

Ethics Informational Packet

Ancillary & Other Business Arrangements

Courtesy of
The Florida Bar
Ethics Department

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Ethics Alert: Business Arrangements with Nonlawyers

Nonlawyers frequently propose to go into business with lawyers or to become part of a lawyer's practice. Lawyers should be wary of these proposals, as nonlawyers are not subject to the same professional obligations as lawyers and are often unaware of them, and many arrangements proposed by nonlawyers violate ethics rules and may subject the lawyer to discipline (see Rules Regulating The Florida Bar.) Nonlawyers have proposed a variety of agreements, even offering to hire lawyers as "in-house counsel" to provide services to the nonlawyer's customers.

Florida Bar members:

- Cannot pay a referral fee or give anything of value to a nonlawyer for referring clients to the lawyer. [Rule 4-7.17(b)]
- Cannot directly or indirectly divide fees with a nonlawyer. [Rule 4-5.4(a)]
- Cannot assist in the unauthorized practice of law by:
 - providing legal services for a customer or client of a nonlawyer company while employed as in-house counsel for a nonlawyer company;
 - forming a company with a nonlawyer to perform services if any of the services are the practice of law; or
 - assisting a nonlawyer individual or company in providing services that the individual or company is not authorized to provide or are otherwise illegal. [Rule 4-5.5(a)]
- Cannot assist a nonlawyer in violating the provisions of laws governing the nonlawyer's business, for example the Foreclosure Rescue Act, Section 501.1377, Florida Statutes in the case of real estate professionals. [Rule 4-8.4(d)]
- Cannot directly contact clients to offer representation (including by telephone or electronic means that include real-time communication face-to-face such as video telephone or video conference) and cannot allow someone else to directly contact clients on the lawyer's behalf. [Rules 4- 7.18(a) and 4-8.4(a)]
- Cannot accept referrals from nonlawyers acting in the guise of a qualifying provider such as a lawyer referral service, directory, pooled advertising program, or similar service (legitimate qualifying providers must comply with a rule which requires all advertisements and contact with prospective clients to be in compliance with the attorney advertising rules, in addition to other requirements) [Rule 4-7.22]
- Must have a direct relationship with clients who hire the lawyer for representation. [Rules 4-1.1, 4-1.2 and 4-1.4]
- Cannot allow a nonlawyer to choose a lawyer for a client or direct a lawyer's representation of a client. [Rules 4-1.1, 4- 1.2, 4-1.4, and 4-5.5(a)]
- Cannot allow a nonlawyer who pays for a lawyer to represent another to direct the lawyer or affect the lawyer's independent professional judgment in providing legal services to the client. [Rules 4-1.8(f) and 4-5.4(d)]
- Cannot allow the lawyer's trust account to be used to hold funds when the funds are not being held in connection with legal representation. [Rule 5-1.1(a)(1)]

Several ethics opinions, Opinions **92-3** and **95-1** in particular, discuss similar proposals and the ethics problems that arise when lawyers enter business arrangements with nonlawyers.

While this ethics alert cannot address every possible area of concern, there are some issues common to certain areas of practice.

Foreclosure Rescue/Loan Modification: State statutes and federal rules impose restrictions on certain nonlawyer industries. Although The Florida Bar cannot provide legal advice, lawyers should be aware of and comply with the requirements of state and federal law. Regarding foreclosure rescue and/or loan modification services, state statutes prohibit accepting advance fees and require registration of service providers. There are exceptions for lawyers, but only under specific circumstances. *See* Florida Statutes, Sections **501.1377** and **494.00115(1)(d)**. The Federal Trade Commission has adopted a rule on Mortgage Assistance Relief Services (MARS). The rule bans providers of mortgage foreclosure rescue and loan modification services from collecting fees *until* homeowners accept a written offer from their lender or servicer. There is an exception for lawyers who meet specific requirements **and** who place their fees into a trust account. This rule effectively bans nonrefundable fees in Florida in these cases, because nonrefundable fees cannot be placed into a trust account under the Rules Regulating The Florida Bar. *See* Rule 5-1.1(a)(1) and Florida Ethics Opinion **93-2**. This alert does not address whether a lawyer is subject to the registration and licensing provisions of Chapter 494. Lawyers with questions about whether they are subject to an exemption should contact the Office of Financial Regulation at 850-410-9896. Information is also available on the **Office of Financial Regulation website**.

Bankruptcy: It constitutes the unlicensed practice of law for a nonlawyer to prepare bankruptcy forms for another. *The Florida Bar v. Catarcio*, 709 So. 2d 96 (Fla. 1998). This includes the petition and any necessary schedules. A nonlawyer corporation should not determine whether it is necessary for an individual to file for bankruptcy. However, a nonlawyer may sell blank forms necessary for a bankruptcy and complete the forms with information provided in writing by the individual. *The Florida Bar v. Brumbaugh*, 355 So. 2d 1186 (Fla. 1978). It also constitutes the unlicensed practice of law for a nonlawyer to represent someone in bankruptcy court. *The Florida Bar v. Kaufman*, 452 So. 2d 526 (Fla. 1984).

Probate and Living Trusts: The Supreme Court of Florida has held that it constitutes the unlicensed practice of law for a nonlawyer to draft a living trust and related documents for another. In *The Florida Bar Re Advisory Opinion - Nonlawyer Preparation of Living Trusts*, 613 So.2d 426 (Fla. 1992) the Court indicated that the assembly, drafting, execution and funding of living trust documents constitute the practice of law, but the mere gathering of necessary information for a living trust does not constitute the practice of law. The case also addressed potential conflicts of interest and concerns regarding non-lawyers influence over an attorney's independent professional judgment. If the lawyer is employed by the corporation selling the living trust rather than by the client, then the lawyer's duty of loyalty to the client could be compromised. Additionally, in *The Florida Bar v. American Senior Citizen Alliance, Inc.*, 689 So.2d 255 the Court found that a lay company engaged in the unlicensed practice of law because the company answered legal questions, determined a living trust was appropriate for particular people based on their circumstances, drafted, executed and funded living trusts. Lawyers were employed as in-house counsel to provide legal services and reviewed the completed documents.

This alert does not address every potential problem or concern. Lawyers should not assume that conduct is permissible merely because it is not listed above. If you are a Florida Bar member

with specific questions about your own conduct related to this type of situation, you should contact The Florida Bar Ethics Hotline at 800-235-8619.

This alert also does not address the issue of what conduct by nonlawyers is permissible. Questions regarding whether conduct of nonlawyers constitutes the unlicensed practice of law should be directed to The Florida Bar Unlicensed Practice of Law Department at 850-561-5840.

FLORIDA BAR ETHICS OPINION
OPINION 02-8
January 16, 2004

Advisory ethics opinions are not binding.

A lawyer may not enter into a referral arrangement with a nonlawyer who is a securities dealer to refer the lawyer's clients to the securities dealer, who would then pay the lawyer a portion of the advisory fee for the clients referred, unless the referral is in the best interests of the client, the lawyer makes full disclosure to and obtains the informed consent of the client in writing, and the client receives the benefit of the referral fee. A lawyer may refer a client to the lawyer's own ancillary business to provide financial services to the client only if the referral is in the client's best interests and the lawyer follows the rule on business transactions with a client. If the services to be provided by the lawyer's ancillary business are nonlegal, the lawyer should advise the client that the protections of the attorney-client relationship will not apply to the nonlegal services. The lawyer should not use the ancillary business as a "feeder" to the law firm.

RPC: 4-1.7(b), 4-1.8(a), 4-5.7, 4-7.4(a) [*See* current 4-7.18(a)]

Opinions: 60-26, 70-13, 73-1, 78-14, 79-3, 88-15

The Professional Ethics Committee has received an inquiry from a member of the Florida Bar who is contemplating entering into a referral arrangement with a nonlawyer. The inquiring attorney has been approached by a securities dealer who would like to pay members of the Florida Bar a portion of any advisory fee generated in exchange for referring clients to a specified financial advisor. The attorney would also have the option of taking an examination to become an investment advisor. The attorney could then become actively involved on the client's account and be eligible to share in an advisory fee based upon the amount of work the attorney performs on the client's account.

This inquiry raises two questions. The first question presented is whether an attorney can accept a referral fee from a nonlawyer, such as a financial advisor. Two prior opinions issued by this Committee apply to this type of an arrangement. Ethics Opinion 60-26 does not disapprove of the payment of a fee to a lawyer provided the following three conditions are satisfied: (1) the lawyer is satisfied after conducting an independent investigation that the investment or referral is a proper one under all of the circumstances; (2) the lawyer makes a full disclosure to the client of all the facts, including the fact of a prospective payment of a fee to him/her by the investment company; and (3) the lawyer secures his/her client's consent in writing to such a payment.

In addition, a lawyer must comply with the requirements of Ethics Opinion 70-13 that discusses the payment of fees to attorneys by financial institutions. In that opinion, the Committee reaffirmed Opinion 60-26 but placed an additional requirement that the lawyer pass on the benefit to the client or credit the client against fees ordinarily charged by the attorney.

The second issue is whether an attorney can ethically refer a client to an ancillary business in which the attorney has a financial interest and will provide the client nonlegal services. Presuming that the ancillary business is more than an attempt to circumvent the restrictions on referral arrangements as outlined in Ethics Opinion 60-26 and 70-13, nothing in

the Rules Regulating the Florida Bar creates a per se prohibition for an attorney to refer a client to a bona fide ancillary business in which the attorney has an interest.

Recently, the Florida Bar has promulgated Rule 4-5.7 that speaks to the issue of responsibilities regarding nonlegal services. Rule 4-5.7 provides the following:

(a) Services Not Distinct From Legal Services. A lawyer who provides nonlegal services to a recipient that are not distinct from legal services provided to that recipient is subject to the Rules Regulating the Florida Bar with respect to the provision of both legal and nonlegal services.

(b) Services Distinct From Legal Services. A lawyer who provides nonlegal services to a recipient that are distinct from any legal services provided to the recipient is subject to the Rules Regulating The Florida Bar with respect to the nonlegal services if the lawyer knows or reasonably should know that the recipient might believe that the recipient is receiving the protection of the attorney client-lawyer relationship.

(c) Services by Nonlegal Entity. A lawyer who is an owner, controlling party, employee, agent, or otherwise is affiliated with an entity providing nonlegal services to a recipient is subject to the Rules Regulating The Florida Bar with respect to the nonlegal services if the lawyer knows or reasonably should know that the recipient might believe that the recipient is receiving the protection of the client-lawyer relationship.

(d) Effect of Disclosure of Nature of Service. Subdivision (b) or (c) does not apply if the lawyer makes reasonable efforts to avoid any misunderstanding by the recipient receiving nonlegal services. Those efforts must include advising recipient, preferably in writing, that the services are not legal services and that the protection of a client -lawyer relationship does not exist with respect to the provision of nonlegal services to the recipient.

