The Committee is requested to render a written opinion as to whether the Indiana Rules of Professional Conduct forbid an attorney from disclosing his or her client's name on IRS Form 8300, which reports the receipt of cash in excess of $10,000.00 as required under 26 U.S.C. § 6050I of the Internal Revenue Code.

In 1984, the United States Congress enacted 26 U.S.C. § 6050I as a portion of the Deficit Reduction Act of 1984. The statute provides that any person who receives more than $10,000.00 in cash, including foreign currency, in the course of a "trade or business" must file a return, known as Form 8300, with the Internal Revenue Service. This informational return must disclose the name, address and tax identification number of the person from whom the cash was received; the amount of cash received; the date and nature of the transaction; and such other information as the Secretary of the Treasury may prescribe.

If a series of related transactions involving the same client takes place in which the aggregate cash amount exceeds $10,000.00, this must also be reported on Form 8300. The statute specifically prohibits "structuring" transactions to evade these reporting requirements. In 1990, the reporting requirements were strengthened by § 11318(a) of the Revenue Reconciliation Act of 1990, which requires the reporting of foreign currency and such
bearer instruments as travelers' checks, cashiers checks or money orders regardless of the amount of funds, if received in connection with a transaction that qualifies for reporting.

Since 1985, the American Bar Association, as well as other associations of attorneys actively representing criminal defendants, have expressed concern about the broad usage by the Internal Revenue Service of the reporting required on Form 8300. The focus of ABA concern is not that it opposes all disclosures, but that it opposes the conversion of a provision intended to reduce the deficit to a general license to investigate "suspicious" cash transactions, in the process turning lawyers into witnesses against their clients.

Thus far, there is no Seventh Circuit authority interpreting lawyer obligations in regard to Form 8300. There is authority from the Second Circuit and the Eleventh Circuit. In United States v. Goldberger, 935 F.2d 501 (2nd Cir. 1991) and United States v. Levanthal, 961 F.2d 936 (11th Cir. 1992), the courts have rejected attorney claims of confidentiality or attorney-client privilege, though the Goldberger court suggested there may be "special circumstances" under which lawyers might be relieved of their obligations to report on Form 8300. However, these "special circumstances" have never been judicially defined.

Between the appearance of the Levanthal and Goldberger decisions and late 1993, the U.S. Department of Justice attempted to work on a case-by-case basis to decide whether to enforce IRS summonses, and determine what circumstances might require attorneys
to provide Form 8300 information.

In late 1993, IRS in a press release stated that it would impose substantial fines on attorneys who filed Form 8300 to report the receipt of cash in excess of $10,000.00, but withheld client-identifying information on the basis of attorney-client privilege, ethical restrictions, or other constitutional grounds. IRS has, at least in some cases, treated such filings as "willful violations" and has assessed fines of up to $25,000.00 on attorneys in several jurisdictions. We are not aware so far of such fines being assessed in Indiana.

APPLICABLE PORTIONS OF THE INDIANA RULES OF PROFESSIONAL CONDUCT

Applicable Indiana Rules of Professional Conduct include Rule 1.6, "Confidentiality of Information," which provides in pertinent part:

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

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

(1) to prevent the client from committing any criminal act; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding
concerning the lawyer's representation of the client.

In the opinion of this Committee, none of these exceptions in paragraph (b) of Rule 1.6 appear to apply. The information called for on Form 8300, in the opinion of this Committee, clearly falls within the category of "information relating to representation of a client," which ought not ethically to be disclosed unless the client consents after consultation.

Other potentially applicable provisions of the Indiana Rules of Professional Conduct include Rule 1.8(b), which provides in pertinent part:

A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation.

It may be argued that the reporting of information on Form 8300 is not necessarily "use" of the information by the attorney. Similarly, Rule 1.9 ("Conflict of Interest: Former Client") states in pertinent part:

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

(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.

There may be some question as to whether information reported on Form 8300 is "used" by the attorney, but there is at least a reasonable argument that "use" would include passing on the information to IRS in order to satisfy the attorney's obligations.
under 26 U.S.C. § 6050I.

