
Wisconsin Formal Ethics Opinion EF-18-02: In-house Counsel; Assisting an employer/client in the unauthorized practice of law by providing legal services to customers of employer/client.

August 14, 2018

Synopsis: Lawyers may not assist others in the unauthorized practice of law and may not share legal fees with nonlawyers. These prohibitions apply to all lawyers, including lawyers who are employed as in-house counsel for entities that are not law firms. Entities that are not law firms are prohibited from practicing law, and a lawyer employed by a non-law firm entity who provides legal services to the customers of the entity as part of the services sold to such customers assists the entity in the unauthorized practice of law. When the customers pay the entity for the legal services provided by the lawyer, the lawyer impermissibly shares legal fees with a nonlawyer. In addition to the prohibitions on assisting another in the unauthorized practice of law and sharing fees with nonlawyers, an in-house lawyer who seeks to provide legal services to the customers of the employer faces potential conflicts of interest and difficulties in observing the duty of confidentiality.

Introduction

The State Bar's Standing Committee on Professional Ethics (the "Committee") and State Bar Ethics Counsel regularly receive questions from lawyers who are employed by, or have been approached by, non-law firm businesses that wish to use the lawyer to provide services to the customers of the business. For example, a trust marketing firm may wish to use in-house counsel to prepare estate planning documents for customers, a collection agency may wish to use in-house lawyers to bring suit on behalf of customers or a credit counseling firm may wish in-house counsel to represent customers in foreclosures. In order to address these questions, this opinion considers the following scenario:

A lawyer is employed as an in-house lawyer for a commercial enterprise that is not a law firm nor owned by lawyers. In the normal course of the lawyer's duties as an employee, the lawyer provides legal services to the company. Recently, management of the company has proposed expanding the scope of the lawyer's duties to include providing legal services to the customers of the company. The legal services provided to customers would be related to the non-legal services the company sells to its customers and the company intends to factor the legal services provided by the lawyer into the fees it charges the customers, either as part of an overall fee or a surcharge for legal services. The lawyer would not be directly compensated for legal services by customers but would continue to be a salaried employee of the company.

The Committee has considered the propriety of this conduct in the past. In Ethics Opinion E-61-1, the Committee opined that a proposed arrangement whereby a lawyer would allow his name and services to be used in connection with the prosecution of legal claims by a collection agency was unethical because of impermissible fee sharing, solicitation and assisting in the unauthorized practice of law. While E-61-1 is still valid, that opinion was issued in 1961, relied upon the now superseded Canons of Professional Ethics and discussed a very specific factual situation. Therefore, the committee has decided to issue this opinion, which provides updated and more general guidance.

For the purposes of this opinion, we will assume that the legal services that the lawyer is asked to perform for customers fall within the definition of the practice of law as set forth in Supreme Court Rule (“SCR”) 23.01 and do not fall within any of the exceptions set forth in SCR 23.02(2).¹

Discussion

I. Unauthorized Practice of Law

Lawyers may not assist others in the unauthorized practice of law. SCR 20:5.5 states, in relevant part, as follows:

(a) A lawyer shall not:

(2) assist another in practicing law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction.

The question then becomes whether a lawyer employed by a company who provides legal services to clients of the company is assisting another in the unauthorized practice of law.

In *State ex rel. State Bar of Wisconsin v. Bonded Collections*, 36 Wis. 2d 643, 154 N.W.2d 250 (1967), the Wisconsin Supreme Court held that a collection agency which took assignments from creditors, furnished a lawyer and brought suit in its own name was engaged in the unauthorized practice of law.² Because the creditors retained a beneficial interest in the amounts

¹ These exceptions permit, for example, lawyers who work for non-profit agencies to provide pro bono legal services to low income individuals [SCR 23.02(q)] and lawyers who are employed by insurance companies to represent insureds [SCR 23.02(r)].

² Cases from other states have reached similar conclusions. See, e.g., *J.H. Marshall & Associates, Inc. v. Burleson*, 313 A.2d 587 (D.C. 1973); *Iowa Supreme Court Commission on the Unauthorized Practice of Law v. A-1 Associates, Ltd.*, 623 N.W.2d 803 (Iowa 2001); *Med Controls, Inc. v. A-1 Associates*, 61 Ohio App.3d 497, 573 N.E.2d 154 (Ohio 1989).

owed despite the assignment, the collection agency was offering legal services to the creditor and thus engaged in the unauthorized practice of law. The *Bonded Collections* case clearly holds that businesses that are not law firms, such as collection agencies, may not offer legal services to their clients in Wisconsin.

There is near universal agreement that a lawyer employed by a non-law firm may not assist the employer in providing legal services to its customers. Cases and ethics opinions from other jurisdictions have discussed situations involving non-legal entities other than collection agencies and similarly found it improper for a lawyer employed by the entity to provide legal services to the customers of the entity.³

Finally, the Committee notes that, pursuant to a Wisconsin statute, it is a crime to engage in the unauthorized practice of law in Wisconsin.⁴ We note that assisting another in the unauthorized practice of law may bring consequences for both the lawyer and the employer.

II. Fee Sharing and Professional Independence

The scenario also implicates SCR 20:5.4. That Rule provides as follows:

SCR 20:5.4 Professional Independence of a Lawyer.

