INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE

OPINION NO. 1 OF 1992

ISSUE AND FACTS

The issue presented to the Legal Ethics Committee of the Indiana State Bar Association is whether, under the Indiana Rules of Professional Conduct (Rules), an Indiana attorney retained by a City Council is permitted to attend a Caucus of the members of a political party represented on that Council for the sole purpose of assuring that the members of the Caucus do not violate the Indiana Open Door Law during the meeting. The attorney presenting the inquiry did not provide any statement of facts. It is presumed for purposes of this Opinion that the attorney is not a full-time employee of the City, that he is paid for his services by the City and not the Caucus, and that he is not representing any other client which may have interests adverse to those of the City Council or of the Caucus. Also, while it might be relevant for a determination of the applicability of the Indiana Open Door Law whether the Caucus constitutes a majority of the Council, the status of the Caucus as a minority or majority is irrelevant for purposes of this Opinion. Also, no Opinion is expressed or implied herein with respect to the Indiana Open Door Law.

ANSWER

In the view of the Committee, the determination of the propriety of an attorney retained by a City Council also attending meetings of a Caucus of members of a political party represented on that Council for the purpose of rendering advice to the Caucus is subject to the rules on conflict of interest between parties. The interests of the City Council and of the Caucus may be adverse on the issue of the applicability of and compliance with the Indiana Open Door Law. However, based upon Rule 1.7, the attorney must determine whether his client is the Council or the Caucus, must disclose the capacity in which he is acting, must receive the consent of the Council after consultation, and should advise and receive the consent of the Caucus.

DISCUSSION

The Rules recognize that a government agency can be a client. See paragraph 3 of the Comment to Rule 1.11. The Comment to Rule 1.11 also makes clear, at paragraph 2 thereof, that the lawyer representing a government agency is subject to the Rules, including addressing the representation of adverse interests.

The initial question, then, is who is the attorney's client? In the
facts presented, it appears to the Committee that the client is the City Council and not the Caucus. The Committee has also concluded that the Caucus is separate from the City Council and not a subpart, as would be the case, for example, with a committee of the City Council. The attorney is being requested to render legal advice to a separate party, namely the Caucus, which is not his client. Thus, attention is directed to Rule 1.7 with respect to rendering advice to the Caucus.

Under Rule 1.7, an attorney may not represent a client where the interests are directly adverse to another client unless the attorney reasonably believes the representation will not adversely affect the relationship with the other client and each client consents after consultation. Rule 1.7(a). Similarly, where directly adverse interests do not exist but may develop, the attorney can accept the engagement only if he or she reasonably believes the representation will not be adversely affected and the client in question consents after consultation. Rule 1.7(b). As indicated in the Comment to Rule 1.7, the question of conflict must be resolved as to each client when more then one is involved.

In the situation presented, it appears that the attorney is being asked to serve a dual role. The case law addressing the functions of government lawyers recognizes that government lawyers may serve dual functions from time-to-time. (See ABA/BNA Lawyers Manual on Professional Conduct, 1991:4101, et seq.) Attorneys have been limited in serving dual roles when there is an actual conflict or where there is an appearance of impropriety.

In the circumstances presented by the inquiring attorney, the potential exists for the interests of the Council and the Caucus to be adverse. The interests of the Council and the Caucus would seem to be compatible in reaching a determination regarding the Open Door Law and assuring compliance therewith. However, the attorney could be in a position to reach a determination that the Open Door Law is applicable, while the Caucus might take the position that it is not.

Thus, before the attorney can render advice to the Caucus, Rule 1.7 requires the attorney to obtain the consent of the Council after consultation regarding the implications of the dual role being played by the attorney.

The attorney must also remain cognizant of his responsibilities to maintain the confidences of the client. Communications offered to the attorney during the Caucus meetings are not subject to attorney-client privilege to the extent the Caucus is not the client. The attorney would not be restricted by the attorney-client privilege from disclosing information obtained by him at the Caucus meetings. If confidentiality is desired, the Caucus must take steps to assure that it establishes a privileged relationship with the attorney.
To the extent the Caucus is a subset of the City Council, issues regarding multiple clients are raised. Because of the Committee’s conclusion that the client is only the City Council, these issues are not addressed in this Opinion.

