

LEGAL ETHICS OPINION 1658

ANCILLARY BUSINESS; NON-LEGAL  
CONSULTING FIRM ESTABLISHED BY  
LAW FIRM TO PROVIDE SERVICES TO  
LAW FIRM CLIENTS AND OTHERS  
AND WHICH WOULD SHARE LOGO  
WITH LAW FIRM.

You are the principal owner of a law corporation ("Law Firm") which limits its practice to labor and employment law representing management. Your clients often seek human resource advice which in many cases may be given by a non-lawyer with professional training, background and certification in human resources and behavioral science.

Law Firm proposes to establish a non-legal Consulting Firm ("Consulting Firm") with a non-lawyer to provide human resource consultations and advice to clients. Consulting Firm would operate as a separate business entity from Law Firm, however, the two firms would share a common logo and similar letterhead trade name and style. The name of Consulting Firm would nevertheless be different from the name of Law Firm and would not suggest that it engages in any activity that constitutes the practice of law. The names of Law Firm and Consulting Firm are such that the average consumer or client would not be confused as to the identity or purpose of the two firms. Consulting Firm would offer those closely affiliated non-legal services to Law Firm's clients (upon referral) as well as to clients who do not require legal services.

As President of Law Firm, you would be a shareholder of Consulting Firm and would serve as Chairman of its Board of Directors. As such, you would have limited involvement in the day-to-day operation of its business. Other partners in Law Firm may be eligible to become shareholders and directors of Consulting Firm. A non-lawyer shareholder would serve as CEO of Consulting Firm and, as such, would have direct operational control of its business. If required, the non-lawyer shareholder may employ additional non-lawyer staff to operate Consulting Firm.

You and any other shareholders of Consulting Firm would be compensated by dividends received from Consulting Firm and would not engage in consulting services while employed by Law Firm. The non-lawyer shareholder of Consulting Firm would be compensated by dividends and a salary/incentive plan paid out of proceeds earned by Consulting Firm. The non-lawyer shareholder of Consulting Firm would not work for Law Firm nor would he/she receive any compensation from Law Firm. The two firms would operate as separate and independent business entities with no sharing of profits or splitting of fees. Each firm would maintain separate bookkeeping records and bank accounts. Each firm would also maintain a separate client base, conflict records and confidential files.

The two firms would maintain separate office space, however, they would share a lobby. The two firms would initially share overhead expenses such as secretarial support, library resources, etc., but would intend to eventually become free-standing in all respects

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other than proximate office space. To the extent that both firms were marketed together, they would share marketing expenses.

Consulting Firm would refer any of its clients who desired or needed legal representation to Law Firm and Law Firm would refer any of its clients who desired/needed consulting services to Consulting Firm. Consulting Firm would also advise referred clients of other law firms which provide the same legal services, and Law Firm would advise its referred clients of the existence of other consulting firms.

All referrals would be made only after full disclosure of the common ownership/relationship between the two firms. Additionally, the common logo and similar letterhead trade name and style would make common ownership apparent to the public.

On any occasion that Consulting Firm required legal advice or counsel, it would use the legal services of Law Firm. Law Firm would charge its regular rate for these services to Consulting Firm and would treat all such services as ordinary legal services for purposes of conflicts and confidentiality. Examples of such legal services may include: (1) conducting research for Consulting Firm on discreet issues; (2) reviewing Consulting Firm products such as sample employee surveys, handbooks, literature, and seminar materials from a legal perspective; and (3) giving specialized legal advice in the areas of labor relations and human resource management. Law Firm would not represent Consulting Firm in any dispute or matter in which a current or former client was an adverse party, or if Consulting Firm is adverse to a person referred to Consulting Firm by Law Firm.

The nature of Consulting Firm's business would require that its work be kept in strict confidence. Only with the knowledge and consent of clients referred to Law Firm would confidential information be shared with Law Firm and only after Law Firm established an attorney-client relationship with the referred client.

The controlling disciplinary rules are:

DR:2-101(A) (prohibiting publicity and advertising which is false, fraudulent, deceptive or misleading);

DR:2-102(A) (prohibiting use of letterhead and professional notices containing information which is false, fraudulent, deceptive or misleading);

DR:2-102(B) (prohibiting use of trade name which is false, fraudulent, deceptive or misleading);

DR:2-103(D) (prohibiting payment of compensation to another for referral of client);

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DR:3-101(A) (a lawyer shall not aid a nonlawyer in the unauthorized practice of law);

DR:3-102(A) (prohibiting fee-splitting with a non-lawyer);

DR:3-103(A) (prohibiting formation of law partnership with nonlawyers);

DR:4-101(B) (requiring attorney to protect client confidences and secrets);

DR:5-101(A) (prohibiting attorney from accepting employment if the exercise of his professional judgment may be affected by his own financial, business, property or personal interests, except with client consent after full and adequate disclosure);

DR:5-104(A) (prohibiting business transactions with a client if attorney and client have differing interests, unless client consents after full and adequate disclosure); and

DR:5-105(A, B and C) (prohibiting representation of multiple parties with conflicting interests unless obvious that attorney can adequately represent multiple clients and each consents after full disclosure).

Based upon these facts, you have asked the committee to address a number of issues concerning the ethical propriety of this arrangement.

1. Will the President of Law Firm violate the Code of Professional Responsibility by establishing and having an ownership interest in Consulting Firm?

