A part-time public defender in Marion County seeks the Committee's opinion relating to a possible conflict of interest pursuant to Rule 1.7 of the Rules of Professional Conduct. Prior to accepting the part-time position as a public defender with the Marion County Superior Court, Criminal Division, the individual initiated a class action suit comprised of indigent defendants in Marion County against the State of Indiana, the City of Indianapolis, Marion County, and the City-County Council. He alleged that the Marion County Public Defender's System, as currently administered, resulted in indigent criminal defendants being subjected to repeated violations of their state and federal constitutional protections. The suit was filed in Marion County Superior Court, Civil Division.

The attorney maintains both a civil and a criminal practice while working part-time as a public defender. Public defenders in Marion County are hired on a part-time basis by a Superior Court judge, assigned to that particular court and paid from that court's budget.

Rule 1.7 of the Rules of Professional Conduct states that:

(a) a lawyer shall not represent a client if the representation will be directly adverse to another client . . . ; and

(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 . . . .

The lawyer's representation of the members of the class action suit is consistent with his advocacy of indigent defendants in the Marion Superior Court, Criminal Division. He is not arguing one position in the civil action and advocating an adverse position while employed as a part-time public defender. He is consistent in his advocacy that all
indigent defendants in Marion County are entitled to the basic constitutional protections. A possible direct benefit that might derive from the civil litigation could be court-ordered improvement in the delivery of services to indigent criminal defendants, a goal advocated daily by the attorney in his part-time capacity as a public defender. The interests of both groups of clients are not sacrificed by his civil action or his part-time employment as a public defender. His loyalties to the clients and his arguments to the courts are consistent.

CONCLUSION

The attorney's initiation of a class action suit alleging inadequate delivery of public defender services in Marion County and his part-time employment as a public defender in that system is not a conflict of interest in violation of Rule 1.7 of the Rules of Professional Conduct.
The Legal Ethics Committee has been presented with the following situation:

A construction worker was injured in his employment under circumstances which suggested that he was entitled to benefits under the Workers Compensation Act. A claim was presented to the compensation insurance carrier. Lawyer A advised the carrier that the claim was compensable and the benefits were paid. The worker then filed a tort action against a third party for damages for the injury. The compensation insurance carrier served notice of its lien for benefits paid on the insurance carrier which provided liability insurance to the tort defendant. The compensation carrier is not a party to the tort action, but it has an interest in the plaintiff worker prevailing in that action so that it may recover on its lien. The liability insurance carrier asks Lawyer B to defend its insured in the tort action. Lawyers A and B are partners in the same firm.

**ISSUE**

Can Lawyer B represent the interests of the liability insurance carrier and its insured (the tort defendant) in the tort action?

**CONSIDERATION**

Rule 1.7 of the Indiana Rules of Professional Conduct provides that:

(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.

Furthermore, Rule 1.10 (a) provides that:

While lawyers are associated with 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.

Finally, Rule 1.9 provides that a lawyer who has formerly represented a client in a matter shall not thereafter:

(a) represent another person in the same or a 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.

DISCUSSION

Under the circumstances set out above, the initial concern is whether Lawyer A's representation of the worker's compensation carrier ended with the advice that the injury to the worker was compensable under the Act. If Lawyer A does not provide further representation to the compensation carrier, Rule 1.9 is applicable. The compensation carrier is a former client whose interest (recovery on its lien against the tort defendant's insurance company) is materially adverse to the interest of Lawyer B's prospective client who seeks to avoid liability to the plaintiff altogether. Under Rule 1.9, Lawyer B could not represent the insurance carrier unless the compensation carrier consented after consultation. In addition, Lawyer B should disclose the conflict to the insurance carrier and obtain its consent, since Lawyer B will be prohibited under 1.9 (b)
from using information stemming from Lawyer A's relationship to the compensation carrier to the disadvantage of the compensation carrier. Furthermore, under the Comment to the Rule, the degree of Lawyer A's involvement with the question of the tort defendant's liability to the laborer is relevant: "(t)he 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." The degree of involvement turns on the facts of each case. In this case, it is certainly possible that Lawyer A's involvement with the question of the tort defendant's liability to the worker in damages is so minimal that, with the consent of both carriers following disclosure of the circumstances (and the caveat that no information will be used to the disadvantage of the compensation carrier), Lawyer B may be able to proceed with representation of the insurance company in this situation.