One other section of the Rules of Professional Conduct, Rule 4.1, "Truthfulness in Statements to Others" states:

In the course of representing a client, a lawyer shall not knowingly: . . .

(b) fail to disclose that which is required by law to be revealed.

It is the opinion of this Committee that the reporting requirements of 26 U.S.C. § 6050I of the Internal Revenue Code create an ethical dilemma for attorneys confronting the problem that, absent client consent to disclose the information, may prove insoluble. On the one hand, the attorney is bound to hold sacred the confidences of his client; on the other, as an officer of the court and as a citizen of the United States, the attorney is bound to obey the law, including § 6050I of the Internal Revenue Code. The problem is that in some cases, by reporting a client's cash transaction activity on Form 8300, a lawyer may attract the attention of the IRS as well as law enforcement authorities to a client who was not previously being investigated.

CONCLUSION

The answer to the question posed at the beginning of this opinion, as to whether an attorney is forbidden by the Indiana Rules of Professional Conduct from disclosing client information on IRS Form 8300, is, in the opinion of this committee, that Rule 1.6, and possibly Rules 1.8 and 1.9 as well, do forbid such disclosures. At the same time, Rule 4.1(b) appears to compel such disclosures. The committee believes that this absurd result can only be
definitively addressed by legislative action.

Until this situation is remedied in Congress, the options open to the lawyer are few. The only way in which the lawyer can avoid the ethical dilemma is to disclose in advance to the client the existence of 26 U.S.C. § 6050I and the reporting requirements of Form 8300. The ethical lawyer will advise the client that if the client wishes to avoid placing a lawyer in an impossible bind, he will not confront the lawyer with cash or bearer transactions that appear reportable. If the client does not consent to representation on those terms, the net effect will be that the client will likely seek a less ethical lawyer, who will agree not to make any report on Form 8300.
The Legal Ethics Committee of the Indiana State Bar Association has been requested to provide an advisory opinion with respect to whether or not it is a violation of the Indiana Rules of Professional Conduct for an attorney to draft and provide "generic" articles of incorporation, by-laws, leases, and promissory notes to an accountant to be used by the accountant in assisting the accountant's small business clients.

The ethical question is "Would the drafting and providing of such 'fill in the blank' forms to the accountant constitute aiding in the unauthorized practice of law in violation of Rule 5.5(b) of the Indiana Rules of Professional Conduct?"

DISCUSSION

Rule 5.5(b) of the Indiana Rules of Professional Conduct provides 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.

The drafting and providing of "fill in the blank" forms to a non-lawyer by a lawyer would certainly qualify as aiding or assisting the non-lawyer. Thus, the question then becomes whether the non-lawyer would be engaged in the unauthorized practice of law by utilizing such "fill in the blank" forms.

The Comment Section to Rule 5.5 states that the definition of the practice of law is established by state law and varies from one jurisdiction to another. The purpose for the rule is to protect the public from the rendition of legal services by unqualified persons who are not subject to discipline by the judiciary system. However, the rule does not prohibit a lawyer from delegating functions so long as the lawyer supervises the delegated work and retains responsibility for the work. Moreover, the rule does not prohibit lawyers from providing instruction to non-lawyers "whose employment requires knowledge of law", for example, accountants. Rule 5.5, Comment.

In Opinion No. 4 of 1992 issued by this Committee, the issue arose as to whether an attorney would be aiding a financial organization in the unauthorized practice of law under an arrangement whereby the financial organization would be providing legal form documents to its customers under the supervision of the attorney. With respect to this arrangement, the Committee stated as follows:
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.

Based on Opinion No. 4 of 1992, it would appear that the accountant would not be engaged in the unauthorized practice of law to the extent the accountant merely furnished forms to his clients. However, in the event the accountant would be filling out such forms, or assisting his clients in completing such forms, the accountant would be engaged in the unauthorized practice of law. From the context of the question, it appears that the latter situation would be occurring. However, note that, based upon Opinion No. 4 of 1992, it would appear that the accountant could fill out the forms under an attorney's supervision.