The committee has previously opined that an attorney's dual activities of practicing law and engaging in related business endeavors is not per se improper. However, the committee has opined that such activities must comply with the requirements of DR:5-101(A) and other applicable provisions in the Code of Professional Responsibility. Arrangements of this sort have been approved where practicing attorneys have established and held ownership interests in non-legal ancillary businesses. See, e.g., LE Op. 1564 (title insurance agencies); LE Op. 1254 (bail bond services); LE Op. 1198 (court reporting service); LE Op. 1163 (accounting service); LE Op. 1131 (realty corporation) and LE Op. 1083 (non-legal services subsidiary). Thus, the committee is of the opinion that it is not improper for an attorney to acquire an ownership interest in a non-legal business, provided that the requirements under DR:5-101(A) and DR:5-104(A) are met, including full disclosure to clients of the attorney's financial interest in such a business where related services or products of the business are to be provided to the attorney's clients. In addition, there are other ethical requirements which are applicable as discussed below.

2. May the President of Law Firm occupy the dual roles of President and practicing attorney and Chairman of the Board of Directors at Consulting Firm?

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The committee is of the opinion that the President may serve as both President and practicing attorney and simultaneously serve as Chairman of the Board of Directors and thereby have a managerial role in the operation of the non-legal business. However, the attorney must comply with the disclosure and consent requirements, restrictions on compensation, and prohibitions against sharing legal fees with the non-lawyer business. See, LE Op. 1564.

3. May Law Firm and Consulting Firm share a common logo and similar letterhead trade name and style?

The committee believes that it is incumbent on the attorney to insure that the public and clients are not misled by the use of trade names, letterhead, advertising and other forms of public communications so that the activities of Consulting Firm and Law Firm are held out to the public as separate and distinct. Since the two firms will occupy the same building, lobby space and share support staff, the attorney must insure that the public is not confused as to which business may lawfully give legal advice. The common logo, letterhead trade name and style of the two firms must not be so similar that the public may be confused or misled as to the role of each firm. Consulting Firm cannot, through public communications or advertising, suggest or imply that it provides legal advice or services. Therefore, the committee is of the opinion that the use of a common logo, similar letterhead trade name and style must comply with DRs 2-101(A), 2-102(A) and 2-102(B). These requirements are met where the logo, trade name and style used by the Consulting Firm make it clear that the Consulting Firm provides non-legal services.

4. May Law Firm and Consulting Firm share overhead expenses such as secretarial support, library resources, lobby space, etc.?

Yes, however, in LE Op. 1564 the committee stated that where an attorney conducts a law practice on the same premises as the non-legal business, the attorney must maintain separate signage and telephone listings, separate and secure client files, and separated office space. In addition, where the two entities employ the same support staff, great care must be exercised to avoid any inadvertent disclosures of confidences and secrets. DR:2-102(A); DR:3-104 and DR:4-101. See also LE Op. 754, LE Op. 1318 and LE Op. 1564.

5. May Law Firm and Consulting Firm be marketed jointly to the public as a total resource package (i.e., together they can offer clients access to both consulting services and legal services)?

The committee is of the opinion that the joint marketing of the services of Law Firm and Consulting Firm as a total resource package is not per se improper. However, the same concerns discussed under Question #3 are pertinent here. Such conduct is risky and great care must be exercised to avoid confusion and the misperception that Consulting Firm is capable of providing legal advice and counseling. Whether or not the joint marketing approach is misleading as to the roles of the respective entities depends upon specific facts and circumstances which are not available. Thus, in the abstract, the committee believes that a joint marketing approach for the two firms is not per se

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improper, provided that the requirements of DR:2-101(A) are met and Consulting Firm is not being held out as capable of practicing law. Rules of Court, Pt. 6, § I(A) (prohibiting non-lawyer from holding himself out in any manner as authorized or qualified to practice law).

6. If there is full disclosure to clients regarding common ownership of the two firms, may Law Firm refer its clients to Consulting Firm and vice versa?

The committee has previously opined that an attorney's referral of clients to a related business in which he or she has a pecuniary interest triggers the requirements of DR:5-101(A) and DR:5-104(A). Since it is the attorney who is to profit by the client using the services of the ancillary business, full and adequate disclosure is required which will enable the client to make an informed decision. DR:5-101(A); LE Op. 1564, LE Op. 1152, LE Op. 939 and LE Op. 886. In addition, since the referral of a client to the Consulting Firm will create a business transaction between lawyer and client, DR:5-104(A) requires that the transaction must not be unconscionable, unfair or unreasonable when made. You have also indicated that there is no fee or compensation paid for the referral of a client by one entity to the other, and no splitting of fees or income generated by the two businesses. Thus the referral of clients under this arrangement would not violate DR:2-103(D) or DR:3-102(A). Assuming these requirements are met, it would not be improper for the one entity to refer a client to the other.

7. What types of legal services may Law Firm provide to Consulting Firm? For example, if a Law Firm client hires Consulting Firm to oversee a union organizational campaign, may Consulting Firm obtain legal advice from Law Firm regarding legal aspects of the organizational campaign?

The committee is of the opinion that the Law Firm may provide legal services to Consulting Firm or to Consulting Firm's clients where legal advice, legal drafting or representation before a tribunal is required, provided that adequate conflicts screening procedures are adopted by both firms to avoid representation of parties adverse to clients of the two firms. DR:5-101(A), DR:5-105(A), (B) and (D). You have indicated that each firm will maintain separate conflicts screening procedures. Also, Law Firm may not represent Consulting Firm in a matter substantially related to a matter handled for a former client, if the interests of Consulting Firm and the former client conflict in any material respect, unless the former client consents after disclosure. DR:5-105(D).

8. May Law Firm shareholders provide non-legal services for Consulting Firm in the future if these shareholders continue to be licensed to practice law but are no longer actively practicing law or employed by Law Firm?

The committee is aware of no disciplinary rule in the Code of Professional Responsibility that would prohibit this conduct. However, the committee has previously opined that a lawyer must comply at all times with applicable rules of the Code of Professional Responsibility, whether or not the attorney is acting in a professional capacity as a lawyer. See LE Op. 1185.