However, if Lawyer A continues to represent the worker's compensation carrier on this or other matters, Lawyer B's defense of the claim against the insured defendant by the worker is directly adverse to the interests of one of his firm's current clients. A successful defense by Lawyer B of the liability suit will bar the worker's compensation carrier from recovery on its lien. Thus, Rule 1.7 (a) applies and representation of the insurance company by Lawyer B is prohibited unless parts (1) and (2) of the Rule are satisfied.

Under 1.7(a)(1), the next inquiry is whether Lawyer B reasonably believes his representation of the insurance company will not adversely affect the firm's relationship with the worker's compensation carrier. If, Lawyer A is currently representing the worker's compensation carrier in an unrelated matter (for example, a discrimination suit against the carrier by a former carrier employee) and Lawyer A did not represent the carrier in anything further involving the case between the worker and the tort defendant, Lawyer B might reasonably believe that his representation of the insurance company would not affect the firm's relationship with the worker's compensation carrier. At this point, under 1.7(a)(2) Lawyer B would need to obtain the consent of each carrier before proceeding with representation of the insurance carrier. It should be noted that the Comment to Rule 1.7 warns that "when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent . . . Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent."

If Lawyer A is actively representing the interest of the carrier in this case (defending, for example, against discovery by the insurance company of the entire worker's compensation file), representation by Lawyer B of the insurance company would clearly affect the firm's relationship with the carrier. In that case, the issue of each carrier's willingness to consent would not even arise, since the criterion for permitting representation contained in 1.7(a)(1) would not be met.
Similarly, under Rule 1.7 (b), if Lawyer B's representation of the insurance company may be materially limited by the firm's responsibility to the compensation carrier, Lawyer B may not represent the insurance company. Under the Comments, the question is again whether a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances. Assuming that Lawyer B can ethically make the disclosures necessary to determine whether his representation of the liability insurance carrier will be adversely affected, he should consult with his prospective client in making this determination. If Lawyer B determines that his representation of the liability insurance carrier will not be adversely affected by his firm's duty to the compensation carrier, he may represent the insurance company if each client consents.
ISSUE

The Legal Ethics Committee has been requested to render an opinion based upon the following question:

Is a partnership agreement providing in pertinent part that a withdrawing partner forfeit 25% of the buyout figure for his interest in the firm, if he continues to practice in the county wherein the partnership's place of business is located or in any adjoining county, violative of the prohibitions of Rule 5.6 of the Rules of Professional Conduct?

RULE

Rule 5.6 of the Rules of Professional Conduct states in pertinent part that:

"A lawyer shall not participate in offering or making:
(a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement . . .".

The Comment to Model Rule 5.6 explains that an agreement restricting the right of partners to practice after leaving a firm "not only limits their professional autonomy, but also limits the freedom of the clients to choose a lawyer." The right of a client's freedom to choose is seen as outweighing a lawyer's interest in being protected against potential unfair competition for clients.

DISCUSSION

The Ethics Committee has previously entertained the issue of the validity of a restrictive covenant between two attorneys. In Legal Ethics Opinion No. 5 of 1974, this Committee, in accord with Formal Opinion 300 of the American Bar Association, found that DR 2-108(a) clearly prohibited a restrictive covenant between attorneys practicing law in this state. DR 2-108 of the Code of Professional Responsibility is nearly identical to the present law found at Rule 5.6 of the Rules of Professional
Appellate Courts have held that an agreement between lawyers which restricts the right to practice after the dissolution of a partnership is void as against public policy and is a violation of a lawyer's ethical obligation, if the restriction is unrelated to benefits upon retirement. Dyer v. Jung, 133 N.J. Sup. Ct. 343, 336 A. 2d 498 (1975). Agreements which tie a partner's right to certain payments upon withdrawal from the firm to a covenant not to compete within a geographical area are also void. Gray v. Martin, Ore. App. 663 P. 2d 1285, 1290 (1983). The only exception to the prohibition on restrictive covenants is that which arises when such agreements are made as a condition to the payment of retirement benefits.