The issues arising out of representation of multiple government units, such as the City Council, its committees, and agencies or departments of the city, are similar to, but distinct from, the issues discussed herein. They have been previously addressed in Opinion No. 7 of 1978 of this Committee.

It is also noted that there may be statutes or ordinances which address conflicts of interest on the part of City Attorneys. The Committee has not researched these possibilities and disclaims any Opinion with respect thereto.

Additionally, the Committee notes that the federal implications of such a question have been addressed by the Federal Bar Association through the promulgation of supplemental ethical considerations under the ABA Model Code. See Poller, The Federal Government Lawyer and Ethics, 60 ABA Journal 1541 (1974). With respect to the issue of the City Council as the attorney’s client, the Federal Bar Association Committee on Professional Ethics, in Opinion 73-1 (1973), has identified the client as the agency which employs the lawyer. This is consistent with the Committee’s view that the attorney’s client in the facts presented to and assumed by the Committee is the City Council.

FOOTNOTE:

1/ The committee recognizes that Rule 1.7 no longer contains the "appearance of impropriety" standard. This reference was used in the authority cited.

Rsc Gostae - June, 1992
An appointed pauper counsel, during a conference with his client, tells the client that if the client has money or can procure money, it might lead to a better defense. The client obtains the money. The following questions are raised:

1. Can the lawyer ethically advise his client in such a fashion?

2. Can the lawyer withdraw as pauper counsel under these circumstances and re-enter his appearance for the defendant in the same case, based on a private compensation agreement?

3. Does it make any difference whether the attorney is a contract public defender or a case-by-case appointed pauper counsel?

4. If an appointed pauper counsel or public defender is asked by his client for advice in a related matter (i.e., a claim for false arrest arising out of the same incident for which he is being defended), may appointed counsel serve the client in that matter? What about a completely unrelated matter?

A lawyer must zealously represent his client within the bounds of the law. This duty is not supposed to be variable, depending upon whether an attorney receives more or less compensation. With that in mind, first, it is obviously unethical, and may even be illegal, for a lawyer to tell his pauper client that the lawyer will deliver inadequate legal representation unless extra sums are paid to the lawyer. This has been held to constitute a criminal offense under Title 18, U.S. Code § 242, which prohibits anyone, under color of any law, from willfully depriving an inhabitant of a state of any right protected by the Constitution or laws of the United States. See U. S. v. Senak (2nd Cir. 1973), 477 F. 2d 304. Thus, if the lawyer's statement means that unless the client comes up with additional money, he will not deliver competent representation, that is unethical and may even be illegal. There are means to obtain court funds for deposition expenses of experts, and it is equally unethical for the lawyer to solicit funds for that purpose.

According to a 1973 opinion of this committee, as an officer of the court, if the lawyer finds that the client becomes ineligible for pauper counsel, the lawyer should disclose to the court his knowledge of the
ability of the defendant to employ counsel. (See Legal Ethics Committee Opinion No. 4 of 1973.) However, in more recent years, the committee has laid emphasis on the primacy of the lawyer's duty to his client "not to reveal information relating to representation of a client unless a client consents after consultation," (Rule of Professional Conduct 1.7 (b)) (See Opinion No. 2 of 1990.)

Thus, if the lawyer has gained knowledge of his client's financial condition through his representation, it would be improper (absent client consent) to reveal it to the court. Such a revelation might invoke Ind. Code 33-9-11.5-6 which could result in the court ordering the client to reimburse the supplemental public defender fund.

If the public defender becomes aware that his client has the means to pay, he should petition to withdraw, citing ethical reasons which cannot be disclosed. It would not be proper for counsel, once having withdrawn for such reasons, to re-enter his appearance for the same defendant as ordinary (non-pauper) counsel.

None of the circumstances recited above ought to change whether the attorney is a contract public defender or a case-by-case appointed pauper counsel. His role is the same in both instances, and the limitations upon that role, when balanced against his role as officer of the court, are identical.