As indicated by Rule 4-5.7, an attorney who has a financial interest, owns an interest or is otherwise affiliated with a nonlegal entity would be subject to all of the Rules Regulating The Florida Bar, unless the activities are distinct from legal services. An attorney should advise the recipient of nonlegal services in accordance with Rule 4-5.7(d) to avoid any misunderstanding that the services being provided are legal services. Whether or not the services being provided by the inquirer are considered nonlegal services is a factual question beyond the scope of an ethics opinion.

Because the inquirer intends to refer legal clients to an ancillary business, all activity related to the referral will be subject to the Rules Regulating the Florida Bar. Rule 4-1.7(b) requires that an attorney not allow his or her own personal interest to affect advice given to a client. Any recommendation to a client to use a particular business or service must be in the client's best interest. Assuming the recommendation to use an attorney's ancillary business is in the best interest of a client, Rule 4-1.8(a) requires the attorney to comply with the following:

(a) Business Transactions With or Acquiring Interest Adverse to Client.

A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, except a lien granted by law to secure a lawyer's fee or expenses, unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

Moreover, some activities of a nonlegal ancillary business will also be subject to the Rules of Professional Conduct. Rule 4-7.4(a) [*See* current Rule 4-7.18(a)] is instructive and provides:

(a) Solicitation. Except as provided in subdivision (b) of this rule, a lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. *A lawyer shall not permit employees or agents of the lawyer to solicit in the lawyer's behalf. A lawyer shall not enter into an agreement for, charge, or collect a fee for professional employment obtained in violation of this rule.* The term "solicit" includes contact in person, by telephone, telegraph, or facsimile, or by other communication directed to a specific recipient and includes (I) any written form of communication directed to a specific recipient and not meeting the requirements of subdivision (b) of this rule, and (ii) any electronic mail communication directed to a specific recipient and not meeting the requirements of subdivision (c) of rule 4-7.6. [Emphasis added.]

Additionally, this Committee has issued a number of opinions which preclude an attorney from using a nonlegal business as a "feeder" to the attorney's law firm. See Ethics Opinions 88-15, 79-3, 78-14 and 73-1. In short, the inquirer and the inquirer's firm may own an ancillary business and provide financial services to clients as suggested subject to Rules 4-1.7(b), 4-1.8(a), 4-5.7 and 4-7.4(a) as discussed above.

FLORIDA BAR ETHICS OPINION
OPINION 98-1
March 27, 1998

Advisory ethics opinions are not binding.

It is impermissible for an attorney to enter into an arrangement with a medical-legal consulting service on a contingency fee basis to provide services to the attorney's client, including provision of an expert witness.

RPC: 4-3.4(b), ABA Model 1.5, 1.7(b), 3.4(b), Illinois 7-109(c), Pennsylvania 3.4(b)
Opinions: ABA Formal 87-354, ABA Informal 1375, Alabama Opinion 83-135, Georgia Opinion 48, Illinois Opinion 86-03, Mississippi Informal Opinion 189, New Jersey Opinion 562, Pennsylvania Informal Opinion 95-79, South Carolina Opinion 81-11, Tennessee Formal Opinion 85-F-101, Texas Opinion 458, District of Columbia Opinion 55
Statutes: F.S. §766.208

A member of The Florida Bar has requested an advisory ethics opinion. The operative facts as presented in the inquiring attorney's letter and prior telephone call are as follows. The inquiring attorney's practice includes medical malpractice cases. He has been approached by a professional medical-legal consulting service. The medical-legal consulting service would pay a medical expert an hourly fee to review the medical records of the inquiring attorney's clients. If the medical expert determines that the client's physicians did not meet the acceptable standard of care, the medical expert would provide an affidavit to that effect as required by Florida Statute Section 766.208. The medical expert would then serve as the inquiring attorney's witness throughout the case.

As previously stated the expert witness would be paid an hourly fee by the medical-legal consulting service. However, the medical-legal consulting service intends to charge a contingency fee. The inquiring attorney asks whether he may ethically enter into such an arrangement. He is aware that Rule 4-3.4(b), Rules of Professional Conduct, prohibits the payment of a contingency fee for the services of an expert witness, but questions the applicability of the rule where it is the medical-legal consulting service that will be paid on a contingency basis rather than the expert. The inquiring attorney enclosed ethics opinions from Georgia, Alabama, Mississippi, and Washington, D.C. Bar Association Opinion 55 and Florida Bar Staff Opinion TEO 87273 which seem to approve such arrangements.

There is no opinion from the Professional Ethics Committee on this matter in Florida. Further, the Florida Bar Staff Opinion cited by the inquiring attorney relied on ABA Informal Opinion 1375. That informal opinion was specifically withdrawn by the ABA in Formal Opinion 87-354. However, the ABA in Formal Opinion 87-354 and other states have addressed the use of contingency fees for medical-legal consultants.

In Formal Opinion 87-354, the ABA Committee on Ethics and Professional Responsibility was asked whether a lawyer could recommend that a client engage, or represent a client who had engaged a medical-legal consulting firm on a contingent or straight fee basis. The consulting firm would provide an initial report through its Medical Directors, consultation

with its Medical Directors and, if the case warranted, assistance to lawyers at depositions and trial. The consulting firm also made expert witnesses from its independent consulting staff available. The consulting firm offered a direct fee contract and three types of contingency fee contracts: (1) a modified contingency fee of 20% of the recovery where the client pays reduced fees for the report and expert witnesses; (2) a straight contingency fee of 30% of the total recovery and (3) a contingency fee for maximizing recovery after a settlement offer that is a percentage of the recovery that is in excess of the settlement offer. The expert witnesses themselves were not paid on a contingency basis. The client would enter into a written contract directly with the consultant. The lawyer was also to agree to distribute any recovery in accordance with the contract and to not use any of the experts provided by the consultant in future cases without the consultant's permission.

The ABA Committee concluded that whether such arrangements in general were permissible would depend upon all the facts and circumstances, but that under the specific facts presented the lawyer's proposed conduct may violate the Model Rules of Professional Conduct. One concern the ABA had involved the reasonableness of the attorney's fee in light of the work done by the consulting service. The ABA stated that if any of the work was that normally provided by a lawyer, the lawyer would violate Model Rule 1.5 if his contingency fee was not adjusted. The second concern the ABA had involved Model Rule 3.4(b) which prohibited payments to expert witnesses that are prohibited by law. The ABA noted that the common-law in most states forbids payment of a contingency fee to expert witnesses. The ABA found that the entire arrangement raised many of the same questions as a direct payment of a contingency fee to an expert. The third concern the ABA had with the arrangement was the provision of the contract where the lawyer agreed not to contact or use the consultant's experts in further cases without the consultant's permission. The committee felt this could present a conflict under Model Rule 1.7(b) because the attorney restricted future clients with respect to the use of expert witnesses. The fourth concern the ABA had dealt with the lawyer's duty to exercise independent professional judgment in the selection and use of expert witnesses. Finally, the ABA was concerned that the arrangement could be champertous under state law as involving defraying the costs of suit for a share of the recovery.

Of the states that have considered such arrangements, it appears that a majority conditionally approve them as long as certain ethical guidelines are met. See, e.g.; Georgia Bar Committee on Ethics Opinion 48 (attorney may recommend that client contract directly with medical-legal consultant on a contingency fee basis if the fee is reasonable, the expert witness is completely neutral, detached and independent of the consulting service, the consulting service does not interfere with the attorney's independent professional judgment and the attorney fully informs the client of the provisions of the contract; Ethics Committee of the Alabama Bar Association Opinion 83-135 (attorney may enter into contingency fee agreement with medical-legal consultant if consultant's activities do not constitute the unauthorized practice of law, the lawyer does not divide his fee with the consultant, fees paid to the expert witness are not contingent on the outcome of the case, the consultant's activities do not interfere with the attorney's exercise of independent professional judgment and all funds collected are put into a client trust account.); Mississippi Bar Committee on Ethics Informal Opinion 189 (attorney may recommend that client contract directly with medical-legal consultant on a contingency fee basis if the consultant does not engage in the practice of law, does not share fees with the attorney and the fee is not payable for the testimony of a lay person); Legal Ethics Committee of the D.C. Bar Association Opinion 55 (attorney may recommend that client contract directly with medical-

legal consultant on a contingency fee basis if expert witness paid regardless of outcome); Tennessee Board of Professional Responsibility Formal Opinion 85-F-101 (attorney may recommend that client contract directly with medical-legal consultant on a contingency fee basis if the attorney retains control over the case, consultant does not engage in the unauthorized practice of law, the attorney does not share legal fees with the consultant, and the contingent fee is not paid for the testimony of a witness and South Carolina Bar Ethics Advisory Committee determined in Opinion 81-11 (1981) (attorney may allow client to contract directly with a medical doctor on a contingency fee basis as long as testimony is not a service for which a doctor receives a contingency fee, the medical doctor does not engage in the unauthorized practice of law, the lawyer does not share fees with the doctor, and the doctor does not interfere with the attorney's independent professional judgment).

Other states which have considered this issue have decided that the ethical problems inherent in such an arrangement are too great and have declined to allow such arrangements with medical-legal consultants. For instance, in New Jersey Advisory Committee on Professional Ethics Opinion 562 (1985), it was determined that such contracts would violate a state statute prohibiting doctors from contracting for contingency fees where medical services rendered to a client form any part of a legal claim. The ethics committee held that to the extent doctors were involved as a principal in the medical-legal consulting service, such conduct would violate the state statute and, therefore, it would be unethical for an attorney to solicit, enforce or otherwise be involved with a contract involving a medical-legal consultant. The Texas Professional Ethics Committee in Opinion 458 (1988) considered whether an attorney may participate in or recommend that a client enter into a contingency fee contract with a medical-legal consulting firm where the firm would provide various services including the provision of expert testimony. The committee found the arrangement in its entirety gave the appearance of impropriety, beyond the problems presented with fee splitting, excessive fees, loss of attorney control over the case, the prevention of the unauthorized practice of law and the payment of contingency fees in exchange for expert testimony. Similarly, the Illinois State Bar Association in Advisory Opinion 86-03 (1986) stated that it was improper for a lawyer to hire or recommend or acquiesce in a client hiring an agency to provide expert witnesses where the agency is to be paid a contingency fee. The Illinois Bar Association found the arrangement to be an improper circumvention of the meaning and intent of its Rule 7-109(c) which prohibited attorneys from paying or acquiescing to the payment of witnesses based on the content of the testimony or outcome of the case. Finally, the Pennsylvania Bar Association Committee on Legal Ethics and Professional responsibility disapproved a similar arrangement in Informal Opinion 95-79 (1995). One committee member stated:

Rule 3.4(b) provides that a lawyer shall not: “. . . pay or acquiesce in the payment of compensation to a witness contingent upon the content of the witness' testimony or the outcome of the case . . . ”

The purpose of the Rule is to assure that a court and jury will hear the honest conclusions of the expert unvarnished by the temptation to share in the recovery.

Here the MFRI Corporation seeks to meet the requirements of the Rule by setting fixed fees for the work performed and the testimony proffered by the experts. The ethical question, however, rests upon still another provision of the contract: the Corporation's requirement that the client obtain the Case Evaluation Report of

its medical consultant. In this regard let us not forget MFRI's interest in the outcome of the litigation--15% of the recovery.