- (a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:
- (1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time

³ See e.g. *Texas Ethics Op. 531*, opining that a lawyer who was in-house for a corporation would be assisting the corporation in the unauthorized practice of law if the corporation billed its subsidiaries "market rates" for legal services provided by the in-house lawyer; *In re Mid-Am. Living Trust Assocs. Inc.*, 927 S.W.2d 855 (Mo. 1996), holding that a trust marketing firm's in-house counsel who reviewed documents only after nonlawyers had given legal advice to clients, recommended and sold nonlawyer-drafted trust instruments, and been paid did not save the firm from engaging in the unauthorized practice of law. Further, outside "review attorneys" who performed essentially the same function were assisting the firm in the unauthorized practice of law: *Illinois Advisory Opinion 14-03*, opining that a lawyer employed by a financial services firm may not represent the firm's customers in social security appeals.

⁴ 757.30 Penalty for practicing without license.

(1) Every person, who without having first obtained a license to practice law as an attorney of a court of record in this state, as provided by law, practices law within the meaning of sub. (2), or purports to be licensed to practice law as an attorney within the meaning of sub. (3), shall be fined not less than \$50 nor more than \$500 or imprisoned not more than one year in the county jail or both, and in addition may be punished as for a contempt.

(2) Every person who appears as agent, representative or attorney, for or on behalf of any other person, or any firm, partnership, association or corporation in any action or proceeding in or before any court of record, circuit or supplemental court commissioner, or judicial tribunal of the United States, or of any state, or who otherwise, in or out of court, for compensation or pecuniary reward gives professional legal advice not incidental to his or her usual or ordinary business, or renders any legal service for any other person, or any firm, partnership, association or corporation, shall be deemed to be practicing law within the meaning of this section.

after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of SCR 20:1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

SCR 20:5.4(a) prohibits, with several clearly delineated exceptions, sharing legal fees with non-lawyers and thus prohibits any arrangement whereby a lawyer employed by a company would perform legal services for clients of the company and the company would charge the client for those legal services. This prohibition applies regardless of whether the clients were charged directly for the legal services, such as through an hourly bill specifically for legal services, or indirectly through a percentage or flat fee for the services of the company.⁵ Maine Ethics Opinion 180 concluded that:

Applying the Bar Rule to the facts, the Commission believes that there is little, if any substantive difference between a lawyer sharing a fee with a non-lawyer and as here, a lawyer being paid a salary by a non-lawyer in order to provide legal representation to fee paying clients of the non-lawyer.

We agree and conclude that the company may not benefit financially from an employee lawyer's provision of legal services to customers.

SCR 20:5.4(b) also prohibits a lawyer from partnering with non-lawyers in such a venture. SCR 20:5.4 (c) prohibits a lawyer from allowing any non-lawyer employed by the company from directing or controlling the lawyer in provision of legal services to customers of the company.

⁵ For examples of financial arrangements between lawyers and non-law firms found to be in violation of that state's version of Rule 5.4, see *In the Matter of Struthers*, 179 Ariz. 216, 877 P.2d 789 (1994); *Connecticut Ethics Op. 99-25* (1999); *Pennsylvania Ethics Ops. 98-14A and 98-14B*; *Montana Ethics Op. 950411* (1995).

SCR 20:5.4(d) would further prohibit a lawyer from being employed by a collection agency and providing legal services to customers of the collection agency if any non-lawyer has any ownership interest in the collection agency.

In addition to the prohibition expressed in the Rules, a Wisconsin statute prohibits sharing legal fees with nonlawyers.⁶ As with assisting another in the unauthorized practice of law, the Committee notes that sharing of legal fees with nonlawyers may bring consequences beyond the Rules.

III. Conflicts and Confidentiality

In addition to the prohibitions described above, there are other Rules which are relevant to the question. First, SCR 20:1.7(a)(2) states that a lawyer has a conflict of interest when there is a significant risk that the representation of one client may be materially limited by the lawyer's responsibilities to another client. A lawyer's duties to the entity-employer client may conflict with the lawyer's duties to the customer client in many ways, such as when a transaction may not be favorable to a customer but the transaction is economically beneficial to the employer. Lawyers are also required by SCR 20:1.6 not to disclose information relating to the representation of a client unless the client gives informed consent or an exception applies. The employer may request or require access to information about legal services provided to customers, and the lawyer may not be able to provide un-conflicted advice to the customer client as to whether to consent to such a disclosure. SCR 20:1.8(f) and SCR 20:5.4(c) impose duties on lawyers who accept fee payments from third parties and this Rule may apply when the lawyer's compensation is coming solely from the employer.

This brief discussion is not an exhaustive list of Rules that may be implicated, but serves to illustrate that such an arrangement is fraught with ethical problems for lawyers.

Summary

A lawyer who provides legal services to the customers of the lawyer's non-law firm employer for the financial benefit of the employer violates SCR 20:5.5 and SCR 20:5.4, and the conduct may raise concerns under Wisconsin statutes and case law. Additionally, lawyers likely face problems with conflicts and the duty of confidentiality.

⁶ 757.45. Sharing of compensation by attorneys prohibited

It is unlawful for any person to divide with or receive from, or to agree to divide with or receive from, any attorney or group of attorneys, whether practicing in this state or elsewhere, either before or after action brought, any portion of any fee or compensation, charged or received by such attorney or any valuable consideration or reward, as an inducement for placing or in consideration of having placed, in the hands of such attorney, or in the hands of another person, a claim or demand of any kind for the purpose of collecting such claim, or bringing an action thereon, or of representing claimant in the pursuit of any civil remedy for the recovery thereof; but this section does not apply to an agreement between attorneys and counselors at law when associated in the conduct of legal matters to divide between themselves the compensation to be received. Any person violating this section shall be fined not to exceed \$500 or imprisoned not to exceed 6 months.