In addition to state ethics opinions, the "unauthorized practice of law" may be defined by the state courts. The Indiana courts have addressed the issue of whether the filling in of blanks on legal form documents by non-lawyers constitutes the unauthorized practice of law. In State ex-rel Indiana State Bar Association v. Indiana Real Estate Association, Inc., 191 N.E.2d 711 (Ind. 1963), the Indiana Supreme Court addressed the issue as to whether the selection, completion, and use of standardized forms prepared by lawyers in real estate transactions by brokers is prohibited as being the unauthorized practice of law. The Indiana Supreme Court held as follows:

Generally, it can be said that the filling in of blanks in legal instruments, prepared by attorneys, which require only the use of common knowledge regarding the information to be inserted in said blanks, and general knowledge regarding the legal consequences involved, does not constitute the practice of law. However, when the filling in of such blanks involves considerations of significant legal refinement, or the legal consequences of the act are of great significance to the parties involved, such practice may be restricted to members of the legal profession.

Id. at 715. In this case, the Indiana Supreme Court approved some forms for realtors to "fill in" and disapproved of other forms.

In approving the filling in of the blanks in a mortgage by bank employees, the Indiana Supreme Court stated:

The core element of practicing law is the giving of legal
advice to a client and the placing of oneself in the very sensitive relationship wherein the confidence of the client, and the management of his affairs, is left totally in the hands of the attorney. The undertaking to minister to the legal problems of another creates an attorney-client relationship without regard to whether the services are actually performed by the one so undertaking the responsibility or are delegated or subcontracted to another.


Following the analysis of the Indiana Supreme Court, the legal documents in question here appear to require more than the use of common knowledge to prepare. In drafting articles of incorporation, there are several options which can be involved. The selection of any one of these options is not a simple matter "which require(s) only the use of common knowledge regarding the information to be inserted in said blanks, and general knowledge regarding the legal consequences involved." In the Committee's opinion, the drafting of articles of incorporation involves "considerations of significant legal refinement, or the legal consequences of the act are of great significance to the parties involved," and thus would constitute the practice of law. The same is true for by-laws, leases, and promissory notes. Therefore, based upon a review of the Committee's previous opinions and the opinions of the Indiana Supreme Court, an accountant would be deemed to be engaged in the unauthorized practice of law by utilizing and completing these form legal documents without the supervision of an attorney.

As an additional consideration, it is particularly dangerous for a lawyer to provide such legal forms because the accountant may designate on the legal form that it was prepared by a lawyer or may inform the client that the form was prepared by a lawyer. Such actions would be in violation of the Rules of Professional Conduct. For example, a lawyer who furnishes bankruptcy forms to a non-lawyer for completion by such non-lawyer and allows his name to be put on the form is in violation of the Rules of Professional Conduct. Matter of Gillaspy, 640 N.E.2d 1054, 1055 (Ind. 1994).

CONCLUSION

Under the circumstances stated herein, the Committee is therefore of the opinion that the drafting and providing of such "fill in the blank" forms by an attorney to an accountant does constitute aiding in the unauthorized practice of law in violation of Rule 5.5(b) of the Indiana Rules of Professional Conduct to the extent that the accountant will be utilizing and completing such legal form documents for his clients without the strict supervision and advice of a licensed attorney.
The Legal Ethics Committee of the Indiana State Bar Association (the "Committee") has been requested to provide an advisory opinion with respect to the following facts and issues.

FACTS

During the past few years, a state agency has been reorganized raising ethical considerations for the staff attorneys. The state agency is empowered to investigate complaints filed by citizens of Indiana. Prior to November 1992, the state agency consisted of two distinct divisions: the Investigative Division and the Legal Division. These two divisions acted independently of one another with separate supervisory personnel. The Investigative Division employed investigators to investigate the complaints and would then recommend to the Director of the agency whether probable cause existed to support the complaint.