It's true the medical consultant is not to be the witness, but who is to doubt that he will carefully shop his Evaluation among prospective witnesses before selecting the expert whose conclusions most closely resemble his own. And consider, finally, the experts themselves and the inclination for them to accept the opinions of the medical consultant handing out the retainers.

The Corporation's efforts to sanitize its contingency contract fall short of the mark, and the Rule says a lawyer may not acquiesce in payment to a witness contingent upon the content of his testimony.

The committee is of the opinion that the inquiring attorney's proposal is ethically impermissible.

FLORIDA BAR ETHICS OPINION
OPINION 97-3
September 5, 1997

Advisory ethics opinions are not binding.

An attorney may not accept referrals from an heir hunting service nor represent an heir hunting service and an heir jointly in matters in which the service seeks to represent heirs in a pending probate matter prior to the heirs being contacted by the personal representative of the estate to notify them of their status as beneficiaries.

RPC: 4-1.7(a), 4-5.4(a) & (d), 4-5.5(b), 4-7.4(a) [*See* current 4-7.18(a)], 4-8.4(a)

Opinions: 73-32, 74-15, 77-8, 92-3

Case: *Sullivan v. Committee on Admissions and Grievances*, 395 F.2d 954 (D.C. Cir. 1968)

The Committee has been asked by the Disciplinary Procedures Committee (“DPC”) to respond to questions regarding members of the bar accepting representation of persons referred by heir location services. The specific questions are as follows:

- 1) whether the heir location service’s solicitation of heirs is improper solicitation, thereby requiring bar members to decline referrals;
- 2) clarifying the identity of the client;
- 3) identification of potential and actual conflicts of interest and when and how same must be disclosed.

The Committee has previously opined that, if it is otherwise permitted by law, “lawyers representing heir-finders with purchased claims may properly prosecute such claims for the heir-finders on a contingent fee basis.” Florida Ethics Opinion 73-32. The Committee did not address: (1) representation of an heir referred by an heir location service; (2) simultaneous representation of an heir location service and an heir; nor (3) representation “if such claims were purchased on a contingency basis by the heir finders who in turn employed counsel on a contingent fee basis.” *Id.* These issues are before the Committee now. This opinion will address these questions in the context of an heir hunting service in which the service seeks to represent heirs in a pending probate matter prior to the heirs being contacted by the personal representative of the estate to notify them of their status as beneficiaries.

An attorney’s agent is subject to the same ethical restrictions on solicitation as the attorney. See Florida Ethics Opinions 77-8, 74-15 [since withdrawn], and 92-3. Rule 4-7.4(a) provides the following:

A lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, in person or otherwise, when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain. *A lawyer shall not permit employees or agents of the lawyer to*

solicit in the lawyer's behalf. A lawyer shall not enter into an agreement for, charge, or collect a fee for professional employment obtained in violation of this rule. The term "solicit" includes contact in person, by telephone, telegraph, or facsimile, or by other communication directed to a specific recipient and includes any written form of communication directed to a specific recipient and not meeting the requirements of subdivision (b) of this rule. [Emphasis added.]

Rule 4-8.4(a) provides similar guidance:

A lawyer shall not:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

Additionally, Rule 4-7.8 prohibits an attorney from accepting referrals from a lawyer referral service unless solicitation by the service is in compliance with the ethics rules. If the methods employed by heir hunting services to contact prospective heirs do not comply with the rules regulating attorney solicitation and advertising, an attorney would be prohibited from accepting referrals from such a source.

The DPC's concerns regarding the identity of the client and potential and actual conflicts of interest can be answered by reference to *Sullivan v. Committee on Admissions and Grievances*, 395 F.2d 954 (D.C. Cir. 1968), in which the court found that such representation presents a conflict of interest, among other ethical considerations. The court found the following problems arose:

The record abundantly supports the view of the District Court panel of judges: The case arises against a background of an inherently champertous undertaking by the Association; the solicitation thereafter by the Association of a lawyer-client relationship between the heirs and a lawyer of the Association's choice is plainly forbidden solicitation of professional work. It is equally clear that an undertaking of representation of the heir, by a lawyer already committed to represent the interests of the "heir finder" creates not a potential but an actual and present conflict of interest. Among other things, the first obligation of a *lawyer* acting truly and wholly in the interests of the heir might well be to advise his heir-client (a) that the contingent fee contract between the "heir finder" and the heir was void; (b) that he, the lawyer, already represented and owed primary duties to the "heir finder"; (c) that in all but rare instances where a contest over heirship existed, the heirs might not need either a lawyer or the Archives Association, and that a contingent fee might be inappropriate; (d) that at most the services of a lawyer, barring a challenge to the heir's rights, would be minimal and that representation should be for a fee measured by the time necessarily devoted to collection of heir's claims. . . . These propositions are so clear and plain that it is difficult to see why lawyers needed to await the action of the Committee on Admissions and Grievances and the decision of the District Court.

The Committee agrees with and adopts the opinion of the court. Such a referral scheme also implicates the rules prohibiting fee splitting with nonlawyers and assisting in the unauthorized practice of law. See Rules 4-5.4(a) & (d) and 4-5.5(b), Rules Regulating the Florida Bar. Therefore, the Committee concludes that representation of: (1) heirs referred by heir hunting services; and (2) heirs and an heir finder jointly is prohibited under the rules regulating attorney advertising and the Rules of Professional Conduct as discussed above. See Rules 4-7.4, 4-1.7(a), and 4-8.4(a), Rules Regulating the Florida Bar. Concerning representing heir finders alone, see Florida Opinion 73-32. The Committee does not address the situation presented by nor express an opinion regarding referrals to attorneys by heir hunting services in the abandoned property context, in which heir hunters find heirs to property which will be escheated to the state.

FLORIDA BAR ETHICS OPINION
OPINION 95-2
July 15, 1995

Advisory ethics opinions are not binding.

An attorney's proposed involvement with a corporation that represents clients in securities arbitration matters would be unethical due to problems concerning conflicts of interest, solicitation, fee-splitting, and assisting the unauthorized practice of law.

Note: Nonlawyers retained for compensation to represent investors in securities arbitrations are engaged in the unauthorized practice of law. See *The Florida Bar re: Advisory Opinion - Nonlawyer Representation in Securities Arbitration*, 696 So.2d 1178 (Fla. 1997).

RPC: 4-1.2, 4-1.4, 4-1.5(a), 4-1.7(b), 4-5.4(a), 4-5.4(b), 4-5.5, 4-7.1 through 4-7.8 [See current 4-7.11 through 4-7.22], 4-7.4(a) [See current 4-7.18(a)], 4-8.4(a)
Opinions: 61-1, 66-44, 67-14, 67-15, 70-18
Cases: *The Florida Bar re: Advisory Opinion - Nonlawyer Preparation of Living Trusts*, 613 So. 2d 426 (Fla. 1992)

A member of the Florida Bar requests an advisory opinion about an affiliation with a nonlawyer company to handle securities arbitrations.

The inquiring attorney wishes to enter into a relationship with a lay company that represents clients in securities arbitration. The company will obtain clients and pay the inquirer to represent the clients in negotiation and arbitration (if necessary). The company will pay the inquirer in the form of a retainer and a percentage of the company's contingent fee. The company would also provide the attorney with information regarding the client's claim and a prepared "Statement of Claim" for the inquirer to file. The company also pays for expert witness and audit services for the client, and, in some cases, costs of arbitration.

The inquirer wishes to know if it would be proper to enter into this relationship.

The inquirer's proposal raises numerous issues regarding the Rules of Professional Conduct. First, the attorney-client relationship must be a direct one. See Florida Ethics Opinions 61-1, 67-14, and 67-15. An attorney must have direct communication with the clients and take direction from the clients. See Rules 4-1.4 and 4-1.2, Rules of Professional Conduct. The role of the nonattorney in gathering information and preparing statements of claim in the inquirer's proposal may be a barrier to that direct relationship.

The proposal also raises the question of prohibited solicitation. An attorney may not solicit business through direct contact with a potential client, and he may not allow another to solicit legal business on his behalf. See Rules 4-7.4(a) [See Rule 4-7.18(a)] and 4-8.4(a), Rules of Professional Conduct. The nonattorney may be soliciting business for the inquirer through direct contact with potential clients in the inquirer's proposal. Rule 4-1.5(a) provides that "[a]n attorney shall not enter into an agreement for, charge, or collect ... a fee generated by employment that was obtained through advertising or solicitation not in compliance with the Rules Regulating The Florida Bar."

Any advertising of the company would have to follow the Rules of Professional Conduct regarding attorney advertising (Rules 4-7.1 through 4-7.8, Rules of Professional Conduct). [See Rules 4-7.11 through 4-7.22].

The business arrangement also appears to interfere with the client's right to choose his own attorney, since it appears that the nonattorney will actually determine who will represent the client in negotiation and at the arbitration. See Florida Ethics Opinions 66-44 [withdrawn] and 70-18. The proposal also implicates rules prohibiting assisting the unauthorized practice of law and splitting fees with nonattorneys. See Rules 4-5.4(a) and (b) and Rule 4-5.5, Rules of Professional Conduct.

The inquirer should also consider whether he may have some personal conflict in representing the clients given his relationship with the company. See Rule 4-1.7(b), Rules of Professional Conduct. In a similar arrangement regarding living trust preparation, the Florida Supreme Court stated, "If the lawyer is employed by the corporation selling the living trust rather than by the client, then the lawyer's duty of loyalty to the client could be compromised." *The Florida Bar re: Advisory Opinion - Nonlawyer Preparation of Living Trusts*, 613 So. 2d 426 (Fla. 1992). The Court went on to say, "In light of this duty of loyalty to the client, a lawyer who assembles, reviews, executes, and funds a living trust document should be an independent counsel paid by the client and representing the client's interests alone." *Id.*

In short, it would be improper for the inquirer to enter into this proposed arrangement in light of the considerations discussed above.

FLORIDA BAR ETHICS OPINION
OPINION 95-1
July 15, 1995

Advisory ethics opinions are not binding.

A Florida Bar member who maintains a law practice or otherwise holds himself or herself out as a lawyer may not ethically enter into a business arrangement with a nonlawyer to represent claimants in social security disability matters. Fees claimed by or paid to the bar member for such representation are considered legal fees, and thus the proposed arrangement would violate Rule 4-5.4, which prohibits a lawyer from sharing legal fees with a nonlawyer.

RPC: 4-5.4

Opinions: 65-4; ABA Informal 1241, Kansas 93-11, Indiana 6 of 1994, Maryland 84-92, Wisconsin E-84-4

Cases: *Sperry v. State*, 373 U.S. 379 (1963)

Misc.: Code of Federal Regulations sec. 404.1705, 404.1720, 416.1505, 416.1520

A member of The Florida Bar has requested an advisory ethics opinion regarding the following:

I have recently been approached by a non-attorney who wishes to start a business representing claimants in social security disability matters. The Code of Federal [R]egulations sections 404.1705 and 416.1505 allow for non-attorneys to represent claimants in these matters. The non-attorney has asked me to work for his company, and act as a claimant representative employed by his company. I would act not only as the representative but also as the management of the company. The non-attorney would be the sole shareholder in the company, but all management, and decisions concerning the representation of clients would be made by me.

