Nebraska Ethics Advisory Opinion for Lawyers
No. 76-7

A PRACTICING ATTORNEY MAY NOT ETHICALLY FORM A CORPORATION WITH OTHER INDIVIDUALS TO MARKET ITS SERVICES TO PROFESSIONAL ATHLETES WHICH WOULD INCLUDE CONTRACT NEGOTIATION, FINANCIAL PLANNING, ESTATE PLANNING, TAX RETURN PREPARATION, BUDGETING, PERSONAL APPEARANCES, PRODUCT ENDORSEMENTS AND OTHER MANAGEMENT FUNCTIONS, THE LEGAL OR QUASI-LEGAL ASPECTS OF WHICH WOULD BE HANDLED BY THE ATTORNEY FROM HIS PRIVATE LAW OFFICE.

You have requested an opinion of The Advisory Committee of the Nebraska State Bar Association concerning the propriety of an attorney entering into a business relationship as set forth below while continuing in the private practice of law.

FACTS

An attorney, who is presently in the private practice of law, desires to form, by incorporation, a company with several other individuals the purpose of which would be to enter into the field of sport commodity marketing. The company would provide and market its services to professional athletes. These services would include contract negotiations, financial planning, estate planning, tax return preparation, budgeting, personal appearances, product endorsements, and other management functions. The company would advertise its services primarily through a direct mail campaign and would also promote its activities through the use of personal solicitation.

The attorney would direct and provide all necessary legal and quasi-legal activities as they were encountered in the management of the athlete's affairs. In addition to his duties with the company, the attorney would continue to practice law privately. All company related

activities would be conducted from his private law office.

APPLICATION DISCIPLINARY RULES

DR 2-101 Publicity in General

DR 2-102 Professional Notices, Letterheads, offices and Law Lists

DR 2-103 Recommendation of Professional Employment

DR 3-101 Aiding Unauthorized Practice of Law

DR 3-102 Dividing Legal Fees with a Non-Lawyer

DR 3-103 Forming a Partnership with a Non-Lawyer.

QUESTIONS PRESENTED

(1) Is it permissible for the attorney to be associated with the sport management company and to continue in the private practice of law? To what extent is such participation, if any, permissible; (director, officer, employee, shareholder)?

(2) May company advertising and solicitation refer to the attorney and/or his qualifications? May it refer to a non-descript "legal staff"?

(3) Is it permissible for the attorney to remain separate and apart from the company and yet to make an arrangement with the company which, in effect, ties the company to the attorney as exclusive legal services representative for the company and its clients? May the company solicit clients and then retain the attorney to perform the legal and quasi-legal management functions for these clients?

DISCUSSION

The questions presented above cover a broad range of ethical considerations. While the question of a practicing attorney participating in a sport management company

as a legal consultant has never in the past been presented to this committee nor to the committee on Professional Ethics of the American Bar Association, these committees have, many times, considered the problem of a practicing attorney who wishes to also engage in another business. A general statement of the problem in found in Legal Ethics by Henry S. Drinker at page 221:

> ". . .There is, of course, nothing in the Canons to prevent this (a practicing lawyer carrying on another business) as to an occupation entirely distinct from and unrelated to his law practice. Thus, no one would dispute the right of a lawyer to be a teacher or a violinist or doctor or a farmer, or to sell rare postage stamps, provided he in no way used such occupation to advertise, or as a feeder to his law practice . . . . Where, however, the second occupation, although theoretically and professedly distinct, is one closely related to the practice of law, and one which normally involves the solution of what are essentially legal problems, it is inevitable that, in conducting it, the lawyer will be confronted with situations where, if not technically, at least in substance, he will violate the spirit of the Canons, particularly that precluding advertising and solicitation. The likelihood of this is the greatest when the collateral business is one which, when engaged in by a lawyer, constitutes the practice of law, and when engaged in from his law office. . . ."