Since a firm may not use a provision that acts as a restriction on the departing lawyer's right to practice law, many firms have attempted to circumvent this broad prohibition by the use of a contractual clause which does not forbid the departing partner to set up a competitive practice, but rather places an economic disincentive on the departing lawyer to deter him from doing so.

In Gray v. Martin, supra, the Oregon Court of Appeals ruled that a partnership agreement that conditioned the withdrawing partner's right to certain payments, such as an unpaid draw or his capital account, on his not practicing in a particular geographical area was unenforceable as against public policy. In rejecting the argument that these payments were retirement benefits, the court stated that "if retirement has the same meaning as withdrawal in DR 2-108(A) (now Rule 5.6(a)), then the disciplinary rule has no meaning. Every termination of a relationship between law partners would be a retirement, and agreements restricting the right to practice would always be allowed." Id. at 1290.

While the Oregon court felt that the economic disincentive provision was just a variation on the right to practice, the economic disincentive approach has been upheld in New York. The court concluded that a provision that denied the competing ex-partner his right to share in the firm's future profits was not a restrictive covenant because it did not preclude the lawyer from practicing law in the same geographical area or

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1 Since this Committee's previous opinion, there have been a number of reported cases which have entertained this issue, some of which are discussed hereafter. While the discussion of these cases may or may not be important for inclusion into the final draft of our opinion, they are instructive for the purpose of understanding and discussing the issue. It may also be helpful to the practitioner to provide the citations for reference, as well as to provide a basis for the conclusion the Committee reaches on this issue at this time.

In Virginia, the court held that a deferred compensation plan based on a non-compete clause violates the code by prohibiting the withdrawing attorney from receiving compensation already earned or derived from either the deferral income or the interest earned on the deferred income. However, if the compensation derives from the funding by the firm or from a third party, the geographical restriction on the lawyer's right to practice is acceptable.

In *Jacob v. Norris, McLaughlin & Marcus*, 588 A. 2d 1287, N.J. Sup. Ct. (1991), the court stated that a partnership agreement is not necessarily unenforceable because it cuts off the withdrawing lawyer's termination compensation if they go into competition with the firm. The court concluded that this did not restrict the lawyer's right to practice and thus did not violate Rule 5.6. The court reasoned that the firm cannot be expected to compensate a former member who lures clients away in the same manner as those who depart and do not diminish the firm's income. The termination provision provided the departing partner with a percentage of the annual draw the member had received while at the firm.

The court distinguished *Gray v. Martin*, stating that *Gray* involved an attempted forfeiture of income already earned by the departing member which he was clearly entitled to receive. In *Jacob*, the plaintiffs received full value of their shares in the defendant professional corporation through a separate buy-sell agreement. The court further distinguished *Gray* and *Cohen* by pointing out that the restrictions in those cases were broadly designed to suppress all professional activity in the same geographical area and seemingly for an unlimited clientele for one year.

While it is clear that the ABA Model Rule 5.6 prohibits all restrictive covenants for lawyer's services, whether appurtenant to the sale of a law practice, or to an employment or partnership agreement, at least one court has upheld a noncompetitive covenant incident to the sale of a law practice which limited the geographical area in which the selling lawyer could practice. *Hicklin v. O'Brien*, 11 Ill. App. 2d 541, 138 N.E. 2d 47 (1956).