The company would incur all costs associated with the representation and collect all fees resulting from it, as allowed by CFR sec. 404.1720 and 416.1520. I as an employee would receive a salary and bonuses based upon the profitability of the company. All work performed for the company would fit within the social security disability area, thus could be performed by non-attorneys.

The company would engage in some advertising but would not advertise the services of an attorney.

[1.] My question is, would this association of quasi-legal representation with the company violate Rule 4-5.4 of the Professional Rules of Conduct, or any other rule of conduct?

[2.] If the above discussed association does not violate a rule of conduct would I still be able to practice law independently of the company in areas other than social security? If the attorney would incur all expenses involved in the representation of clients and receive all fees resulting from that representation. The legal

representation performed by me would be conducted from my office with the company but would have no other connection to the company.

[3.] Lastly, would I as an independent attorney be able to represent the company's clients in Federal District Court proceedings resulting from their social security claim? I the attorney would bear the court costs and expenses associated with the district court case and would receive any Equal Access to Justice Act fees that may result from this action.

As noted by the inquirer, federal legislation permits nonlawyers to practice in certain specified subject areas. States are preempted from enjoining conduct that Congress has expressly sanctioned by such legislation. *Sperry v. State of Florida ex rel. The Florida Bar*, 373 U.S. 379 (1963). Nevertheless, states "maintain control over the practice of law within [their] borders except to the limited extent necessary for the accomplishment of the federal objectives." *Id.* at 402. It therefore appears that a state may properly proscribe, by application of its ethics rules, activities by lawyers with nonlawyers as long as the proscription does not infringe on the authorization granted the latter by Congress. ABA Informal Opinion 1241. This conclusion is consistent with our Florida Ethics Opinion 65-4. Moreover, ethics authorities from other jurisdictions have generally disapproved the type of arrangement proposed above. See Kansas Opinion 93-11. See also, e.g., Indiana Opinion 6 of 1994; Maryland Opinion 84-92; Wisconsin Opinion E-84-4.

Additionally, it is important to note that a particular activity constituting the practice of law does not cease to be the practice of law simply because nonlawyers may legally perform it. ABA Informal Opinion 1241. When engaged in by lay persons, such activity is simply the authorized practice of law. Thus, it our opinion that members of The Florida Bar who, while maintaining a law practice or otherwise holding themselves out as attorneys, represent claimants in social security disability matters are providing legal services for which they are receiving a "legal" fee even though the matters may properly be handled by nonlawyers. See ABA Informal Opinion 1241. Under those circumstances, the Florida lawyer may not join with a nonlawyer to provide such services without running afoul of Rule 4-5.4.

FLORIDA BAR ETHICS OPINION
OPINION 94-6
April 30, 1995

Advisory ethics opinions are not binding.

A law firm may operate a mediation department within the firm. The mediation practice must be conducted in conformity with the Rules of Professional Conduct. Consequently, nonlawyers employed by the firm's mediation department may not have an ownership interest in the firm or its mediation department, the attorney advertising rules will apply to any advertising by the mediation department, and the mediation department may not use a proposed trade name because that trade name is not the name under which the firm practices.

RPC: 4-5.4(a), 4-5.4(b), 4-5.5(b), 4-7.7 [*See* current 4-7.21]

Opinions: 86-4, 86-8, 88-15, 89-4, 90-7; Arizona 88-5, Illinois 90-32

A member of the Florida Bar requests an opinion regarding the propriety of establishing and operating a mediation department in his law firm. The inquiring attorney states that the department would use the trade name "Sunshine Mediation." The mediation department would use this trade name on its letterhead in all correspondence and billing. The letterhead would state "Sunshine Mediation, The Mediation Department of [the law firm]." The mediation department also wishes to hire nonlawyer mediators as "independent contractors" and to list the nonlawyers on the letterhead.

Florida Bar members may participate in business practices other than law. See, e.g., Florida Ethics Opinions 86-8 [withdrawn], 88-15, and 90-7 [withdrawn] for a discussion of ethical considerations that are applicable when an attorney engages in dual professions. Where, as in the inquirer's situation, the business practice is conducted through the law firm and is closely associated with the practice of law, the Committee is of the opinion that the mediation practice must be conducted in conformity with the Rules of Professional Conduct (Chapter 4, Rules Regulating The Florida Bar). See, e.g., Arizona Opinion 88-5 and Illinois Opinion 90-32.

Consequently, in the situation presented the Committee is of the opinion that any nonlawyer mediators employed by the inquirer's law firm may not have an ownership interest in either the law firm or the mediation department. To do so would implicate rules prohibiting sharing fees with nonlawyers, partnership with nonlawyers, and assisting in the unauthorized practice of law. See Rules 4-5.4(a), 4-5.4(b), and 4-5.5(b).

The Committee also is of the opinion that the lawyer advertising rules (Rules 4-7.1 through 4-7.7 [*See* current Rules 4-7.11 through 4-7.22]) will apply to any advertising done by the mediation department of the law firm. Advertising by a department within a law firm must be considered advertising by the law firm itself. Regarding letterhead, nonlawyer mediators employed by the firm may be listed on the letterhead only if their nonlawyer status is clearly indicated. Florida Ethics Opinion 86-4 and 89-4.

The Committee further concludes that, under the circumstances described, it would be improper for the law firm to use the trade name "Sunshine Mediation" for its mediation department. Rule 4-7.7 [*See* current Rule 4-7.21] permits the use of non-misleading trade names by law firms, but only if the trade name is used in all aspects of the law firm's practice, including the firm name, letterhead, business cards, office sign, fee contracts, and pleadings. The plain language of the rule does not allow the limitation on the use of the trade name to a department within the firm.

FLORIDA BAR ETHICS OPINION
OPINION 92-3
October 1, 1992

Advisory ethics opinions are not binding.

It is unethical for an attorney to enter into a working arrangement with a public adjuster. Ethical problems exist regarding solicitation, fee-splitting, and assisting the unlicensed practice of law.

RPC: 4-5.4(a); 4-5.5(b); 4-7.4(a) [*See* current 4-7.18]; 4-8.4(a)
Statutes: F.S. § 316.066

The inquiring attorney has been contacted by a public adjusting firm (the “Company”) regarding participation in a proposed arrangement involving personal injury claims. The Company would employ a nonlawyer to pick up accident reports each week from local law enforcement agencies. Those persons with significant claims who have been injured by insured vehicles would then be solicited by the Company. The injured persons (the “claimants”) would be given the opportunity to contract with the Company, which, for a fee of 20% of the claimant’s recovery, would attempt to negotiate settlement of the claimant’s personal injury claim within the tortfeasor’s policy limits.

The Company has asked if the inquiring attorney would be interested in representing claimants who need the services of an attorney in the event that the Company is unable to effectuate a settlement. The Company would recommend the attorney to the claimant. The attorney would have contact with the client, would contract directly with the claimant, and would have total control over the handling of the case. In exchange for referring the claimant to the attorney, the attorney would agree to recognize the Company’s “contract” with the claimant and agree to protect the Company’s “lien.” The inquiring attorney describes these financial arrangements as follows:

[I]f the lawyer settled a case for \$100,000.00 after suit was filed and was entitled to a 40% contingent fee, i.e., \$40,000.00, he would agree to pay the Company 20% of his fee (or a negotiated lesser amount) in order to protect the Company’s contract and lien with the client, which they claim would entitle them to 20% of the gross recovery. The Company claims that this is not “fee splitting with a non-lawyer” in that it is no different than a lawyer agreeing to protect the lien of a health care provider such as a physician or hospital by way of a letter of protection. Further, the Company claims that it is to the benefit of the client, since *it is no extra money out of the client’s pocket, as the real division is between the lawyer and the Company out of the gross attorneys’ fees.* [Emphasis added.]

The attorney has requested an advisory opinion regarding whether it would be unethical for him to participate in this proposed arrangement. Specifically, the attorney has asked whether doing so would violate the rule prohibiting fee-splitting with a nonlawyer.

It would be unethical for the attorney to participate in the proposed arrangement. A number of ethical problems are apparent. For example, the proposed fee division arrangements would violate Rule 4-5.4(a), Rules Regulating The Florida Bar, which prohibits attorneys from sharing legal fees with nonlawyers. The Company's fee would be paid out of the *attorney's* portion of the recovery, which clearly would constitute improper fee-splitting.

Additionally, the proposed arrangement would result in violation of the rules governing advertising and solicitation. Rule 4-7.4(a) provides:

A lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. *A lawyer shall not permit employees or agents of the lawyer to solicit in the lawyer's behalf. A lawyer shall not enter into an agreement for, charge, or collect a fee for professional employment obtained in violation of this rule.* The term "solicit" includes contact in person, by telephone, telegraph, or facsimile, or by other communication directed to a specific recipient and includes any written form of communication directed to a specific recipient and not meeting the requirements of paragraph (b) of this rule. [Emphasis added.]

See also 4-8.4(a), which provides:

A lawyer shall not:

(a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another[.]

The solicitation problem is amplified because the Company would use traffic accident reports to solicit claimants. Florida Statutes § 316.066 prohibits the use of accident reports for commercial solicitation purposes.

Furthermore, the Bar's Unlicensed Practice of Law Counsel has taken the position that a public adjuster engages in the unlicensed practice of law if the adjuster acts on behalf of a claimant against a tortfeasor's insurance company; the authorized activities of a public adjuster are limited to adjusting claims with the claimant's insurer. Therefore, an attorney who is involved in a situation in which a public adjuster is acting on behalf of a claimant against a third party's insurer would be in violation of Rule 4-5.5(b), which prohibits attorneys from assisting someone in activity that constitutes the unlicensed practice of law.

FLORIDA BAR ETHICS OPINION
OPINION 88-15
October 1, 1988

Advisory ethics opinions are not binding.

Lawyers may practice two professions from the same premises. Lawyers also may share office space with nonlawyers. In both cases, certain ethical limitations apply.

RPC: 4-1.6, 4-5.4(a), 4-7.1 [*See* current 4-7.13], 4-7.2 [*See* current 4-7.13], 4-7.2(c) [*See* current 4-7.17(c)], 4-7.4(a) [*See* current 4-7.18(a)], 4-8.4(a)

Opinions: 61-9, 79-3

An attorney asks whether it is permissible for him to operate both his law practice and a separate, nonlegal business from the same suite of offices. He also asks whether an attorney ethically may share office space with a nonlawyer.

Previous opinions of this Committee have concluded that neither arrangement is prohibited. See Florida Opinions 79-3 and 61-9. There are, however, certain ethical guidelines that must be observed when an attorney operates “dual professions” from the same office or shares office space with a nonlawyer. Generally speaking, the attorney must preserve client confidences, avoid misleading appearances, refrain from prohibited solicitation practices, and not participate in improper division of legal fees.