Generally, a public defender or appointed pauper counsel is being paid by the government only to represent the client in the matter which is assigned, and not in regard to other matters, whether they are related to the incident or not. Certainly, pursuant to the reasoning cited above, it would be unethical for pauper counsel, during the pendency of the criminal action, to be paid by the client to take a different matter, whether related or unrelated to the defense for which he is serving as pauper counsel.
HYPOTHETICAL FACTS

In 1987, Attorney A entered into a written contingent fee agreement to represent a client who had suffered personal injuries. Attorney A filed the complaint, spent several hundred hours on the case and created a file approximately five inches thick.

Three or four years after commencement of the representation, the client notified Attorney A that his services were no longer required because he had obtained the services of Attorney B to represent him in the litigation. Attorney A promptly withdrew his appearance. It is presumed that the termination of Attorney A's services was without cause.

Attorney A retained the file to secure payment of a reasonable attorney fee. However, the client was provided with copies of all pleadings and all correspondence.

ISSUE

May Attorney A file suit for payment on a quantum meruit basis, and may he assert a retaining lien on the file?

CONCLUSION

Attorney A should first attempt to negotiate payment of a reasonable fee and file suit only as a last resort. If negotiations are fruitless, Attorney A may file suit against the former client for recovery of a reasonable value for services rendered prior to discharge.

Attorney A may assert an attorney's retaining lien on the file. Attorney A should attempt, however, to reach agreement with the client as to a reasonable amount of security for fees and release the file to the client. If Attorney A and the former client are unable to agree on the amount of security and a court orders the file released upon the delivery of adequate security, then Attorney A should release the file upon delivery of security in the amount ordered by the court.

DISCUSSION

Several provisions of the Indiana Rules of Professional Conduct bear upon
the issue of retaining liens.

Rule 1.8(j) provides as follows:

"A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation a lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien granted by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case." (Emphasis added.)

Rule 1.16(d) provides as follows:

"Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. A lawyer may retain papers relating to the client to the extent permitted by other law." (Emphasis added.)

The Comments to Rule 1.16 provide in relevant part as follows:

"A client has the right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services . . . .

Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for the fee only to the extent permitted by law." (Emphasis added.)

This Committee had occasion, during the era of the former Indiana Code of Professional Responsibility (prior to adoption of the Indiana Rules of Professional Conduct in 1987), to address whether suit may be brought to recover fees rendered pursuant to a contingency fee arrangement. In Opinion No. 6 of 1981, this Committee concluded that:

"(T)here is nothing unethical about an attorney requesting fees on a quantum meruit theory from a former client who has terminated the attorney-client relationship without cause after the attorney has invested time in the case, and this is true even though the attorney had a contingency
fee contract with the former client and even though there might ultimately be no recovery by the client."

We see no reason to deviate from this conclusion.

With regard to a retaining lien on the file, the Committee in 1981 referred to Opinion No. 5 of 1977 (which overruled Opinion No. 1 of 1966). The 1981 Committee had this to say about Opinion No. 5 of 1977:

"(U)nder certain circumstances, the propriety of such a lien may involve ethical considerations. For example, the ethical aspects of retaining such papers must be considered in circumstances of flagrant overcharges and in circumstances where the attorney who is retaining possession of the papers has deliberately failed to perform the services which he had contracted with his client to perform. The conclusion of Opinion No. 5 of 1977 went on to state that other situations exist in which an attorney may be ethically required to return possession of a client's papers to the client because of ethical considerations, despite the fact that the attorney may have a retaining lien under the statutory or common law."

The 1981 Committee would allow a retaining lien upon the client's file until he has been reimbursed for expenses advanced by him. On the other hand, the Committee did not believe it appropriate for the attorney to continue to hold a lien on the file to secure payment for attorneys' fees when recovery was sought on a quantum meruit basis:

"(O)nce the former client has reimbursed the attorney for the expenses advanced, the attorney must promptly turn over the file to him. The lien should and ought not be utilized in cases where the attorney is seeking payment for his services rendered on a quantum meruit theory. In these situations, the attorney should pursue this remedy provided by law without the assertion of the lien. The Legal Ethics Committee can envision too many situations where asserting the lien would result in substantial ethical problems, such as were mentioned in Opinion No. 5 of 1977."