In the present case, the partnership agreement provides that the withdrawing partner will forfeit 25% of the buyout figure for his interest in the firm, if he continues to practice in the county wherein the partnership's place of business is located or in any adjoining county. In order to determine whether this provision violates Rule 5.6 of the Rules of Professional Conduct, it is necessary to classify what this "buyout figure" represents. If the buyout figure is classified as a retirement benefit or based on a percentage of the future income of the firm, then the provision would not be in violation of Rule 5.6. However, if the buyout figure is derived from deferred income or interest from deferred income, then the provision would be in violation of Rule 5.6.
Despite the 1956 ruling in Hicklin, the ABA has made it clear that all restrictive covenants violate 5.6, regardless if it is appurtenant to a sale. The term "buyout figure" seems to indicate that the withdrawing partner is selling his portion of the practice to the firm. If this is the case, the provision would likely be a violation of the Rules of Professional Conduct, with Hicklin providing the only exception. However, in Hicklin, the withdrawing attorney was to receive a percentage of future income from the sale of his practice for the next several years. Id. at 48. The case law suggests that future income is an economic disincentive and not a restriction on an attorney's right to practice or a client's right to choose an attorney.

CONCLUSION

Depending on the basis of the buyout figure, it seems likely that the provision requiring a forfeiture of 25% of the buyout figure due a withdrawing partner practicing within a county or any adjoining county would be a violation of Rule 5.6.

A partnership agreement which restricts the right of a lawyer to practice after termination of a relationship is in violation of Rule 5.6, unless the provision concerns retirement benefits. A provision in a partnership agreement which calls for the forfeiture of a buyout figure is in violation of Rule 5.6, if it is determined that this provision prevents a lawyer from practicing or prevents a client from engaging the attorney of the client's choice.

The lone exception to this rule concerns provisions denying a withdrawing lawyer retirement benefits. It is clear that any economic disincentive based on deferred income already earned will be a violation. An economic disincentive based on a percentage of future income will probably not be a violation of Rule 5.6.

What is not clear in the present case is what the buyout figure is based on. The ABA has indicated that even if the non-compete provision is based on the sale of a practice, a provision which restricts an attorney from practicing will be in violation.

As this Committee previously found, a restrictive covenant would tend to interfere with and obstruct the freedom of the client in choosing and dealing with his lawyer. The Indiana Supreme Court recently held that "though a firm may refer to clients of the firm as 'the firm's clients', clients are not the 'possession' of anyone, but, to the contrary, (they) control who will represent them." Kelly v. Smith (1993) Ind., 611 N.E. 2d 118. The prohibition of restrictive covenants among lawyers is generally the law in Indiana. Rule 5.6 provides the only apparent exception, when an agreement concerns benefits upon retirement.
INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE

OPINION NO. 4 OF 1994

ISSUE

The Legal Ethics Committee has been requested to render an opinion based upon the following question:

Does Guideline 9.1 prohibit the use of paralegals through temporary services, contract services and leasing firms? Does Guideline 9.1 require all legal assistants to be employees of the attorney?

RULE

Guideline 9.1 of the Rules of Professional Conduct states, in pertinent part, that:

"A legal assistant shall perform services only under the direct supervision of a lawyer authorized to practice in the State of Indiana and in the employ of the lawyer or the lawyer's employer. Independent legal assistants, to-wit, those not employed by a specific firm or by specific lawyers are prohibited."

DISCUSSION

The question posed by the inquirer is whether the Rules of Professional Conduct prohibit the use of paralegals through temporary services, contract services and leasing firms. Guideline 9.1 does not prohibit the employment of a legal assistant on a project-by-project basis, so long as the work on a given project is under the direct supervision of the lawyer. A lawyer should give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product.

CONCLUSION

The use of temporary services, contract services and legal assistants from leasing firms is not prohibited, provided all other requirements of the Guidelines and Rule 5.3 are satisfied.
Rule 5.3 of the Rules of Professional Conduct, Responsibilities Regarding Nonlawyer Assistants, states that:

"With respect to a nonlawyer employed or retained by or associated with a lawyer: (a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligation of the lawyer; (b) A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and (c) A lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

The employment of paralegals on a case-by-case basis is not prohibited provided that they are under the direct supervision of a lawyer."
ISSUE

The Legal Ethics Committee has been asked to render an opinion based upon the following question:

Does Rule 1.7 permit an attorney to represent both an injured plaintiff and the subrogated interest of the insurance carrier which has paid plaintiff's medical expenses?