Upon a determination of probable cause, the Legal Division would assign a staff attorney to advocate the complainant's interests in court or in an administrative proceeding. The staff attorneys had little or no involvement with the investigators or the determination of probable cause other than to provide technical assistance regarding the legal standards to be applied to particular situations. Although individual attorneys were assigned to particular cases, the staff attorneys acted as a law firm with each attorney privy to the files and information of all cases and with open communication and assistance among the attorneys with respect to the preparation of cases. Moreover, the staff attorneys met on a regular basis to discuss legal developments and procedures affecting their cases.

Effective as of August 1994, following a reorganization, the role of the staff attorneys was greatly expanded. The Investigative Division was divided into three teams based on the nature and type of complaint. Each team was comprised of two staff attorneys, investigators, and other support staff. The Chief Staff Counsel supervised all three teams and the Legal Division. The investigators' role remained largely unchanged. However, the staff attorneys were more involved in particular investigations on their team, including review of the investigation report to assure that the proper legal standards were applied and participation in recommending a determination of probable cause. Following a review of the report and team recommendations, the Director transferred the cases to the Legal Division for prosecution of the complaint. With slight differences among the organization of each team, the staff attorneys were overall responsible for directing
investigators, reviewing their work product and prosecuting complaints.

Since October 1994, the staff attorneys have been assigned to investigate complaints themselves with their responsibilities for prosecuting complaints remaining unchanged. Thus, the staff attorneys are performing both the role of investigator and advocate for complaints. In addition, the staff attorneys must direct and supervise investigators and train new investigators. As a result, the staff attorneys are expected to prosecute cases on behalf of complainants on which their investigations are based. In addition, the state agency has discussed training non-attorney state agency personnel who are not pursuing a legal education to represent complainants in administrative hearings. If implemented, the staff attorneys would be responsible for training the non-attorney personnel.

**ISSUES**

1. Whether the staff attorneys of the Legal Division of a state administrative agency comprise a "firm" under the Indiana Rules of Professional Conduct, thus disqualifying all attorneys from representing a client when it is determined that any one attorney in the Legal Division would be prohibited from such representation.

2. Whether the Indiana Rules of Professional Conduct would prohibit a state administrative agency staff attorney from representing an individual who has filed a complaint as a client in either an agency administrative hearing or a circuit or superior court to determine whether the individual's rights had been violated, when:

   (a) the attorney has directed others in the investigation of the complaint pursuant to the agency's statutory mandate to conduct impartial investigations of complaints;

   (b) the attorney has reviewed the final investigative report, investigative work file, and other work product of the investigation and made comments and recommendations regarding them which resulted in a determination by the Director of the agency that there was probable cause to believe the complained of practice had occurred;
(c) the attorney has investigated the complaint herself or himself and recommended to the Director a finding of probable cause;

(d) another agency staff attorney has participated in the investigation of the complaint as described in (a), (b), and (c); and

(e) another agency staff attorney has participated in the investigation of the complaint and might, therefore, be required to testify as a witness in the hearing or trial.

3. Whether the Indiana Rules of Professional Conduct prohibit a staff attorney of a state agency from training a non-attorney staff member to represent complainants in an adjudicatory administrative proceeding.

4. Whether the representation of a complainant by a non-attorney staff member of a state agency in an adjudicatory administrative proceeding constitutes the unauthorized practice of law.

DISCUSSION

Rule 1.10 of the Indiana Rules of Professional Conduct (the "Rules") provides as follows:

(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.

The key to the application of this rule is the definition of a "firm." In the Definitions section of the Rules, a "firm" is defined as "a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization and lawyers employed in a legal services organization."

Further, the Comment to Rule 1.10 reads as follows:

Whether two or more lawyers constitute a firm within this definition 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. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved.

Based on the Comment to Rule 1.10 and the Definition section, "firm" has been given a broad definition for the purposes of the Rules.