Since the 1981 ethics opinion, the Indiana Court of Appeals has issued two opinions which warrant note. First, in Bennett v. NSR, Inc., 553 N.E. 2d 881 (Ind. Ct. App., 2nd Dist. 1990), the Indiana Court of Appeals stated that "an attorney is not required to produce documents and other personal property for which he claims a retaining lien, unless adequate security is provided for payment of fees allegedly owed by the client." In so holding, the court mentioned that Rule 1.16(d) "explicitly allow(s) attorneys to retain the papers of clients to the extent permitted by law."

The second case of note is Estate of Forrester v. Dawalt, 562 N.E. 2d
1315 (Ind. Ct. App., 1st Dist. 1990), in which the Court of Appeals stated that "when an attorney is discharged by a client with or without cause, the attorney's remedy is limited to recovery of the reasonable value of his or her services rendered before discharge on the basis of quantum meruit." The Court noted in footnote three that its reasoning was based on the Rules of Professional Conduct and indicated that quantum meruit is the only basis for recovery of attorneys' fees upon discharge, with or without merit, regardless of whether the contractual basis for the fee is fixed, hourly or contingent.

This Committee is precluded from rendering opinions on questions of law and refrains from any interpretation or opinion as to the legal effect of these cases. Nonetheless, the cases are noted here inasmuch as Rules 1.8(j) and 1.16(d) expressly permit liens granted or permitted by law.

If assertion of the lien is permitted by law and the attorney has exhausted reasonable efforts to reach agreement with the former client as to the amount of security, this Committee perceives no ethical impediment to assertion of the lien and commencement of suit to recover fees under a quantum meruit basis, assuming there is no other ethical impediment to pursuing the claim, such as the charging of an excessive fee or the deliberate failure to perform services. It is true that the amount of the fee and the appropriate security for payment of fees are more difficult to determine in a contingency fee arrangement, but adequate security could be determined at a hearing. It is also true that a client's file should not be held hostage to the point of substantially prejudicing the client's case (rather than merely making assertion of a claim more difficult), but this concern will be present whether the matter is on an hourly, fixed or contingent fee basis. And it may be true that a retaining lien should not be asserted upon the files of certain classes of defendants, such as criminal defendants, see, e.g., People v. Altvater, 78 Misc. 2d 24, 355 N.Y.S. 2d 736 (1974), but contingency arrangements are prohibited in criminal matters in any event. See Rule 1.5(a)(2). See also In re Genmer, 566 N.E. 2d 528 (Ind. 1991) (violation for attorney to continue to assert retaining lien on client file critical to immediate defense in proceeding for unpaid sales and use taxes).

We see no significant cause to distinguish retaining liens in fixed, hourly or contingent cases. Opinion No. 6 of 1981 is consequently overruled to the extent it is read to mean that a retaining lien on a client's file may never be asserted to secure payment following discharge for services provided pursuant to a contingent fee arrangement and sought based upon a quantum meruit basis.
Fac	s

An attorney has requested an emergency advisory opinion concerning his relationship with an organization that provides financial advice as well as various investment instruments for potential investors.

This Financial Organization presents seminars to potential investors, informing them on methods to avoid the probate process. The Financial Organization collects information from prospective investors and then refers them to the Attorney for legal advice.

The Attorney then makes a fee arrangement directly with the Client, and the Client is billed separately by the Attorney. The Client is also billed by the Financial Organization for its services.

The understanding between the Attorney and the Financial Organization is set out in a document which provides that the responsibilities of the Attorney are as follows:

1. The Attorney will provide the legal expertise; and the Financial Organization will provide Clients with information regarding legal resources of information, however, will never give legal advice specific to the Client's facts;

2. The Attorney will assist in the initial assessment of the Client's legal needs based on the facts regarding the Client's assets;

3. The Attorney will explain to the Client the distinction between Attorney fees for legal services rendered strictly by the Attorney, and the fees for the Financial Organization for planning and document preparation. Further, the Attorney will explain to the Client the legal fee arrangement and the Client's responsibility to pay legal fees directly to the Attorney;

4. All Client questions concerning legal advice or legal documents must be referred to and answered by the Attorney;

5. The Attorney will prepare, review, and file all documents necessary to transfer assets into the Living Trust, including but not limited to quitclaim deeds on real estate transferred into the Living Trust;
6. The Attorney will explain to the Client the present and future purpose and effect of legal documents prepared by the Attorney for the Client; and

7. The Attorney will be present and assist in the signing and notarization process of all legal documents required to be signed by the Client.