FACTS

An attorney is representing an individual client in a claim for bodily injuries arising out of an accident. An insurance company which paid for medical services for treatment of the client's injuries is asserting a subrogation claim on any recovery against a third party and has asked the attorney to represent its interest.

RULE

Rule 1.7 provides as follows:

"Conflict of Interest: General Rule

(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."

**ANSWER**

The common representation is ordinarily not permitted by reason of paragraph (b), because the risk of adverse effect is substantial.

**DISCUSSION**

As stated in the Comments,

"Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. See also Weinberg v. Underwood, 244 A.2d 538, 540; North Carolina State Bar v. Whitted, Jr., 347 S.E.2d 60, 64 (N.C.App. 1986); State v. Kopke, Kan., 502 P.2d 813, 815 and Jedwabny v. Philadelphia Transportation Company, 135 A.2d 252, 254."

The interest of the insurance company is to recoup the full amount paid for medical services for treatment of the client's injuries. The interest of the individual client is to obtain the maximum amount of compensation for a claim for bodily injuries, which may be to resist the insurance company's receiving part or all of its subrogation claim.

Therefore, as attorney for the individual client, there is a responsibility to investigate thoroughly the possibility that the insurance company does not have a right of subrogation. If the right is claimed under an insurance policy, the policy itself should be examined. It is possible that the individual client is not bound by the policy or that the tortfeasor is an additional insured under the policy. The insurance company cannot recover by right of subrogation from its own insured. 7a Am Jur 2d, Automobile Insurance, Sec. 438, p. 95. There may be some other defense such as waiver or estoppel. 73 Am Jur 2d, Subrogation, Sec. 129-133; 26 ILE Subrogation, Sec. 13.

Assuming that there is a right of subrogation and there is no defense to the right of subrogation, there still is the proposition that there is no right to subrogation for the full amount paid unless the individual client has been paid in full.

The conflict becomes most apparent where there is an attempt at settlement for less than the full amount, based upon the contingency of liability, and the individual client wants the insurance company to take less because the individual client is taking less. The attorney must then negotiate adversely to the insurance company.

There are rights to subtract from the subrogation claim costs and attorney's fees and collectibility. See I.C. 34-4-33-12 and I. C. 34-4-41-4.

There are other statutory provisions relating to subrogation such as I. C. 27-7-5-6, Uninsured Motorists Coverage, I. C. 22-3-2-13, Workmen's Compensation and I. C. 34-4-33-12. Since the attorney is entitled by statute to a set fee on the recovery by the insurer on its subrogation claim anyway, in the typical injury case, there ordinarily is no compulsion to establish an attorney-client relationship with the insurer.

CONCLUSION

Such dual representation is strongly discouraged. The possibilities of a conflict between the plaintiff insured and his own insurance carrier are inherent. Until all of these possibilities are explored exhaustively and the conflict is negated, Rule of Professional Conduct 1.7 mandates that the representation of the insurance carrier be declined. If a conflict does arise where representation of the insurer has been undertaken, then the rule requires that the attorney withdraw from representation of both parties. Weinberg v. Underwood, 244 A.2d, 538.
ISSUE

Does the lawyer's proposed business violate any Rules of Professional Conduct?

The Legal Ethics Committee has been presented with the following situation:

A lawyer wishes to set up a business with several nonlawyers who were formerly employed as claims adjudicators for the Social Security Administration. Both the lawyer and the nonlawyers would represent claimants seeking Social Security disability benefits. In addition, the lawyer would use his contacts to secure referrals from businesses and insurance companies of potential Social Security disability claimants who were receiving disability benefits under insurance policies or self-insured company plans. Many of these policies require beneficiaries to apply for Social Security disability benefits which will offset some portion of the insurance payment.