This Committee has stated in its Formal Opinion No. 72-4 relating to an attorney engaging both in general practice and in the operation of an insurance investigation and adjustment bureau (citing Formal Opinion No. 57 of the American Bar Association Committee on Professional Ethics):

> ". . . It is not necessarily improper for an attorney to engage in a business; but

> impropriety arises when the business is of such a nature or is conducted in such a manner as to be inconsistent with the lawyers duties as a member of the Bar. Such an inconsistency arises when the business is one that will readily lend itself as a means for procuring professional unemployment for him, is such that it can be used as a cloak for indirect solicitation on his behalf, or is of a nature that, if handled by a lawyer, would be regarded as the practice of law. . . . Some businesses in which laymen engage are so closely associated with the practice of law that their solicitation of business may readily become a means of indirect solicitation of business for any lawyer that is associated with them. . . . It is difficult to conceive how a lawyer could conduct a claim adjustment bureau, a company for the organization of corporations, or a bureau for securing income tax refunds, without practicing law. In performing the services which he would ordinarily render in connection with any of these activities, his professional skill and responsibility as a lawyer would be engaged. The fact that a layman can lawfully render certain service does not necessarily mean that it would not be professional service when rendered by a lawyer. On the contrary, lawyers are frequently called upon to render such service for the very reason that it can be better rendered by a lawyer. . . ."

The American Bar Association Committee on Ethics has concluded that the following occupations are so closely related to the practice of law that a practicing attorney cannot ethically engage in them as a second occupation:

> "Opinion 75 (March 19, 1932) - Insurance claims adjuster, Opinion 31 (March 2, 1931) - A corporation service business, Opinion 225 (July 12, 1941) - A collection agency,

> Opinion 234 (February 21, 1942) - An income preparation service, Opinion 269 (June 21, 1945) - A lawyer may not, at the same time, practice law and engage in the practice of accounting in partnership with a non-lawyer, Opinion 272 (October 25, 1946) - A practicing lawyer may not, at the same time, hold himself out as a lawyer and as a CPA even from different office locations."

A summary of the criteria developed over the years by the ABA Committee to be used in determining whether a particular second occupation is ethically permissible is set forth in ABA Formal Decision No. 775 (February 15, 1965). A practicing attorney will not necessarily be in violation of the Code of Professional Responsibility if the second occupation:

> 1 . Is clearly not necessarily the practice of law when conducted by a lawyer, and
>
> 2. Can be conducted in accordance with and so as not to violate the (Code of Professional Responsibility), and
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> 3. Is not used or engaged in in such a manner as to directly or indirectly advertise or solicit legal matters for the lawyer as a lawyer, and
>
> 4. If it will not "inevitably serve" as a feeder to the lawyers law practice, and
>
> 5. If it is not conducted in or from a lawyer's law office, except in cases where the volume of the law practice and business is so small that separate quarters for either is not economically feasible and where, even in such cases, there is no indication on shingle, office, door, letterhead or otherwise that the lawyer engages in any activity therein except the practice of law.

This Committee has adopted in general the foregoing criteria in its Formal Opinions Nos. 68-3, 72-4, 72-5, 74-3, and 75-5.

It is the opinion of this Committee that, under the criteria set forth above, the participation by a practicing attorney in the sports management company, as proposed, is prohibited by the Code of Professional Responsibility. First, the attorney's express function in the company will be to render legal advice to company clients. Clearly the lawyer's duties will constitute the practice of law. Second the company proposes to advertise and solicit for clientele. Such advertising would constitute indirect advertising and solicitation of legal matters for the benefit of the attorney and his legal practice. Advertising and solicitation, whether direct or indirect is prohibited by Disciplinary Rules 2-101 and 2-102. Third, it appears to this Committee that the proposed sport management company would "inevitably serve" to feed the law practice of the attorney. Fourth, the attorney proposes to conduct the business of sport management from his present law office. Such an a arrangement would create the appearance of a feeder business and improper solicitation. In summary, it is the view of this Committee that the proposed company and the practice of law are so closely related that a practicing attorney could not engage in the sports management business without violating the provisions of the Code of Professional Responsibility.

The extent of participation by the attorney in the company would not alter the Committee's conclusion as stated herein. It is obvious that as a director, officer or employee of the company, the attorney would be in a position to feed his private law practice and, as proposed, the company would do so. In addition, the attorney's private practice would benefit from the sports management company's solicitation and advertising.

In its Formal Opinion No. 72-4, this Committee considered the propriety of a practicing attorney engaging also in the insurance adjusting business where the business was incorporated and where the attorney was a shareholder in the business. The attorney, in that

case, proposed to withdraw as an officer or director of the corporation. The Committee held that the incorporation of such a business would not remove the objectionable features of the situation since the attorney would remain an owner of the second business. The same reasoning can be applied to the present case. As a shareholder of the sports management company the attorney would be in a position to utilize the business as a feeder to and as a means of utilizing indirect solicitation for the benefit of his private practice.