The responsibilities of the Financial Organization are as follows:

1. The Financial Organization will provide general educational information concerning the Living Trust, and under no circumstances may its employees, agents or representatives hold themselves out to the public as possessing expertise in any area of the law;

2. The Financial Organization must clearly distinguish and explain to the Client that legal fees are for services provided by the Attorney, and its fees are for financial planning and document preparation;

3. The Financial Organization will provide financial and investment advice to Clients who will be funding their Living Trust with its investment instruments;

4. The Financial Organization will provide legal document preparation services for Clients only under the strict supervision of the Attorney;

5. The Financial Organization may provide forms to Clients, but must always refer specific legal questions to the Attorney;

6. Any amendments, edits, addenda or additional documents must be prepared by the Attorney and never by the Financial Organization, or its employees or agents; and

7. The Financial Organization may present public seminars that will be limited in scope to financial planning and asset preservation.

ISSUES

The Attorney's specific question is whether or not this relationship with the Financial Organization could be characterized as aiding in the unauthorized practice of law by a nonlawyer, in violation of Rule 5.5 of the Indiana Rules of Professional Conduct, and further whether there would be a violation of Rule 5.4 of the Indiana Rules of Professional Conduct with regards to a fee-sharing relationship with nonlawyers.
DISCUSSION

Rule 5.5 of the Indiana Rules of Professional Conduct provides in pertinent part as follows: "A lawyer shall not . . . (b) assist a person who is not a member of the Bar in the performance of activity that constitutes the unauthorized practice of law."

Item 4 of the Financial Organization's responsibilities indicates that the Financial Organization may provide forms to Clients. It then goes on to provide that this will be done under the strict supervision of the Attorney. This provision raises some question as to the relationship between the Financial Organization and the Attorney.

Furnishing forms to a person would not constitute the practice of law. However, filling out or helping the person fill out the forms or assisting in the execution of the forms would constitute the practice of law.

If the Financial Organization were filling out the forms under the Attorney's supervision, it would not seem to be in violation of the Indiana Rules of Professional Conduct in that Rule 5.3 provides that nonlawyer employees or independent contractors may act for an attorney in the rendition of the lawyer's professional services. However, it might raise a question with regards to fee-sharing.

Rule 5.4 of the Indiana Rules of Professional Conduct provides in pertinent part as follows: "(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that: . . . (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; and (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."

If the Attorney intends to conduct his legal services on the basis as stated in the document, that is, if the Attorney intends to independently make an assessment of the Client's legal needs and to answer all the Client's legal questions, and the Attorney will prepare, review and file all necessary documents, there appears to be no violation of Rule 5.4 or Rule 5.5.

CONCLUSIONS

If the Financial Organization and the Attorney both abide by the conditions as set out above, there would appear to be no violation of the Indiana Rules of Professional Conduct in the Attorney providing legal services to Clients referred to him by the Financial Organization under those terms and conditions. However, the difficulty would be in complying with all of those terms.
The potential for a violation of the Indiana Rules of Professional Conduct is great in such an arrangement, and particularly where the recommendations of the Financial Organization may conflict with the Attorney's judgment as to what is in the best interest of the Client.

It would be incumbent upon the Attorney to exercise his independent professional judgment for the best interest of the Client. Further, the Attorney must advise the Client of other alternatives, if appropriate, even if the same is adverse to the interest of the Financial Organization. The Attorney must not be committed merely to preparing the forms submitted by the Financial Organization.

The Legal Ethics Committee would also note that if this agreement were an exclusive agreement between the Financial Organization and the Attorney, it may well be considered a referral service in violation of Rule 7.3.

The Legal Ethics Committee would also note that the Attorney should be aware of and fully comply with Rule 7.3(f), which provides: "A lawyer shall not compensate or give anything of value . . . 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 . . . ."
Attorney A is the sole shareholder of Indiana Corporation X, which was formed for the purpose of providing mediation services in all fields, including domestic relations, to the general public.