The referrals would be obtained by the company providing the lawyer with a list of disability insurance recipients whom the lawyer would then contact to offer assistance in pursuing the Social Security claim. Alternatively, the company would contact the recipients and direct them to the lawyer to pursue the claim.

DISCUSSION

The first question posed by the inquirer is whether
the Rules of Professional Conduct govern the behavior of a lawyer who is engaged in an activity that can also be performed by non-lawyers. In this case, the answer is "yes"; the Rules of Professional Conduct are applicable to the lawyer's activity because representing claimants before the Social Security Administration for the purpose of securing disability benefits is clearly the practice of law. See Legal Ethics Committee Opinions No. 5 of 1991, No. 5 of 1992, and No. 1 of 1993 discussing what constitutes the practice of law. "Even though a particular activity may be open to laymen, if such activity is the practice of law when engaged in by a lawyer, one who is a lawyer cannot free himself of the ethical restraints merely by announcing he is to be regarded as a layman for this particular purpose." See ISBA Legal Ethics Subcommittee Opinion No. 4 of 1964 adopting ABA Professional Ethics Committee Opinion No. 297.

Federal regulations governing the Social Security disability program permit nonlawyers to represent claimants in any administrative matter involving the Social Security Administration. 20 C.F.R. §404.1705. However, this fact does not mean that representing Social Security claimants in disability appeals is not the practice of law. The federal government may permit individuals to practice law before a federal agency operating within a state even if the individuals do not meet state qualifications for the practice of law. Sperry v. Florida ex rel. Florida Bar, 373 U.S. 379 (1963).

The inquirer next asked whether Rule 7.3 prohibits his
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proposed activity. Rule 7.3(a) states that "A lawyer shall not seek or recommend, by in-person contact (either in the physical presence of, or by telephone), the employment, as a private practitioner, of himself, his partner, associate, or his firm, to a nonlawyer who has not sought his advice regarding employment of a lawyer, or assist another person in doing so." This would prohibit the lawyer from contacting, except by letter, the individuals on any list furnished by the companies. Such a letter would have to comply with Rule 7.3(c) concerning the appearance, dissemination and filing of what the Rules define as advertising material.

Under Rule 7.3(a) a lawyer is barred from assisting another person in engaging in prohibited solicitation of employment. Thus, the lawyer would also be unable to use the businesses and insurance companies as his agents to make in-person contacts to solicit employment if he could not make these contacts himself. This would seem to prohibit the lawyer from entering into an arrangement where the companies contacted the disabled individuals and directed them to the lawyer for representation. See Opinion No. 8 of 1986 in which the Committee concluded that a law firm could not solicit church and charitable organization leaders for the purpose of sponsoring a reduced fee "Will Day" without running afoul of DR 2-103(A), the predecessor to Rule 7.3(a). However, the lawyer would not be prohibited under 7.3(a) from making in-person contacts with the businesses for the purpose of informing them of the nature of his practice.
Further, Rule 7.3(e) states that "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)." The businesses and insurance companies which would be the source of referrals to the lawyer under his proposed arrangement do not fall within any of the referral services described within subparts 1-4. Thus, acceptance of clients referred by these companies would also violate Rule 7.3(e) if the proposed arrangement could be characterized as involving a lawyer referral service.

There is very little guidance to be found in either ethical opinions or cases as to the criteria to determine whether a for-profit company, engaged in a business unrelated to the practice of law, is acting as a lawyer referral service when it directs individuals (its employees or insurance beneficiaries) to a lawyer for representation. Most opinions discussing lawyer referral services concern organizations that have been set up for the specific purpose of referring individuals to attorneys to obtain legal services. (See Legal Ethics Committee Opinions No. 3 of 1985, No. 4 of 1986 and No. 2 of 1991.) However, one opinion does provide some assistance. Opinion No. 4 of 1992 discusses the relationship between an attorney and a for-profit financial organization which provided information to investors concerning how to avoid probate. The financial organization referred clients to the attorney for legal advice. Although the opinion primarily addresses issues under Rules 5.4 and 5.5, the Committee notes in conclusion, "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."