The Comment to Rule 1.10 is instructive in demonstrating that to be deemed a "firm" for purposes of the Rules it is not required that the lawyers be formally associated. A group of lawyers practicing law in a legal department of a state agency could qualify as a "firm" provided they at least conduct themselves as a firm. Most important in this consideration is the manner in which the legal department functions, not the name or type of organization or association.

The rationale for imputed disqualification for members of a firm under Rule 1.10(a) is based upon the presumption that client confidences are shared among members of a firm and these confidences should be protected. Moreover, imputed disqualification gives effect to the principle and duty of loyalty owed to the client by preventing representation of an opposing party by a member of a firm. To protect the integrity of the rule of imputed disqualification, the determination of whether a legal division or department constitutes a firm should examine the degree to which confidential client information is shared among the members of the division or department. Where such client confidences are shared among attorneys in a division or department, the division or department should be deemed to be a "firm" based upon the underlying rationale of imputed disqualification.

The Indiana Supreme Court recently addressed for the first time the issue of what constitutes a "firm." In Matter of Sexson, 613 N.E.2d 841, 843 (Ind. 1993), the Court noted that the definition of "firm" is a question of fact. There are several crucial factors to examine in this determination: (1) the level of association, (2) the appearance of the association to the public, (3) any specific agreements, (4) access to confidential information, and (5) the purpose of the rule. Id. The Court concluded that where the attorneys "conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules." Id.
In this case, the attorneys were held to be a "firm" as they shared an office, phone lines, office personnel, used common letterhead, and had access to each other's confidential information. Id.

In the facts presented to the Committee, the Legal Division of the state agency acts as a "firm." Each attorney has access to information on all cases, including confidential client information. In addition, the attorneys communicate openly with one another and assist one another in preparation of the cases. Moreover, the Legal Division holds regular meetings to discuss legal developments and procedures affecting their cases. The staff attorneys are conducting themselves as a firm. Moreover, the purpose of the rule of imputed disqualification and the protection of client confidences mandates that the Legal Division be treated as a "firm." The definition of "firm" is broad enough to include such an organization. As the legal division of a state organization, the staff attorneys constitute a "firm" for purposes of the Rules.

The second issue raises numerous questions. However, the issues presented in (a), (b) and (d) do not raise ethical concerns under the Rules. The types of activities discussed in (a), (b) and (d) are those relating to directing others in the investigation of a complaint, reviewing the investigation file and the participation of other staff attorneys in this process. These activities mirror the discovery process and represent the general role of an attorney in litigation. As a result, the performance of these functions by a staff attorney does not raise ethical concerns.

However, issues (c) and (e) involve ethical considerations under Rule 3.7. Rule 3.7 of the Rules provides as follows:

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) the testimony related to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.
The rationale underlying Rule 3.7 relates largely to the problems arising from the dual role of a lawyer acting as an advocate and witness such as the possibility of the appearance of impropriety to the public who may suspect the attorney of distorting the truth to further his case and prejudice to the opposing party by inhibiting cross-examination of the lawyer-witness. Opinion No. 6 of 1986. Furthermore, the Comment to Rule 3.7 provides that the purpose for this rule is to prevent prejudice to the opposing party where the roles of witness and advocate are combined. The Comment reads as follows:

A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

The rule that a lawyer should not combine the roles of witness and advocate is designed to avoid the public perception that the lawyer is a more credible witness or distorting the truth for the sake of his client.

Based on the purpose of the rule and the prevention of prejudice to the opposing party, a problem might arise for a staff attorney where the staff attorney acted both as the sole investigator and the advocate on a case. Following the organizational changes in the state agency in October 1994, the staff attorneys have been assigned to investigate complaints as well as prosecute complaints. Where the staff attorney investigates and prosecutes the same complaint, a conflict would exist under Rule 3.7 if the staff attorney investigating the complaint would also be a necessary witness unless the staff attorney's testimony would relate to an uncontested issue, the nature and value of legal services rendered in the case, or the disqualification of the staff attorney would work substantial hardship on the complainant. Based on the nature of the investigation and complaints handled by this state agency, a staff attorney would be permitted to act as both witness and advocate only where the staff attorney's testimony related to an uncontested issue as agreed to by the parties to the litigation or where disqualification would work a substantial hardship on the complainant.

