of litigation.

The following is an extended excerpt from the Committee's discussion in Opinion No. 8:

"We identified in Formal Opinion No. 3 of 1973 that the following were the minimum tests that must be met to avoid misleading the public about the professional relationship between space-sharers:

(1) There should be no sharing of liability, profits or responsibility;

(2) Each attorney should use separate letterheads, cards and announcements containing his name only;

(3) Each attorney should be listed separately in law lists and telephone directories;

(4) Each attorney should have a separate office telephone number;

(5) The building or office door should show no closer connection than "Law Offices, Fred Doe, Arthur Smith."

Such cases are particularly fact-sensitive. In this case, it appears that the space-sharers have met the minimum tests of Opinion No. 3 of 1973 (on the assumption they have separate letterheads, etc.) but there remains a concern regarding the matter of confidentiality.

Accepting that there is no association among the attorneys beyond their sharing the same building with certain common areas, concern must be given to the perception of the arrangement that might be held by a client and the concern that a client might understandably have concerning the confidentiality of his relationship with the attorney and the security of activities in the client's behalf. Under the circumstances, the client will be conscious of the fact that his every visit to his attorney's office may be known to the opposing attorney. The arrival of witnesses or potential witnesses at his attorney's office may be known to the opposing attorney. Phone messages and correspondence may be perceived to be accessible to the opponent's attorney or staff. Research projects in the library may be in view of the opponent's attorney or his staff. Material inadvertently
left in the copier is accessible. An attorney has an obligation to preserve the confidences of his client under DR 4-101 and to practice in a setting which could well create the appearance that confidentiality is impaired, runs the risk of creating the appearance of failing to preserve confidentiality.

It is recognized that the economics of practice may often require the sharing of space by attorneys not otherwise associated. It is essential, however, that clients have full confidence that their dealings with their attorney are not subject to scrutiny by the attorney for their opponents.

While the committee does not believe that the situation described rises to the level of a violation of DR 5-105, it raises sufficient concern under Canon 9 and EC 9-6 that the committee believes that the phone system should be changed so that there is no access between the phone systems of the separate practices. The committee is also concerned that the presence of a secretary of one attorney in the reception area creates a situation in which clients or other persons waiting to see one of the other attorneys may hear things related to matters as to which there would be a conflict. Care must be taken to avoid material being left in the copier area or library which should not be seen by the opposition. Finally, clients should be fully informed of the circumstances of the space sharing and measures to avoid any compromise of client confidentiality so that the client may decide, with full information, whether or not to continue the relationship. If these concerns cannot be met, the committee believes it would be in the best interests of the profession that the attorneys in question not represent adverse interests.

Other authorities have addressed the issue in other factual patterns. In United States v. Cheshire, 707 F. Supp. 235 (M.D. La. 1989), a group of attorneys shared offices and also shared letterhead on which they referred to themselves as an "Association of Attorneys at Law." Even though they were not actually partners or actually associated in the usual sense, the court held that they were a "firm" for purposes of Rule 1.10 because they held themselves out to the public in a way that suggested they were a firm. Accordingly, the court granted a motion to disqualify counsel.

The Supreme Court of Oregon, under the Code of Professional Responsibility, stated that "when two lawyers share office space it may well be that their relationship is such that representing clients with opposing interests, either in actual litigation or in business transactions, would preclude impartial and vigorous representation of such clients." In re Smith, 614 P. 2d 1136, 1139 (Or. 1980) (emphasis
added). However, in that case, the court found it permissible for office-sharers to represent adverse interests because it found, on the facts of the case, that there had been no adverse effect on professional judgment.

A New York ethics committee stated that attorneys sharing office space could be treated as partners if each had access to the client files of the others and, thus, to the confidences and secrets of each other's clients. New York County Lawyers' Association Committee of Professional Ethics, Opinion 680 (Sep. 14, 1990).

In ABA Informal Opinion 1486 (Feb. 8, 1982), under the Model Code of Professional Responsibility, the ABA Standing Committee on Ethics and Professional Responsibility reviewed a situation in which one attorney was to rent space from a law firm which represented adverse interests and with which the attorney anticipated exchanging referrals in the future. Besides renting space, the attorney would share with the firm a reception area, secretarial space and library facilities. There would be separate stationery, and the lettering on the firm door would show that there were two separate law practices. The Committee concluded that the lawyer renting space and the firm could represent litigants with adverse interests so long as they exercised reasonable care to protect the confidences or secrets of their clients, and so long as they obtained the consent of their clients after fully explaining the situation to them.

Language in one opinion suggests that, under the former Code of Professional Responsibility, Attorneys A and B would not have been allowed to represent their governmental clients while sharing office space. In In re Opinion No. 415, 407 A. 2d 1197 (N.J. 1979), the New Jersey Supreme Court held that members of the same law firm or association, or participants in some other office-sharing arrangement, may not represent both a county and a city located therein. The court stated that county and city attorneys represent the public and, therefore, are required to more scrupulously avoid not only actual conflict, but also the appearance of impropriety. Consent from clients would not suffice.

However, Indiana's current Rules of Professional Conduct have eliminated the "appearance of impropriety" standard contained in the former Code of Professional Responsibility. "The modern approach to conflict of interest requires a realistic balancing of the interests involved." G. Hazard & W. Hodes, The Law of Lawyering Sec. 1.7:101 (1991). Counsel should not be disqualified based upon an appearance of impropriety standard, for "(t)hat standard is too vague for fair application, and was accordingly dropped from the Model Rules." Id. "(T)he problem of imputed disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety." Comment, Rule 1.10.

The Comment to Rule 1.10 says expressly that "two practitioners who
share office space and occasionally consult or assist each other
ordinarily would not be regarded as constituting a firm." It is our
conclusion that Attorneys A and B, in the office-sharing relationship
described, are not a "firm" under Rule 1.10. Thus, even were we to
address the issue and to conclude that representation within one firm of
both a county and a city therein is a conflict of interest under Rule
1.7, any such conflict would have no bearing on representation by
Attorneys A and B because, under Rule 1.10, the conflict would not be
imputed.

Although the attorneys do not have separate telephone numbers as
suggested in the 1973 ethics opinion, there are separate telephone
listings, telephone lines are not cross-accessed, and the number is
identified by the receptionist as "Law Offices." The lack of separate
telephone numbers is not pivotal in these circumstances, although
separate numbers are recommended.

Thus, we conclude that there is no impediment to representation so long
as Attorneys A and B obtain consent from their respective clients, as
recommended in the 1985 ethics opinion, in matters involving a conflict
of interest.