1. Do such mediation activities constitute the practice of law?

2. If mediation is the practice of law, does setting up a corporation and using a trade name violate Rule 7.2(b) of the Rules of Professional Conduct?

3. Can Attorney A solicit business for Corporation X from other attorneys, insurance carriers and the general public?

The Indiana Supreme Court adopted, effective January 1, 1992, the Rules of Alternative Dispute Resolution. Mediation is defined as "an informal and nonadversarial process," the objective of which is to help the parties reach an agreement among themselves. ADR Rule 1.3. ADR Rule 2.4 (B)(1) provides that a mediator in a civil dispute must be an attorney in good standing "unless the parties agree to a mediator who is not such an attorney and the court enters an order approving of such mediation." In fact, subject to court approval, the parties' chosen non-attorney mediator is not required to meet the hours-of-training requirement of the
rule. ADR Rule 2.5(B)(2). Similarly, in domestic relation disputes, a mediator need not be an attorney. ADR Rule 2.5(C). Thus, it appears that by opening the field of mediation to non-attorneys, the Supreme Court did not consider mediation the practice of law.

In addition, the nature of a mediation service differs substantially from the nature of the practice of law. Unlike the attorney who "should act with commitment and dedication to the interests of the client and with zeal in advocacy on the client's behalf," Rules of Professional Conduct, Comment to Rule 1.3, the mediator is required to advise the parties that he does not represent either or both of them. ADR Rule 2.7(A)(2). He is to be "a neutral third person." ADR Rule 1.3(A). See also ADR Rule 2.4 regarding the selection of mediators and Rule 2.12 regarding confidentiality and privilege in the mediation process.

Thus, because the Supreme Court permits non-attorneys to act as mediators and because the nature of the mediation is substantially different from the practice of law, mediation service is not the practice of law. Contrast Professional Adjusters, Inc. v. Tandon, (1982) Ind., 433 N.E. 2d 779, in which the Supreme Court found that the certified public adjuster who was actively representing a client in settlement negotiations with an insurance company was engaged in the practice of law.

2. While RPC Rule 7.2(b) prohibits an attorney in private practice from operating under a trade name, Attorney A is proposing to operate a mediation service under a trade name. Since mediation is not the practice of law, the use of a trade name would not be prohibited. However, should Attorney A also practice law, he would need to practice under a different name from the trade name used by the mediation service to avoid running afoul of RPC Rule 7.2.

3. The ADR Rules do not prohibit a mediator from soliciting business for his mediation service from attorneys, insurance carriers and the general public. An attorney who practices law and also engages in mediation services and who wishes to advertise and solicit mediation business must avoid violating RPC Rules 7.1 and 7.3 regarding publicity, advertising and solicitation.

4. Finally, an attorney who practices law and engages in mediation would not be able to mediate cases arising from his own law practice without the risk of violating RPC Rules 1.7 and 1.8 concerning conflicts of interest. In addition, ADR Rule 2.7 addresses conflicts of interest in the mediation process.
FACTS

The issue presented to the Legal Ethics Committee of the Indiana State Bar Association concerns a fee-generating procedure for a proposed Lawyer Referral and Information Service (LRIS) program to be established by the Indiana State Bar Association.

The purpose of the LRIS program would be to provide a Bar-sponsored not-for-profit referral service which would make referrals to attorneys based on geographical and area-of-practice considerations. It has been proposed that there be a panel fee of $100.00 per attorney and a referral fee of 10% of any attorney fee in excess of $200.00 collected from a client referred by the Service.

QUESTION

Would the proposed action be violative of the Indiana Rules of Professional Conduct concerning fee splitting?

DISCUSSION

RPC Rule 7.3 (f) provides that: "A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment . . . ."

Bar-sponsored not-for-profit referral services have been approved by court decision in California1, by the American Bar Association Committee on Professional Ethics2, and by the State Ethics Committees in Tennessee3, Ohio4 and Michigan5.

Approval has been given to registration fees, flat fees, and a percentage of fees collected. However, participating attorneys are not permitted to increase their fees in order to pass on the cost of the service to the client.

