

Committee Opinion  
June 28, 1990

LEGAL ETHICS OPINION 1364

CORPORATE COUNSEL:  
INDEMNIFICATION OF IN-HOUSE  
COUNSEL BY CORPORATE  
EMPLOYER.

You have requested that the Committee opine as to whether a lawyer who practices law on behalf of a corporate employer is in violation of Disciplinary Rule 6-102(A) [ DR:6-102] if, during the tenure of that employment, the lawyer may be indemnified pursuant to the corporate employer's articles of incorporation or bylaws as permitted by Virginia law.

Following your discussion with the Committee on April 19, 1990, during its regularly scheduled meeting of May 17, 1990, the Committee reviewed the circumstances of your inquiry and considered at great length the arguments involved in the question you raised.

Although the Committee recognizes the statutory availability of indemnification to corporate officers and employees, the Committee continues to be of the opinion that the plain language of DR:6-102(A) does not ethically permit a corporate attorney-employee to avail himself of such indemnification. Additionally, the Committee appreciates the conflict demonstrated between the conclusions reached in South Carolina Ethics Opinion 85-30 and District of Columbia Ethics Opinion 193. The Committee is not persuaded by the reasoning of the latter that such indemnification is permitted since the corporate employer, a "sophisticated business entity," has made a "careful 'business judgment' that it prefers to waive its rights of legal redress against its employees."

Rather, in affirming prior LE Op. 1211 and LE Op. 877, and in adopting South Carolina Opinion 85-30, the Committee's concern is that such a broad reading of DR:6-102(A) as you have requested would ultimately permit analogous application of the result to individual clients of a practitioner in private practice when those clients possess high levels of sophistication and business judgment. The Committee believes that such a dilution of the language of the rule does inestimable damage to the protection afforded a client by the Code of Professional Responsibility.

In a recent opinion, the Committee, recognizing the reasoning of the Supreme Court of Virginia, found that certain acts are ethically improper when undertaken by a member of the bar, irrespective of the legality of such behavior. (See LE Op. 1324; *Gunter v. VSB*, 238 Va. 617, 621 (1989))

Since the Committee believes it is required to predicate its conclusions upon the plain language of DR:6-102(A), the Committee respectfully suggests that, if customary malpractice insurance is unavailable to corporate counsel, the appropriate avenue for reaching a different conclusion (which would permit corporate counsel to accept indemnification by their corporate employers) would be a proposal to the council for a change to the current rule. Such a change could more clearly delineate the ethical propriety of a corporate attorney accepting indemnification as permitted by the corporation's articles of incorporation, bylaws and statute.

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The Committee offers the sample language below as a suggestion for Corporate Counsel § to consider proposing for council's adoption and submission to the Supreme Court of Virginia.

DR:6-102

(B) A lawyer employed as in-house counsel to a corporation shall not negotiate or condition his or her employment upon the granting of prospective indemnification rights by the corporate employer/client.

(C) A lawyer employed as in-house counsel to a corporation may accept prospective indemnification pursuant to the corporate employer's articles of incorporation or bylaws, as permitted by law, provided that the employer/client is independently represented in making the agreement.

Although the Committee is of the belief that such language would render proper the corporate counsel's acceptance of indemnification, the Committee also believes that, under certain circumstances, it may be improper for corporate counsel to bring an action for breach of the indemnification agreement or any other agreement for the corporation's voluntary reimbursement of the corporate counsel's liability. In any case, the enforceability of such indemnification raises legal questions beyond the scope of the Committee's purview.

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**Legal Ethics Committee Notes.** – This LEO was overruled by Rule 1.8(h), which permits such indemnity agreements if the corporation is separately represented.