Rule 4-1.6, Rules Regulating The Florida Bar, provides that an attorney must preserve in confidence all information relating to representation of his or her clients. An attorney sharing space with a nonlawyer must ensure that the nonlawyer and his or her employees do not have access to the attorney’s client files. This can be done, for example, by keeping client files in a room to which the nonlawyers do not have access or by keeping the files in locking file cabinets. Additionally, the nonlawyers should not be able to overhear confidential attorney-client conversations.

Any advertising or other statements concerning an attorney or his or her law practice must be truthful and not misleading. Rules 4-7.1 and 4-7.2 [*See* current Rule 4-7.13]. Consequently, an attorney must take steps to avoid misleading the public as to the nature of the business activities being conducted within his or her offices. This means there should be a separate sign at the office entrance and on the building directory (if there is one) for each business or profession operated within the attorney’s offices. For example, if attorney John Smith operated his law practice and a title company on the same premises he would need to post a sign for “John Smith, Attorney at Law” and a sign for “Smith Title Company.” Or, if John Smith operated a law practice and Jane Jones operated a real estate brokerage in the same office suite, there should be a sign for each business. Furthermore, it is recommended that two businesses or professions which share space have separate telephone lines even if those lines will be answered by a common receptionist. If there is only a central incoming line, the receptionist must answer in a neutral manner (such as “professional offices”) in order to avoid misleading callers.

An attorney is prohibited from engaging in in-person solicitation of legal employment, except from relatives, clients and former clients. Rule 4-7.4(a) [*See* current Rule 4-7.18(a)]. This prohibition may not be evaded through the use of nonlawyer agents. Rule 4-8.4(a). In addition, Rule 4-7.2(c) [*See* current Rule 4-7.17(c)] provides that an attorney may not give “anything of value” in exchange for a recommendation. Of course, an attorney may not divide legal fees with a nonlawyer. Rule 4-5.4(a). These rules therefore prohibit an attorney from using a nonlawyer with whom he or she shares space as an agent for solicitation of legal employment or from paying the nonlawyer for referrals. An attorney who operates dual professions out of the same location must avoid using his nonlegal business as a vehicle for improper solicitation of legal employment.

It is important to note that this opinion is written from the standpoint of The Florida Bar and the legal profession. Other professions may have different or additional requirements for their members.

**FLORIDA BAR ETHICS OPINION
OPINION 79-3**

Advisory ethics opinions are not binding.

An attorney may place a sign on his law office door or have wording printed on his letterhead and business cards indicating that he is a registered real estate broker.

Note: Lawyer advertising rules are now in Rules Regulating The Florida Bar 4-7.11 through 4-7.22.

CPR: DR 2-102
Opinion: 73-18

Vice Chairman Mead stated the opinion of the committee:

The issue presented is whether an attorney can place a sign on his law office door or have wording printed on his letterhead and business card indicating that he is a registered real estate broker.

It has long been the Committee's position that the two professions must be conducted from offices that are functionally and geographically separate. This conclusion was based on DR 2-102(E), which prohibited the dual practice presented here, and our prior opinion 73-18 [since withdrawn]. However, we now recognize the deletion of the old DR 2-102(E) from the new Disciplinary Rule 2-102 as promulgated by the Florida Supreme Court in its decision of July 26, 1979, amending the Code of Professional Responsibility of The Florida Bar.

In view of the above revision of DR 2-102, the proposed conduct appears to be no longer prohibited. We caution the attorney, however, that the "feeder" aspect of this association may lead to direct solicitation not protected by the *Bates* decision or the recent changes in the Code related to advertising.

**FLORIDA BAR ETHICS OPINION
OPINION 78-14**

Advisory ethics opinions are not binding.

An attorney may engage in the practice of law and real estate from the same office.

CPR: DR 2-102(E), DR 2-102

Opinions: 73-18

Case: *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed. 2d 810 (1977)

Vice chairman Mead stated that opinion of the committee:

The issue presented is whether an attorney can engage in the practice of law and real estate from the same office. The inquiring lawyer requests a response specifically in light of “the advertising edicts permitted by recent changes relative to advertisement.”

It has long been the Committee’s position that the two professions must be conducted from offices that are functionally and geographically separate. This conclusion was based on DR 2-102(E), which prohibited the dual practice presented here, and our prior opinion 73-18 [since withdrawn]. However, we now recognize the deletion of the old DR 2-102(E) from the new Disciplinary Rule 2-102 as promulgated by the Florida Supreme Court in its decision of July 26, 1979, amending the Code of Professional Responsibility of The Florida Bar.

In view of the above revision of DR 2-102, the proposed conduct appears to be no longer prohibited. We caution the attorney, however, that the “feeder” aspect of this association may lead to direct solicitation not protected by the *Bates* decision or the recent changes in the Code related to advertising.

FLORIDA BAR ETHICS OPINION
OPINION 75-40
June 15, 1977

Advisory ethics opinions are not binding.

A lawyer may, with client consent after full disclosure, participate in an arrangement with a title company whereby the title company prepares a title commitment to which the lawyer adds an endorsement and the title company remits a substantial percentage of the title insurance fee to the lawyer.

Canon: 38, Canons of Professional Ethics
CPR: EC 2-21; DR 5-107(A)(2)
Opinions: 74-50, 75-27
Misc.: Drinker, *Legal Ethics*, p. 97; Real Estate Settlement Procedures Act of 1974, 41 Fed. Reg. 109

Vice Chairman Lehan stated the opinion of the committee:

This inquiry concerns the circumstances outlined in Opinion 74-50, i.e., an arrangement between a lawyer and a title insurance company under which:

1. The lawyer would ask the title company for a commitment;
2. The title company then prepares and signs by its authorized in-house agent a title commitment in usual form and sends same to the attorney, accompanied, however, by a photocopy of the title company's search;
3. The lawyer then spends whatever time he wishes "looking at the search;"
4. The attorney adds a stamped or typed endorsement to the commitment stating that the title appears to be the way the title company says it is, then signs his name; and
5. Finally, the title company "remits a substantial percentage of the title insurance fee" to the lawyer.

Opinion 74-50 finds that arrangement unethical for the reasons stated therein.

The present inquiry is:

- (a) whether the arrangement above is permissible if the attorney makes full disclosure to the client of the amount received from the title company and obtains the client's consent; and
- (b) to what extent, if any, the attorney must credit against any fee charged the client the money the title company has remitted to him.

For purposes of this inquiry, we assume that the premiums charged by any competing title companies between which the attorney might choose in placing title insurance and the amounts of the premium each title company would remit to the attorney are competitive. Also, the underlying facts, as we construe them for the purpose of this opinion, involve the attorney bearing responsibility to the title company for the status of title in the event a title defect causes loss. See Opinion 75-27.

The Committee is of the opinion that the inquiry should be answered in the affirmative as to (a). As to (b), the Committee is of the opinion that if any part of the fee the attorney charges the client is for time spent looking at the search and endorsing the commitment, the amount the attorney receives from the title company should be credited against that part of the fee. Of course, if the client's consent to the attorney's keeping the money he receives from the title company is conditioned upon the attorney's crediting that amount against the fee charged the client, the attorney should credit the amount received from the title company. Otherwise, it is not necessary to credit against the fee to the client the amount the title company remits to the lawyer.

DR 5-107(A) provides:

(A) Except with the consent of his client after full disclosure, a lawyer shall not:

(2) Accept from one other than his client any thing of value related to his representation of or his employment by his client.

EC 2-21 provides that "a lawyer should not accept compensation or anything of value incident to his employment or services from one other than his client without the knowledge and consent of his client after full disclosure." EC 2-21 is similar to former Canon 38 providing that a lawyer "should accept no compensation, commissions, rebates or other advantages from others without the knowledge and consent of his client after full disclosure." That Canon was construed as permitting, with client consent after full disclosure, "customary allowances" from title companies which "obviously in no way interfere with the lawyer's loyalty to his client." Drinker, *Legal Ethics* (1953), p.97.

We reach the same conclusion as to the propriety of this practice under the Code of Professional Responsibility. We do not believe that the attorney's accepting the fee from the title company under the circumstances stated above necessarily impairs his ability to properly represent his client.

We add the caveat that, of course, a lawyer may not receive payment from a third party if that would constitute a violation of law. See the Real Estate Settlement Procedures Act of 1974 and regulations thereunder, including those relating to prohibitions as to referral fees. 41 Fed. Reg. 109. The Committee expresses no legal opinion whatsoever as to the effect of RESPA under the facts of this Inquiry or under the facts of Opinion 74-50.

FLORIDA BAR ETHICS OPINION
OPINION 73-20
October 8, 1973

Advisory ethics opinions are not binding.

If utmost care is taken to avoid unethical conduct, lawyers may own a corporation that investigates prospective jurors for a set fee for members of The Florida Bar.

Vice Chairman Daniels stated the opinion of the committee:

A group of lawyers desire to buy a corporation which provides a Select-a-Jury service. The inquiring lawyers ask if they may ethically:

Form a group of not more than fifteen legal entities (entity defined as a single practitioner, partnership, or professional association) to purchase and wholly own and control a corporation formed for the purpose of providing a "jury service." This service would investigate the general background of prospective jurors in the community by means other than personal confrontation of the prospective jurors. No member of The Florida Bar would act as an investigator and one single investigative criteria would be set and followed in regard to all persons investigated; there could be no "special orders" on particular cases with regard to the additional acquiring of information, calculated to discover a prospective juror's likely views on particular issues to be raised in future litigation. The Service would be operated on a day-to-day basis by a managing agent but overall control would be repositied in a Board of Directors or other similar body composed of ownership. The services provided would be available for purchase by any member of The Florida Bar at standard rates fixed in advance by the Board of Directors.

The Committee sees no ethical impropriety per se in the purchase of the corporation by the inquiring lawyers under the above quoted circumstances. However, the sensitive nature of the subject matter is such that the service will have to be managed with the utmost care to avoid unethical conduct.

FLORIDA BAR ETHICS OPINION
OPINION 73-1
April 20, 1973

Advisory ethics opinions are not binding.

There is no ethical objection to members of a law firm having a substantial interest in a title insurance company so long as any client referred to the company is informed of that interest and the company is not used to feed legal business to the firm.

Note: Lawyers who refer clients to a business in which the lawyer owns an interest must comply with Rule 4-1.8(a), regarding business transactions with clients.

CPR: EC 2-21

Opinions: 59-38, 63-12, 64-45, 70-16, 72-26; ABA Informal C731, 883

Vice Chairman Zehmer stated the opinion of the committee:

The inquiring attorney's firm intends to organize, in conjunction with other parties, a corporation for profit to act as title insurance agents for the purpose of issuing title insurance to real estate vendees and mortgagees. The members of the inquirer's law firm will own the majority of the stock. Although the title insurance business will be conducted in cities where the law firm maintains offices, the title company will conduct its business from a location substantially distant from the location of the law office. The inquirer further states that members of his firm would be directors of the title company, but would take no part in its day to day operations. His firm would probably issue title opinions to the title company upon which various title policies would be written.