In Emmons v. State Bar of California, a participating attorney filed a Declaratory Judgment Action to nullify the Bar Association's claim to a portion of his fees. The Court noted that "serious and progressive elements within and outside the legal profession, have for several decades sought means of making legal services more readily available to the public." The Court then noted that "classic attitudes, crystallized
in canon and rule, frequently lag behind institutional and functional change."

The Court in Emmons also recognized that "prohibited fee splitting between lawyer and layman carries with it the danger of competitive solicitation . . . poses the possibility of control by the lay person, interested in his own profit rather than the client's fate . . . facilitates the lay intermediaries' tendency to select the most generous, not the most competent, attorney . . . (may establish) lay intermediaries (who may) demand allegiance the lawyer owes his client." Presumably a Bar-operated LRIS would not generate any of these evils.

The LRIS proposal recognizes that many citizens do not seek legal advice primarily because they don't know a lawyer. This referral system is an alternative to advertising. Also, it does not add to the cost of the legal services and avoids the evils of solicitation.

CONCLUSION

It is the opinion of the Committee that the LRIS as proposed is not violative of the Rules of Professional Conduct. Participation of the State Bar in such a LRIS would be in accordance with the Indiana Rules of Professional Conduct. Approval of such a LRIS by the Board of Managers and the House of Delegates would not be a violation of the Rules.

FOOTNOTES:


4. Board of Commissioners on Grievance and Discipline of the Supreme Court of Ohio: Opinion 92-1, February 14, 1992

FACTS

Attorney is the elected Clerk of the Circuit Court.

ISSUE

The inquiry presented to the Committee is as follows:

May the Clerk of the Circuit Court engage in the practice of law?

DISCUSSION

The Rules of Professional Conduct and prior opinions in this state have not addressed this issue. Opinion 649 of the State of New Jersey approved a private practice by a County Clerk conditioned on prohibition from appearing in the Court or filing documents in the Court in which the Clerk served. Warning was expressed about using the public office to promote the appearance of obtaining preferential treatment for his clients.

CONCLUSION

The Committee believes the Clerk may engage in the practice of law, but may not appear nor file pleadings in the Court for which the attorney serves as Clerk. Practicing in the city courts or in other counties would be permissible.
I. ISSUE

A deputy county attorney queries the committee about his responsibilities pursuant to Rule 4.2 of the Rules of Professional Conduct. The attorney indicates that he is a county attorney and also a technical advisor to the county.

The attorney states he has attended meetings on behalf of the county (hereinafter called "technical meetings") as a technical advisor, and not as an attorney, with respect to certain environmental issues. The attorney also was requested by the county to attend citizens information committee meetings (hereinafter called "citizens meetings") which have been organized by a federal governmental agency. The attorney had been attending those meetings as a representative of the county. The attorney does not indicate whether he is representing the county as an engineer or as an attorney in these citizens meetings.

The governmental agency recently advised the attorney that he would not be permitted to communicate with non-attorney employees of this federal governmental agency on issues relating to the environmental matter outside of the presence of counsel for the federal governmental agency or absent the express consent of counsel for the federal governmental agency. The governmental agency has indicated to the deputy county attorney that such communication with non-attorney federal governmental agency employees regarding environmental issues without the presence of their counsel or without their counsel's consent would constitute a violation of Rule 4.2. The attorney's question is whether his activities at the technical meetings and/or citizens meetings would be a "communication" under Rule 4.2. Specifically, the attorney questions whether such a "communication" would constitute the following: speaking or listening at a meeting which is attended by non-legal federal governmental personnel.

II. DISCUSSION

Rule 4.2 of the Rules of Professional Conduct states that:

"In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another attorney in the matter unless the lawyer has the consent of the other lawyer or is authorized by law to do so."
Furthermore, the comment to the rule indicates that the rule does not prohibit communication "with a party, or an employee or agent of a party, concerning matters outside the representation." The comment goes on to state that "in the case of an organization, this rule prohibits communications by a lawyer for one party concerning the matter and representations of persons having managerial responsibility on behalf of the organization and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an omission on the part of the organization."

The attorney indicates that at technical meetings he was functioning as an engineer and, therefore, technical advisor to the county. Furthermore, the attendance at these technical meetings was limited to engineers, not attorneys.