Businesses and insurance companies can and do refer employees and customers to lawyers without the activity being considered the operation of a lawyer referral service. The determination of whether a lawyer referral service exists depends on the nature of the arrangement between the lawyer and the business. The situation raised by the inquirer appears to consist of a formal arrangement to channel a class of individuals to a specific lawyer for the purposes of legal representation. This constitutes a lawyer referral service under Rule 7.3.

Opinion No. 4 of 1986 discusses when an attorney can accept referrals from a for-profit corporation that is not a law firm, but which administers group and individual legal services plans. The Opinion was issued before adoption of the current Rules; under the rules then in effect, a lawyer was permitted to accept referrals from "a qualified legal assistance organization." There is no similar provision in the current Rules. However, the Opinion raises some considerations relevant to the arrangement proposed by this inquiry. These deal primarily with issues related to the impact the referring entity has on the lawyer/client relationship and the independence of the lawyer's judgment. Specifically, the Committee expressed reservations over a lawyer referral system that gives the client no control over the selection of who his lawyer will be, but instead makes a referral on a "take-it or leave-it" basis. In addition, the Committee noted that the attorney had to
retain the right to decline a referral when he had a conflict or lacked the time or competence to take on the matter. Further, concerns relating to client confidentially were raised.

The inquirer also raised the question of whether a partnership could be formed and whether the nonlawyers could be compensated on a percentage contingent basis. Rule 5.4(a) prohibits sharing legal fees with a nonlawyer, except in certain limited circumstances not applicable here. In *In the matter of Bruce M. Frey*, 475 N.E.2d 688 (Ind. 1985), the Court disciplined a lawyer for a fee-sharing arrangement in which the lawyer received $800.00 per case, $100.00 of which he agreed to pay over to his non-lawyer assistant. Thus, the percentage contingent-type arrangement proposed here would violate the Rule. Similarly, Rule 5.4(b) states that "A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law."

**Conclusion:** It is the opinion of the Committee that the proposed arrangement violates the Rules of Professional Conduct, specifically Rules 7.3 and 5.4.
ATTORNEY prepared a will for an elderly widow who had one son. The will devised a residence, its furnishings and two thousand dollars ($2,000) to a friend who looked after her. The residue of the property was devised to the son. The will named the friend as executrix. The attorney did not witness the will.

Following death of the testatrix, the son filed a civil suit contesting the validity of the will. The will was presented to the Superior Court and impounded by the Court, which substituted a bank as personal representative of the estate.

The son has informed the bank that he objects to the representation of the estate by the inquiring attorney. The attorney does not represent the friend. The friend of the decedent is represented by other counsel in the will contest. The estate is not a party to the will contest.

ISSUE

May the attorney act as attorney for the estate?
DISCUSSION

First, the inquiring attorney's statement that the estate is not a party to the will contest is incorrect. Indiana Code 29-1-7-17 provides, "the executor and all other persons beneficially interested in the will shall be made defendants to the action." Secondly, in all probability, the drafting attorney will be a necessary witness concerning the preparation of the decedent's will and any related matters. Rule 3.7 of the Indiana Rules of Professional Conduct would seem to bar the attorney from serving as counsel in the civil will contest litigation.

CONCLUSION

The bank as personal representative of the estate may hire any counsel it desires to represent the estate. The beneficiary son has no standing to control or dictate that decision. The decision appears to be a legal decision, not an ethical decision.

The attorney ought not to represent any party in the civil will contest since he was the author of the will which is subject to litigation and most likely may be a witness in the civil case. Since the bank personal representative would be a party to the civil will contest, the attorney should not represent the bank in the capacity of defending the will. The attorney, however, may represent the bank personal representative in probate matters of accounting and death tax proceedings.