The inquirer also states that employees of the title company would be instructed not to refer legal matters to the inquirer's firm and the inquirer's firm would refer business to the title company only upon solicitation by a client or third party with full disclosure that members of the law firm have a financial interest in the title company. The title company would not engage in the abstract business.

The inquirer asks whether there is any ethical objection to the members of his firm having a substantial interest in the title company so long as his firm does not use the title company as a "feeder" for the law practice and the members of the law firm do not mingle title company business either physically or functionally with their law practice.

It appears that the inquirer and the members of his law firm are cognizant of the ethical considerations involved and are taking every precaution to avoid them. They are meeting the requirements of EC 2-21, Code of Professional Responsibility, by disclosing to clients that members of the law firm have a financial interest in the title company. They are taking specific action to avoid the "feeder" problem. In short, the Committee finds no ethical impropriety under these circumstances. See this Committee's opinions 59-38, 63-12 [since withdrawn], 64-45 [since withdrawn], 70-16 [since withdrawn], and 72-26. See also ABA Informal Opinions C731 and 883.

FLORIDA BAR ETHICS OPINION
OPINION 72-26
July 10, 1972

Advisory ethics opinions are not binding.

A lawyer is not prohibited from owning stock in a corporation engaged in the bail bond business, especially when he does not participate in its management. The lawyer should not refer clients to the business unless the lawyer's interest is disclosed and the client would suffer no detriment.

Opinions: 65-16, 66-16, 66-21, 66-30

Committeeman Kittleson stated the opinion of the committee:

A Florida lawyer submitted the following succinct inquiry:

I have been asked to buy stock in a corporation being formed for the purpose of operating a bail bond business. Under no circumstances would I participate in the management of the corporation.

1. Is it unethical for me to do so? Does the answer turn on the percentage of control which my shares would represent?

2. Would the ethical considerations be different if I had a categorical policy of not representing any persons bonded by the corporation?

The CPR does not appear to prohibit, per se, a lawyer from owning stock in a corporation engaged in bail bond business, especially when he does not participate in management of the business. The Committee has several times advised that a lawyer is not ethically restrained from engaging in business, if he does not mingle the business with his law practice, either physically or functionally, and if the business does not operate as a feeder to his law practice. See, for example, Opinions 66-16 [since withdrawn], 66-21 [since withdrawn] and 66-30 [since withdrawn]. He also should not use his position as a lawyer to direct a client's patronage to the business, unless the client not only suffers no detriment thereby but also knows of the lawyer's relation to the business and nevertheless chooses or consents to give his patronage to the business.

We caution that our failure to find a violation of a disciplinary rule in the CPR should not be construed as advice that a particular activity should be encouraged as being in the best interest of the legal profession.

Two members of the Committee, relying in part upon our Opinion 65-16 [since withdrawn], find impropriety in the proposed stock ownership because of the close relationship between the corporate business and the practice of law.

FLORIDA BAR ETHICS OPINION
OPINION 72-21
June 21, 1972

Advisory ethics opinions are not binding.

A lawyer should not undertake to provide “general legal services” to a mutual fund when such services would include preparation of “prototype trust instruments” for use by agents of the mutual fund in dealing with customers.

Opinions: 64-33, 64-70, 67-11

Chairman Clarkson stated the opinion of the committee:

We are again called upon to determine whether proposed legal representation of a lay agency in the estate planning field may violate ethical precepts.

The inquiring member of The Florida Bar states that his firm has been asked to provide “general legal services” to a mutual fund. Initially, the firm would prepare “prototype trust instruments” for use by agents of the mutual fund in dealing with customers. Thereafter, if requested to do so by a customer or his attorney, the law firm would “make an analysis as to whether or not a trust was warranted, and if so, which of the trust forms should be used.” The law firm's compensation would be paid by the mutual fund except in those instances in which the firm prepared legal documents upon request of the customer or his attorney, in which event the firm would be paid directly by the customer or his attorney.

As we have consistently noted in the past, arrangements between lawyers and mutual funds, life insurance agents or other lay agencies active in estate planning work are fraught with ethical pitfalls. Both the former canons and the present code have condemned similar relationships because of the inherent conflict of interest, the inevitable imposition of a lay intermediary between attorney and client and the strong likelihood that the attorney's services may occasionally and unwittingly aid the unauthorized practice of law. The proposed method of dealing between the mutual fund and its potential customers too readily lends itself to the sale of a package which includes legal services.

For the reasons stated in exhaustive detail in our former opinions 64-33, 64-70 and particularly 67-11, we have concluded that the inquiring lawyer should not undertake the representation as proposed.

FLORIDA BAR ETHICS OPINION
OPINION 67-15
July 24, 1967

Advisory ethics opinions are not binding.

The rationale of Opinion 67-14 precludes a lawyer from preparing a trust pursuant to a referral from a trust company in the absence of direct contact with the client.

Canon: 35
Opinion: 67-14

Chairman MacDonald stated the opinion of the committee:

A member of The Florida Bar inquires as to whether or not a lawyer may prepare a trust for a client pursuant to a referral from a trust company without otherwise contacting the client. For the reasons indicated in our Opinion 67-14 we conclude that he may not.

FLORIDA BAR ETHICS OPINION
OPINION 67-14
July 24, 1967

Advisory ethics opinions are not binding.

A lawyer may not accept employment by a real estate broker to prepare a deed for use by the broker in closing a real estate transaction when the lawyer would have no contact with either party to the transaction.

Canon: 35

Opinion: ABA Informal 508

Cases: *Cooperman v. West Coast Title Company*, 75 So.2d 818 (Fla. 1954), *Keyes v. Dade County Bar Association*, 46 So.2d 605 (Fla. 1950), *The Florida Bar v. McPhee*, 195 So.2d 552 (Fla. 1967)

Chairman MacDonald stated the opinion of the committee:

We are asked by a member of The Florida Bar whether he may properly accept employment by a broker for the purpose of preparing a deed in an uncomplicated real estate transaction. Such deed would then be returned to the broker who would close the real estate transaction, collecting a minimal fee from the seller and remitting to the lawyer without the lawyer ever being in contact with either party to the real estate transaction.

We conclude that the law of Florida still is that a broker may not draft a deed, *Keyes v. Dade County Bar Association*, 46 So.2d 605 (Fla. 1950), *Cooperman v. West Coast Title Company*, 75 So.2d 818 (Fla. 1954), and *Florida Bar v. McPhee*, 195 So.2d 552 (Fla. 1967). Thus we are not confronted with a consideration of whether, assuming the broker could properly draft a deed, he might properly retain legal assistance in his own right to aid such preparation. Moreover, we are not confronted with a situation such as that described in *Cooperman, supra*, wherein the issuance of title insurance and the preparation of various documents in satisfaction of the requirements of the insurer were involved.

On the facts before us, which in essence involve the intervention of a broker between the lawyer and the client, we have no hesitancy in concurring in Informal Opinion 508 of the American Bar Association (1962), disapproving this practice in essence on the ground that such a transaction is devoid of the personal contact which should exist between attorney and client.

FLORIDA BAR ETHICS OPINION
OPINION 67-11
April 25, 1967

Advisory ethics opinions are not binding.

An arrangement whereby the general counsel of an “estate protection service” would prepare various trust indentures or other documents for consideration of clients of the service and on occasion represent such clients is improper.

Canons: 35, 47

Opinions: 64-33, 64-70, 66-19

Chairman MacDonald stated the opinion of the committee:

An organization styled as “Estate Protection Service,” offering to act as financial, management, and economic consultants in establishing “family circle trust organizations” for the apparent purpose of avoiding probate and estate taxes for its clientele, has requested a member of The Florida Bar to serve as its general counsel. Apparently the attorney would prepare various trust indentures or other documents for the consideration of these clients with the understanding that the proprietors of the service would advise such clients that they might retain their own counsel for review of these documents. If the customers did not utilize their own attorneys then the general counsel would undertake with the consent of the client to represent the interests of the client and what is termed “the family trust organization.”

A number of inquiries are posed, including several relating to the definition of the unauthorized practice of law. Necessarily that is a matter without the scope of the opinion of this Committee. However, it does not seem improvident to observe that the selling of a service for the only apparent purpose of organizing an estate from the principal standpoint of potential tax liability, apparently unaccompanied by any of the other conventional business relationships of insurance, accounting or a statutorily qualified trustee, will surely suffer for lack of a label if it does not constitute the practice of law.

The arrangement posed is not remarkably different from those condemned in our previous Opinions 64-33 and 64-70. We therefore believe that it would be improper for the attorney to act for the Estate Protection Service, even assuming that it is not engaged in the unauthorized practice of law, in the preparation of documents for submission to prospective customers or actual customers of the service.

We necessarily also observe that inasmuch as the attorney is not to be a full-time employee of the service he may not use the title general counsel (see our Opinion 66-19) (since withdrawn).

FLORIDA BAR ETHICS OPINION
OPINION 64-70
December 8, 1964

Advisory ethics opinions are not binding.

It would be improper for an attorney to prepare proposed estate analyses for insurance agents. Even if the proposed arrangement were otherwise proper, it would be improper to make the fee for professional services rendered contingent in whole or in part upon the sale of insurance.

Canons: 6, 12, 13, 27, 35

Opinion: 64-33

Chairman Smith stated the opinion of the committee:

A member of The Florida Bar requests our opinion on the following facts and questions.

The general agent for a life insurance company has agents working under his supervision. These agents approach prospective insurance clients and propose an estate analysis. The analysis includes: (1) mathematical computation of estate taxes as if the insurance client had died yesterday, (2) an analysis of critical areas in estate planning and (3) proposed solutions for critical areas. If insurance is needed to solve estate problems the agent sells the insurance. If insurance is not needed the insurance client refers the agent to three other persons of equivalent financial standing.

The general agent wishes to employ the lawyer to prepare the proposed analyses and to supply information concerning estate analysis which is needed by the agents for their respective insurance clients. The analyses would be limited to explaining the various instruments which should be prepared in a particular case and to stating the provisions which such instruments would contain. The lawyer's only contact would be with the insurance agents, and his name would not appear on the analysis.

In some manner which is not stated, the analysis initially prepared would first be presented to attorneys and accountants employed by the prospective client, and the analysis might be changed after conferences with those individuals. After those conferences and changes, if any, the analysis would be presented to the agent's prospective client with a written explanation, and an oral explanation would be given by the agent.

The lawyer would be paid for his service by the general agent who, in turn, would pass on all or part of the cost to his agents as he sees fit.

Our opinion is sought as to the following questions:

1. Is the above arrangement in any way unethical? If so, in what way? Does it in any way violate Canon 35 dealing with intermediaries?

2. In setting the fee in such a situation is it unethical to set the fee either in whole or in part on a contingent basis depending on the sale of insurance?