The Committee is not a fact-finding body and, therefore, cannot conclusively determine whether a "substantial hardship" exists in any given situation. Unpublished Opinion U1 of 1983. However, the Committee will provide some guidance in this determination.
In an analysis of former rule DR 5-102(B)(4), containing similar language to Rule 3.7(a)(3), the Committee has previously stated that the pecuniary hardship involved in retaining another firm to prosecute a case does not alone satisfy the requirement of "substantial hardship." Unpublished Opinion No. U1 of 1983. However, ABA Informal Opinion 339 (Jan. 31, 1975) stated:

Despite these considerations, exceptional situations may arise when these disadvantages to the client would clearly be outweighed by the real hardship to the client of being compelled to retain other counsel in the particular case. For example, where a complex suit has been in preparation over a long period of time and a development which could not be anticipated makes the lawyer's testimony essential, it would be manifestly unfair to the client to be compelled to seek new trial counsel at substantial additional expense and perhaps to have to seek a delay of the trial.

Such an exceptional circumstance may be created in this situation where the Legal Division of this state agency has been specifically created to aid individuals in prosecuting certain complaints. The disqualification of a staff attorney could qualify as "substantial hardship."

Note, however, that the Comment to Rule 3.7 states that in determining the effect of any disqualification of an attorney "[i]t is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness." In this situation, it would be relatively easy to foresee that a staff attorney would probably be a witness where the staff attorney investigates as well as prosecutes the same complaint. As a result, this factor may be considered in the determination of whether the complainant will suffer substantial hardship. In Jackson v. Russell, 498 N.E.2d 22 (Ind. App. 1986), the court stated that the "hardship exception is not meant for a case where a possible disqualification was visible early on, but the parties went right on increasing the helpless dependence of client upon lawyer." Thus, unless the staff attorneys and the Legal Division can satisfy themselves that the "substantial hardships" exception applies, the easiest solution for the state agency to avoid any potential conflict with Rule 3.7(a) would be to have different persons investigate and advocate the same complaint.

Nevertheless, a potential conflict could arise under Rule 3.7(b) where different staff attorneys investigate and advocate the same complaint. As described in issue one, the Legal Division of the state agency is considered a "firm" for purposes of the Rules. Rule 3.7(b) would allow one staff attorney to advocate a complaint.
where another staff attorney in the state agency is likely to be called as a witness in the same trial unless precluded from doing so by Rule 1.7 or Rule 1.9. The Comment further provides that where the conflicts rules disqualify a lawyer from acting as advocate and witness, then Rule 1.10, the imputed disqualification rule, disqualifies the entire firm. However, Rule 1.10 would permit the affected complainant "to waive imputed disqualification of the firm when the firm reasonably believes the representation will not be adversely affected by the conflict." Annotated Model Rules of Professional Conduct, 2d ed., p. 395 (1992).

As the state agency is charged with the responsibility for prosecuting certain complaints as a service to the public, disqualification of the entire Legal Division of the state agency would create hardship for complainants. A complainant would be forced to hire private counsel to prosecute his complaint or discontinue the prosecution of the complaint. As a result, the best solution for the Legal Division of the state agency to avoid potential conflicts under Rule 3.7 and disqualification from prosecuting a complaint would be to separate the investigation and prosecution functions. The state agency may be advised not to require staff attorneys to investigate complaints. Where the staff attorneys have not investigated any complaints, the staff attorneys will not qualify as a necessary witness and will avoid any potential conflict under Rule 3.7. If the staff attorneys continue to investigate complaints, the Legal Division should pay close attention to potential conflicts arising under Rule 3.7.

Issues three and four will be addressed together. Rule 5.5(b) of the Rules provides 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.

Thus, in issue three, the staff attorneys would be prohibited from training a non-attorney staff member to represent complainants in an adjudicatory administrative proceeding if such representation constitutes the unauthorized practice of law.