The committee has insufficient facts upon which to decide whether there would be a violation of Rule 4.2 for the attorney to attend and "communicate" at the technical meeting as an engineer rather than an attorney. It depends upon the interpretation of his contract with the county. If he is hired as an attorney, and the contract reflects such functions as an attorney, then conceivably Rule 4.2 can be applied regarding these technical meetings. Since Rule 4.2 prohibits "communication" and not attendance, he may feel free to attend these meetings. If his contract indicates he functions as both, and his function at the technical meetings has consistently been limited to that of an engineer, then perhaps the proscriptions of Rule 4.2 regarding "communication" do not apply. However, it appears from the general tenor of the attorney's letter that he in fact functions as an attorney for the county and the letterhead indicates that he is an attorney. Therefore, since he presumably functions primarily as an attorney for the county, it is this committee's belief that Rule 4.2 regarding "communication" must be looked at carefully in both the technical meetings and the citizens meetings.

The federal governmental agency has not prohibited the attorney from attending these meetings; rather, it is objecting to communications by the inquiring attorney. It is this committee's opinion that "communication" does not apply to comments or statements made in a public forum or pursuant to the attorney's first amendment rights of free expression. If the technical meetings are considered a public forum, then the proscriptions of "communications" may not apply. The attorney's comments to non-legal federal employees may not be prohibited if those comments are directed solely to those personnel and not to other persons attending such meetings. Furthermore, Rule 4.2 permits "communications authorized by law." The comment indicates that such communications include the right of a party to a controversy with a government agency to speak with government officials about the matter. The term "officials" is not defined and, therefore, the committee takes no position with respect to these "communications."
It is more apparent to the committee that the citizens meetings are in the nature of a public forum and, therefore, Rule 4.2 would not apply.

III. CONCLUSION

Thus, the committee considers the presence of the attorney at these meetings not to be a violation of Rule 4.2; and furthermore, if the attorney makes comments or statements directed to federal governmental agency employees in a public forum, these comments or statements would not violate Rule 4.2. The committee may not give an opinion on facts it does not possess. However, in view of the comment regarding the right of a party to controversy to speak with court "officials," the committee notes that there is probably a legitimate controversy for which the appropriate forum is in court.
The Legal Ethics Committee of the Indiana State Bar Association has been presented with the following question:

Is it a violation of the Rules of Professional Conduct for an attorney to represent a School Corporation and also represent separate and distinct Holding Corporations where there exists ongoing lease-purchase agreements and under conditions where the School Corporation makes disbursements of all funds for each corporate entity?

The issue is conflict of interest. Rule 1.7 of the Rules of Professional Conduct provides:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Merely because two or more entities may be involved in a transaction, conflicting interests prohibited by the Rule are not established ipso facto. A conflicting interest to constitute misconduct must be of a nature to reasonably affect independent judgment. Matter of Long, 486 N.E. 2d 1031, 1035. Over the years, the committee has responded to many
questions on Rule 1.7 that involve litigation directly or indirectly.
This question does not immediately involve litigation, and the answer is
not as simple. As stated in the comments to Rule 1.7:

Conflicts of interest in contexts other than litigation
sometimes may be difficult to assess. Relevant factors
in determining whether there is potential for adverse
effect include the duration and intimacy of the lawyer's
relationship with the client or clients involved, the
functions being performed by the lawyer, the likelihood
that actual conflict will arise, and the likely prejudice
to the client from the conflict if it does arise. The
question is often one of proximity and degree.

A simple arranging of a land sale contract between seller and buyer can
develop into a conflict when the exercise of professional independent
judgment on behalf of one client is adversely affected by representing
the other. Matter of Banta, 412 N.E. 2d 221. Sometimes the
relationship may be perfectly ethical in the beginning, and later develop
into a conflict. Matter of Lance, 442 N.E. 2d 989.

CONCLUSION

The question as posed does not include any conflict or potential conflict
between the School Corporation and the Holding Corporations. So if, as
the Rule provides, the lawyer reasonably believes the representation will
not be adversely affected and the clients have consented, then there is
no violation of Rule 1.7 at least until the lawyer becomes aware of the
facts which reasonably leads him to believe there may be a conflict
between his clients.