3. What steps must the lawyer take, if any, to prevent the agents from disclosing that the analysis is prepared by him?

4. If the insurance client does not have an attorney does the lawyer have any responsibility to prevent the agent from recommending his services?

5. Although it is contemplated that the agent will gather all information, would it be unethical for the lawyer to participate in gathering information from the insurance client, which would involve disclosure of the lawyer's name?

6. Would it be unethical for the lawyer to participate in conferences with the insurance client's attorney and accountant?

Questions of similar nature have previously been propounded to our Committee. In our Opinion 64-33 we covered, particularly in the second situation discussed there, a problem quite similar to the one now posed.

In connection with the specific questions which are presented, the Committee unanimously agrees as follows:

1. It would be ethically improper to engage in the work outlined in the factual situation above. Violations of Canons 6 and 35 are involved for the reasons presented in connection with the second factual situation outlined in Opinion 64-33. The Committee does not consider material that the lawyer's name will not appear on the proposed analyses.

2. Even if the proposed arrangement was otherwise proper, it would be ethically improper to make the fee for professional services rendered contingent in whole or part upon the sale of insurance. The effect of such arrangement is to attempt rendition of a service to a prospective insurance client through an intermediary when the lawyer would be paid by the intermediary only if the client purchased insurance from the intermediary. Canons 6 and 35 are involved.

3. We can conceive of no effective steps which could be taken to prevent the agents from disclosing who prepared the analyses if the agents desired to do so.

4. Although it is not always improper to accept employment upon reference by a layman, we believe it would be wise to decline to represent the prospective insurance client even if he is referred by the insurance agent without the lawyer's knowledge or consent. Otherwise, the whole arrangement could be subject to criticism as a device for channeling legal employment.

5. We also believe it would be unwise to participate in gathering information from the prospective client by direct contact with the client. We understand the lawyer would be employed by the general agent to render advice on the basis of information he furnishes. Direct contact with the prospective insurance client would offer the same possibility for criticism mentioned immediately above.

6. Assuming that he was to render the services contemplated, a majority of the Committee believes it would not be improper for the lawyer to confer with attorneys or accountants representing the prospective insurance client provided the meeting, in effect, amounts to negotiations “at arm’s length.”

FLORIDA BAR ETHICS OPINION
OPINION 64-33
June 22, 1964

Advisory ethics opinions are not binding.

It is improper for an attorney employed full-time by an insurance firm to prepare an estate analysis for prospective clients of the insurance firm, since the attorney's opinion is to be presented to the client as an opinion of a member of The Florida Bar prepared for the benefit of a prospective client. It also is improper for a practicing attorney to prepare an estate analysis from information furnished by an insurance agency to be presented to the prospective client as having been prepared by the agency's attorney.

Canons: 6, 27, 35, 47

Cases: *Oregon State v. John H. Miller & Co.*, 385 P.2d 181 (Ore. 1963)

Chairman Smith states the opinion of the committee:

A member of The Florida Bar requested the opinion of the Professional Ethics Committee relative to two rather complex, but related, problems. The inquiry has been considered by all members of this Committee. It is difficult to express in a compiled form the views presented by the Committee. The following, however, fairly represents a composite of the opinions received.

In the first situation presented, a member of The Florida Bar, who is not a practicing attorney, is employed full time by a firm engaged in the sale of life insurance. The attorney receives a salary plus a minimum bonus from the life insurance firm. The compensation is not directly related or connected with the legal services rendered and the attorney does not receive commissions. The attorney is a member of various legal associations, but does not have the necessary occupational licenses for the practice of law. The services of this attorney include the preparation of estate analyses for prospective clients of the insurance firm. The insurance agent furnishes the attorney with information from which the analysis is prepared. The analysis is then submitted to the prospective client with the representation that the analysis is prepared by an attorney working for the life insurance firm. The analysis is furnished without cost to the prospective client. Subsequently, as the matter develops, the attorney for the life insurance organization may consult with or assist the client's attorney, certified public accountants or other professional advisors. There is no preparation of legal documents by the attorney involved and, if the client needs an attorney, a referral is made by the insurance firm. The attorney uses a letterhead which shows his name and indicates that he is a consulting attorney for the insurance firm by which he is employed. No other person in the insurance firm uses this letterhead and the attorney's name does not appear on any other letterhead used by the firm.

In the second situation, the attorney is a member of The Florida Bar and is engaged in the active practice. One of his clients is an insurance firm engaged in the sale of life insurance. The attorney receives a fixed retainer for the agency's general legal work and, in addition, receives a fixed fee for the preparation of the estate analysis. This attorney maintains the usual licenses of law and is a member of legal associations. His services include the preparation of estate analysis

from information furnished by the life insurance firm. Once prepared, an analysis is presented to the prospective client and the representation is made that the analysis has been prepared by the agency's attorney. There is no cost for the services to the prospective client. Subsequently, the attorney will assist the client's own attorney or other professional advisors. If the insurance client does not have an attorney, the attorney for the insurance group will offer to handle the matter for the client. At this point, the usual attorney-client relationship is created with the client paying to the attorney fees for services rendered.

The Committee is divided in its opinion as to the first situation presented. In the second instance, the Committee unanimously believes that ethical improprieties are involved.

As to the first situation, four members of the Committee feel that the attorney's participation in the program is ethically improper. These members believe, as do the others, that it is quite proper for a firm to hire an attorney and for that attorney to serve the firm full time. All members further feel that it is proper for the attorney to render opinions or develop estate analyses for the benefit of the attorney's employer. The majority maintain, however, that it is improper for the attorney's opinion to be presented to the client as an opinion of a member of The Florida Bar prepared for the benefit of the prospective client. No direct relationship exists between the attorney and client and, it is argued, Canon 35 is offended because the situation amounts to the practice of law through an intermediary. Further, the majority feel that the situation is misleading inasmuch as the attorney's opinion apparently is presented as an unbiased evaluation whereas it is in fact prepared for the purpose of selling life insurance and is most likely slanted in that direction. As a result, the attorney is in a position of giving unsolicited legal advice to a member of the public upon representations of fact furnished to the attorney by his employer, who is financially interested in the circumstances. There is a possibility of conflict of interests and of engaging in the practice of law through a lay agency in violation of specific provisions of the Canons of Ethics.

Two members of the Committee believe that the attorney's practice is not unethical providing he is employed full time by the life insurance firm, and providing further that the presentation to the client is made so that it clearly appears that the estate analysis is made by an employee of the life insurance firm for the purpose of presenting one possible solution to the estate problem of the client. One member of the minority suggests that the circumstances would be more properly presented if the attorney used the regular letterhead of his employer and signed the analysis as staff counsel or in some other capacity which clearly shows the relationship of the attorney to the insurance organization.

Regarding the second factual situation, all members believe that ethical improprieties are presented. The attorney is not a full time employee of the insurance agency. He is allowing his services to be sold or presented to the prospective client, for the benefit of the client, when he has not been retained by the client for that purpose. The interest of the insurance company and that of the client could easily conflict and the attorney is placing himself in a position of representing conflicting interests. There is no disclosure of this fact, contrary to the provisions of Canon 6. In addition, the professional services of the attorney are being controlled or exploited by a lay agency, contrary to the provisions of Canon 35. In addition, the attorney is in effect rendering an opinion on a factual situation presented to him by a third party. This offends both the Canons mentioned.

This Committee is not authorized to determine whether a particular practice constitutes unauthorized practice of law. Thus we can express no opinion regarding the activities of the life insurance agencies concerned. In one of the few cases on point, however, *Oregon State v. John H. Miller & Co.*, 385 P.2d 181 (Ore. 1963), an analogous estate planning service was declared to constitute the unauthorized practice of law. Further, statements of principle are periodically propounded by the National Conference of Lawyers and Life Underwriters. These principles are referred to on pages 151A and 152A, Volume III, Martindale-Hubbell. Therein it is stated that it is improper for a life underwriter to furnish attorneys who will give legal advice to the life underwriter's clients or prospective clients. The life underwriter, it is said, may properly obtain legal advice from an attorney for the underwriter's own guidance. However, it is improper to circularize any such opinion or to use it as a selling document. The same material presents certain findings which tend to condemn the practice of an attorney as set forth above.

Should the problems be presented to the Committee on Unauthorized Practice of Law of The Florida Bar, and should that group find that the insurance firms are engaged in such practices, it is obvious that any member of The Florida Bar permitting his professional services or name to be used to aid such unauthorized practice would be in violation of Canon 47.

FLORIDA BAR ETHICS OPINION
OPINION 63-37
January 11, 1964

Advisory ethics opinions are not binding.

If an attorney participates with his clients in a corporation formed as a consulting service for prospective sponsors of condominium housing developments, the personnel of which would be lawyers and real estate brokers, and legal services are rendered to the consulting service and to its clients, ethical violations are probable and inevitable.

Caveat: The validity of this opinion may be affected by *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217 (1967).

Canons: 6, 27, 33, 35, 47

Chairman Smith stated the opinion of the committee:

A member of The Florida Bar states that a client of his office wishes to form a corporation for the purpose of furnishing a consulting service for prospective sponsors of condominium housing developments under the Florida Condominium Act. Personnel of the corporation will consist of lawyers and real estate brokers or salesmen. He mentions the names of two of the lawyers but does not indicate whether they are members of The Florida Bar. He indicates that the service rendered will include consultation from the initial planning stage through the sale of a dwelling unit. He further states that his firm expects to furnish legal representation to some of the clients of the consulting service and that he has been asked to act as a legal advisor to the service and as a director and stockholder.

Attention is directed to the provisions of Canons 6, 27, 33 and 47 respectively. They are published in Florida Statutes Annotated and elsewhere. Subject to receipt of further details concerning the plan and his expected participation, it is the opinion of the Committee that violation of one or more of the Canons mentioned is probable.

Of course, any attorney duly admitted to practice in this state can form a corporation and act as legal advisor to it. Further, he may also be a director and/or stockholder of the corporation. His inquiry suggests the possibility, however, of rendering legal advice not only to the corporation but also to its clients. Conceivably a conflict of interests could develop which could offend the provisions of Canon 6.

More importantly, he suggests that his firm expects to receive professional employment from clients of the consulting service. Canon 27 prohibits the solicitation of legal representation either directly or indirectly. A lawyer can be engaged in more than one business or profession but they must be kept separate and apart and no other business or professional interest should be used to obtain or channel professional work.

It seems inevitable that the consulting service will render legal service through its personnel, some of whom are lawyers possibly not admitted to practice in this State. There is a

strong possibility that the service contemplated will, at least partially, constitute unauthorized practice of law. Canon 47 provides that no lawyer shall permit his professional services, or name, to be used in aid of unauthorized practice of law by any lay agency, personal or corporate.

One member of this Committee refers to Canon 33, which relates to partnerships and prohibits the formation of partnerships between lawyers and non-lawyers where any part of the partnership's employment consists of the practice of law. It is suggested that to become intimately connected with the corporation as suggested would offend the spirit of this Canon since the corporation will advise its clients about legal matters and will necessarily interpret and apply the provisions of the Florida Condominium Act.