The Comment to the Rule states that the definition of the practice of law is established by state law and varies from one jurisdiction to another. The purpose for the rule is to protect the public from the rendition of legal services by unqualified persons who are not subject to discipline by the judiciary system. However, the Rule does not prohibit lawyers from providing
instruction to nonlawyers "whose employment requires knowledge of law"; for example, persons employed in government agencies. Rule 5.5, Comment.

Lay practice before state administrative agencies is one area of frequent controversy. The Committee has not yet addressed this issue. The key factor in determining whether lay practice before a state administrative agency qualifies as the unauthorized practice of law is (1) whether the state legislature has authorized such a practice, and (2) whether the state courts have held that the state legislature has no power to regulate the practice of law and any such legislation is an encroachment on the exclusive power of the judiciary to regulate the practice of law. Note, Representation of Clients Before Administrative Agencies: Authorized or Unauthorized Practice of Law? 15 Val. U.L.Rev. 569 (1981).

While a state administrative agency hearing resembles a courtroom trial, the Indiana legislature has provided that a complainant's case before this state agency may be presented by the complainant himself, a staff attorney, a private attorney, a legal intern, unless the complainant designates otherwise. 910 IAC 1-8-1(B). Based on this regulatory authority, provided the complainant designates that he desires assistance by a non-attorney, it appears a non-attorney may represent a complainant before this state agency. The Indiana Administrative Orders and Procedures Act provides no contrary authority to this authorization.

However, despite this regulatory authority, the question remains whether the state courts will disregard or strike down this statute as impinging upon inherent judicial powers. Note, Representation of Clients Before Administrative Agencies: Authorized or Unauthorized Practice of Law? 15 Val. U.L.Rev. 569, 604 (1981). It is questionable whether a lay practitioner should rely on state law for authorization to appear before state administrative agencies. Id. However, as the Committee has previously stated, it is not within the scope of our authority to find that the state legislature or state courts do not have the authority to decide these questions or that the state legislature or state courts have determined this question incorrectly. Unpublished Opinion 2 of 1979. Moreover, the Committee has previously stated that it believes "an attorney should generally be entitled to accept rules of procedure adopted by administrative agencies as lawful for the purpose of determining ethical conduct." Id.

Therefore, based solely on this regulatory authorization and a review of the Rule and Comment, the representation of a
complainant by a non-attorney staff member of this state agency in an administrative proceeding does not constitute the unauthorized practice of law where the complainant designates a desire for the assistance of a non-attorney. As a result, a staff attorney of the state agency would be permitted to train a non-attorney staff member to represent complainants in an administrative hearing under this particular fact situation.

CONCLUSION

In order to preserve the integrity of the duty of loyalty and the protection of client confidences, the Rules mandate that the Legal Division of this state agency constitutes a "firm". The staff attorneys conduct their legal practice as if the Legal Division were a "firm.

With respect to the issue of staff attorneys acting as both an investigator and an advocate, the potential conflict exists that a staff attorney may qualify as both a necessary witness and an advocate. Unless a "substantial hardship" is shown, the staff attorney cannot assume both the role of witness and advocate due to the prejudices involved. However, it is the opinion of the Committee that because the staff attorneys and the Legal Division of the state agency could reasonably foresee that the staff attorney may become a necessary witness where the staff attorney investigates as well as prosecutes the same complaint, the "substantial hardship" exception should not apply. Therefore, due to Rule 3.7 and the possibility of imputed disqualification, the state agency is advised to avoid all such potential conflicts and separate the investigation and advocacy functions of its staff attorneys.

The Committee believes that lay practice before a state administrative agency does not constitute the unauthorized practice of law based upon the regulatory authority permitting the Complainant to choose representation by a non-attorney. However, the Committee provides no opinion as to the validity of this regulation. The Indiana courts may hold that the state legislature has no authority to enact this statute. Nevertheless, in reliance on this rule of procedure adopted by the state administrative agency, the staff attorneys may train a non-attorney staff member to represent a complainant in an administrative proceeding.