The factual situation posed does not indicate whether the other individuals involved in the formation of the company are attorneys or laymen. DR 3-103 provides that, ". . . A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law. . . ." BC 3-8 states in part, ". . . Since a lawyer should not aid or encourage a layman to practice law, he should not practice law in association with a layman or otherwise share legal fees with a layman. . . ." Under these provisions of the Code the attorney would be in violation of the Code if he formed a corporation or partnership with laymen to provide legal services to its clients. Since the sports management company, as proposed, would provide legal service to its clients it would be impermissible under DR 3-103 and EC 3-8 for the attorney to participate in such a company if the other individuals involved are laymen.

In response to the second question posed, any advertising or solicitation by the sports management company which refers to the attorney by name and/or to his qualifications as an attorney would directly violate the provisions of DR 2-101 of the Code of Professional Responsibility. You have also asked whether the company could, in its advertising, make reference to a non-descript "legal staff". It should first be noted that this Committee can only consider questions concerning professional ethics of members of the legal profession. It cannot consider questions of law. Assuming that no attorney was participating in the company, no issue of legal ethics would be presented even if the company advertised itself as having a legal staff. While such an

advertisement would certainly be misleading to the public this Committee would have no authority to prohibit the advertisement's use as no member of the legal profession would be involved. In the event, however, that an attorney became involved in the situation by accepting referrals from the company using the advertisement or otherwise, a question of professional conduct would be presented. In such a case this Committee would have the jurisdiction to rule on the propriety of the attorney's participation. It is the opinion of this Committee that any attorney accepting referrals from a company advertising a non-descript "legal staff" would thereby be benefiting from the company's solicitation of clients and by accepting such referrals would be in violation of the provisions of the Code of Ethics against indirect advertising or solicitation.

Finally, you have asked what arrangements are permissible to "tie" the management company to the attorney so that he will be the exclusive legal services representative for the company and its clients. An attorney is not prohibited, under the Code, from contracting with a client who has requested his legal service to provide the requested service. In the present case there would be no unethical conduct if the attorney would contract with the company to provide legal services for the company itself. In such a case the company would be the client and the arrangement would amount to nothing more than a common retainer. Where, however, the attorney desired to enter into an agreement with the company whereby the company would be bound to refer not only its own legal work but that of its clients to the attorney, the Code of Ethics would be violated.

Disciplinary Rule 2-103 states in part:

> (A) A lawyer shall not recommend employment, as a private practitioner, of himself, his partner or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer.
>
> (B) Except as permitted under DR 2-

> 103 (C) a lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having had a recommendation resulting in his employment by a client.
>
> (C) A lawyer shall not request a person or organization to recommend employment, as a private practitioner, of himself, his partner, or associate . . . .
>
> (D) A lawyer shall not knowingly assist a person or organization that recommends, furnishes or pays for legal services to promote the use of his services or those of his partners or associates . . . .
>
> (E) A lawyer shall not accept employment when he knows or it is obvious that the person who seeks his services does so as a result of conduct prohibited under this Disciplinary Rule.

This rule makes it clear that an attorney is prohibited from recommending his employment as a private practitioner both personally or indirectly through another person or organization. The attorney cannot request a person or organization to recommend his employment nor can the attorney assist any person or organization in the promotion of the use of his services.

It is the opinion of this Committee that any arrangement between the company and the attorney whereby the company agreed to refer its clientele to the attorney would violate the provisions of DR 2-103 (A), (C), (D) and (E). In addition, DR 2-103 (B) prohibits the payment of compensation to the company by the attorney for clients referred and DR 3-102 prohibits the sharing or splitting of legal fees for services rendered by the attorney with the company. The attorney may, however, accept referrals from the company provided such referrals are not in conflict with DR 2-103 and DR

2-101 of the Code.

It should be noted that the attorney must be very careful to avoid any appearance of a tacit agreement for client referrals from the sports management company since he has participated in the company's formation. The burden will be upon the attorney to refuse the referral of any employment if the attorney knows or has reason to know that the referral is being made as a result of any conduct prohibited under DR 2-103.

CONCLUSION

Answers to the questions presented are as follows:

1. Not permissible to any extent.

2. Not permissible.

3. It is permissible for the attorney to enter into a contract amounting to a retainer with the company whereby the attorney provides the company with legal service as to company affairs only. It is not permissible for the attorney and the company to enter into an agreement whereby the company agrees to exclusively refer its clientele to the attorney. The attorney may accept referrals of company clientele conditioned, however, upon complete compliance with the provisions of DR 2-103 and DR 2-101. The attorney may not, under any circumstances, enter into a fee splitting arrangement with the company for referrals made nor should he in any way compensate the company for such referrals.