FLORIDA BAR ETHICS OPINION
OPINION 61-19 Supplemental
October 11, 1961

Advisory ethics opinions are not binding.

While a lawyer may not hold a share in a Professional Service Corporation with accountants, there is no objection to his holding a share in a corporation not organized under such act, if there is no “feeder” arrangement involved.

Canons: 27, 35 [*See* current 4-7.18]

Opinion: 61-19

Chairman Holcomb stated the opinion of the committee:

Following Opinion 61-19 advising a member of The Florida Bar that under the Professional Service Corporation Act he as a lawyer could not hold stock in such a corporation organized by accountants or any other profession than lawyers, he has requested our further opinion as to whether he might be permitted to hold a share of stock in a corporation not organized under the Professional Service Corporation Act but as a standard corporation for profit where the accountant firm is located in another city, there is no sharing of reception or other space and there is no “feeder” arrangement involved under which he would receive business through the firm.

It is our opinion that under these circumstances there is no reason why he should not ethically hold stock in any business corporation which is operated entirely separate from his own business and does not involve any “feeder” arrangement.

FLORIDA BAR ETHICS OPINION
OPINION 61-1
June 15, 1961

Advisory ethics opinions are not binding.

A lawyer may not properly prepare all the necessary documents and instruments for a real estate closing at the request of a real estate broker, and receive a fee from such broker, having no contact with buyer or seller.

Canons: 35, 38

Opinions: ABA Informal 321, 328

Chairman Holcomb stated the opinion of the committee:

The Committee on Professional Ethics of The Florida Bar has considered the problem submitted.

A member of The Florida Bar states that local real estate people were informed by a County Bar Association that they were prohibited from preparing instruments other than the customary purchase and sale agreement on a printed form, and asks if it would be unethical for an attorney, at the request of a real estate broker or salesman, to prepare all the necessary instruments and documents attendant to the closing, such as warranty deed, note, mortgage and the like, and to charge the real estate broker without any contact whatsoever between the attorney and the buyer or seller. The member noted that in most instances the broker would be reimbursed for the legal fees by either the seller or buyer.

A majority of the Committee finds that such a procedure would not be ethical insofar as a lawyer belonging to The Florida Bar would be concerned. Canon 35 provides: "The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between the client and lawyer. The lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary. A lawyer's relation to his client should be personal, and the responsibility should be directed to the client. Charitable societies rendering aid to the indigent are not deemed such intermediaries." The arrangements proposed by the letter appear to offend the intent of Canon 35.

In his treatise, Mr. Drinker, on page 161, deals with delegation of professional functions, stating that a lawyer "may not advise an accountant so as to enable him to pass on the advice to his clients as his own." (cf. Drinker, Appendix A, p. 300, No. 321.) Some of the local Committee feel there is a possibility that the real estate broker or salesman, under the circumstances raised by the inquiry, might pass on the work of the attorney as the product of the realtor. Another unreported ABA decision indicates that while a credit bureau may retain an attorney it is the lawyer's duty to get in direct touch with the creditor, and this opinion stresses the desirability for direct contact between the attorney and client. (See Drinker, Appendix A, p. 300, No. 328.)

Henry S. Drinker, in his book *Legal Ethics*, reviews the entire problem of direct relations with clients, commencing on page 159. He notes that "A lawyer may not properly draw a will on the instructions of a daughter and give it to her to have her mother sign, but should see the testatrix personally. The practice of drawing wills for trust companies to have their patrons sign is wholly improper. . . ." At page 160 appears the following: "He may not make an arrangement with a broker to prepare abstracts for him to be delivered to the broker's client, the broker to arrange for and collect the lawyer's fee, the lawyer not to see the client." Implicit throughout the discussion of Canon 35 is the thought that every client has an individual problem based upon a particular factual situation, and a lawyer cannot fulfill his obligation to render sound legal advice where he permits an intermediary to direct the scope and extent of his professional services.

Based on the foregoing it is our opinion that it would clearly be unethical for a lawyer to prepare the instruments and documents attendant to a real estate closing at the request of the real estate broker or salesman, charging the broker or salesman, and having no contact with either the buyer or seller in that transaction.

RULE 4-1.8 CONFLICT OF INTEREST; PROHIBITED AND OTHER TRANSACTIONS

Rule 4-1.8(a):

(a) Business Transactions With or Acquiring Interest Adverse to Client. A lawyer is prohibited from entering into a business transaction with a client or knowingly acquiring an ownership, possessory, security, or other pecuniary interest adverse to a client, except a lien granted by law to secure a lawyer's fee or expenses, unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

RULE 4-5.7 RESPONSIBILITIES REGARDING NONLEGAL SERVICES

Rule 4-5.7

(a) Services Not Distinct From Legal Services. A lawyer who provides nonlegal services to a recipient that are not distinct from legal services provided to that recipient is subject to the Rules Regulating The Florida Bar with respect to the provision of both legal and nonlegal services.

(b) Services Distinct From Legal Services. A lawyer who provides nonlegal services to a recipient that are distinct from any legal services provided to the recipient is subject to the Rules Regulating The Florida Bar with respect to the nonlegal services if the lawyer knows or reasonably should know that the recipient might believe that the recipient is receiving the protection of a client-lawyer relationship.

(c) Services by Nonlegal Entity. A lawyer who is an owner, controlling party, employee, agent, or otherwise is affiliated with an entity providing nonlegal services to a recipient is subject to the Rules Regulating The Florida Bar with respect to the nonlegal services if the lawyer knows or reasonably should know that the recipient might believe that the recipient is receiving the protection of a client-lawyer relationship.

(d) Effect of Disclosure of Nature of Service. Subdivision (b) or (c) does not apply if the lawyer makes reasonable efforts to avoid any misunderstanding by the recipient receiving nonlegal services. Those efforts must include advising the recipient, preferably in writing, that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the provision of nonlegal services to the recipient.

Comment

For many years, lawyers have provided to their clients nonlegal services that are ancillary to the practice of law. A broad range of economic and other interests of clients may be served by lawyers participating in the delivery of these services. In recent years, however, there has been significant debate about the role the rules of professional conduct should play in regulating the degree and manner in which a lawyer participates in the delivery of nonlegal services. The ABA, for example, adopted, repealed, and then adopted a different version of ABA Model Rule 5.7. In the course of this debate, several ABA sections offered competing versions of ABA Model Rule 5.7.

One approach to the issue of nonlegal services is to try to substantively limit the type of nonlegal services a lawyer may provide to a recipient or the manner in which the services are provided. A competing approach does not try to substantively limit the lawyer's provision of nonlegal services, but instead attempts to clarify the conduct to which the Rules Regulating The Florida Bar apply and to avoid misunderstanding on the part of the recipient of the nonlegal services. This rule adopts the latter approach.

The potential for misunderstanding

Whenever a lawyer directly provides nonlegal services, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the nonlegal services are performed may fail to understand that the services may not carry with them the protection normally afforded by the client-lawyer relationship. The recipient of the nonlegal services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of nonlegal services when that may not be the case. The risk of confusion is acute especially when the lawyer renders both types of services with respect to the same matter.

Providing nonlegal services that are not distinct from legal services

Under some circumstances, the legal and nonlegal services may be so closely entwined that they cannot be distinguished from each other. In this situation, confusion by the recipient as to when the protection of the client-lawyer relationship applies is likely to be unavoidable. Therefore, this rule requires that the lawyer providing the nonlegal services adhere to all of the requirements of the Rules Regulating The Florida Bar.

In such a case, a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required elsewhere in these Rules Regulating The Florida Bar, that of nonlawyer employees comply in all respects with the Rules Regulating The Florida Bar. When a lawyer is obliged to accord the recipients of such nonlegal services the protection of those rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the Rules Regulating The Florida Bar addressing conflict of interest and to scrupulously adhere to the requirements of the rule relating to disclosure of confidential information. The promotion of the nonlegal services must also in all respects comply with the Rules Regulating The Florida Bar dealing with advertising and solicitation.

Subdivision (a) of this rule applies to the provision of nonlegal services by a lawyer even when the lawyer does not personally provide any legal services to the person for whom the nonlegal services are performed if the person is also receiving legal services from another lawyer that are not distinct from the nonlegal services.

Avoiding misunderstanding when a lawyer directly provides nonlegal services that are distinct from legal services

Even when the lawyer believes that his or her provision of nonlegal services is distinct from any legal services provided to the recipient, there is still a risk that the recipient of the nonlegal services will misunderstand the implications of receiving nonlegal services from a lawyer; the recipient might believe that the recipient is receiving the protection of a client-lawyer relationship. Where there is such a risk of misunderstanding, this rule requires that the lawyer providing the nonlegal services adhere to all the Rules Regulating The Florida Bar, unless exempted by other provisions of this rule.

Avoiding misunderstanding when a lawyer is indirectly involved in the provision of nonlegal services

Nonlegal services also may be provided through an entity with which a lawyer is somehow affiliated, for example, as owner, employee, controlling party, or agent. In this situation, there is still a risk that the recipient of the nonlegal services might believe that the recipient is receiving the protection of a client-lawyer relationship. Where there is such a risk of misunderstanding, this rule requires that the lawyer involved with the entity providing nonlegal services adhere to all the Rules Regulating The Florida Bar, unless exempted by another provision of this rule.

Avoiding the application of subdivisions (b) and (c)

Subdivisions (b) and (c) specify that the Rules Regulating The Florida Bar apply to a lawyer who directly provides or is otherwise involved in the provision of nonlegal services if there is a risk that the recipient might believe that the recipient is receiving the protection of a client-lawyer relationship. Neither the Rules Regulating The Florida Bar nor subdivisions (b) or (c) will apply, however, if pursuant to subdivision (d), the lawyer takes reasonable efforts to avoid any misunderstanding by the recipient. In this respect, this rule is analogous to the rule regarding respect for rights of third persons.

In taking the reasonable measures referred to in subdivision (d), the lawyer must communicate to the person receiving the nonlegal services that the relationship will not be a client-lawyer relationship. The communication should be made before entering into an agreement for the provision of nonlegal services, in a manner sufficient to assure that the person understands the significance of the communication, and preferably should be in writing.

The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a sophisticated user of nonlegal services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and nonlegal services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.

The relationship between this rule and other Rules Regulating The Florida Bar

Even before this rule was adopted, a lawyer involved in the provision of nonlegal services was subject to those Rules Regulating The Florida Bar that apply generally. For example, another provision of the Rules Regulating The Florida Bar makes a lawyer responsible for fraud committed with respect to the provision of nonlegal services. Such a lawyer must also comply with the rule regulating business transactions with a client. Nothing in this rule (Responsibilities Regarding Nonlegal Services) is intended to suspend the effect of any otherwise applicable Rules Regulating The Florida Bar, such as the rules on personal conflicts of interest, on business transactions with clients, and engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.

In addition to the Rules Regulating The Florida Bar, principles of law external to the rules, for example, the law of principal and agent, may govern the legal duties owed by a lawyer to those receiving the nonlegal services.