

OPINION 512

June 1995

Question Presented

May the in-house lawyer of a corporation represent a joint venture in which the corporation is a venturer, without violating [DR 1.06](#), conflict of interest, and/or [DR 5.05](#), unauthorized practice of law?

Facts

A corporation is considering forming joint ventures, in corporate and partnership form, with other corporations. Most of the other joint venturers will have their own legal departments, but some may not. The corporation will sometimes own a majority of the joint venture, sometimes 50 percent, and other times it will be a minority owner. Often the joint ventures will not have their own separate employees; rather, certain employees of each joint venturer will be "loaned" to the joint ventures, but will not be separately compensated by the joint venture.

In line with this arrangement, and in order to operate efficiently and cost effectively, the corporation would like to make its in-house lawyers available, from time to time, to provide legal services to these joint ventures. Similarly, the other joint venturers may desire to make their in-house lawyers available, from time to time, to provide legal services to the joint venture. It may be that one party makes available to the joint venture one type of legal service (*e.g.*, labor) and the other party makes available another type of legal service (*e.g.*, corporate). These legal services would relate to the ongoing business activities of the joint venture. Under one arrangement, no charge would be made by the corporation to the joint venture for the legal services provided by its in-house lawyers, but under an alternative arrangement, the corporation may be reimbursed by the joint venture for the costs of providing the lawyer, based on the proportion of time each in-house counsel spends on joint venture matters.

Discussion

The above situation raises questions governed by [DR 1.06](#), conflict of interest (general rule); [DR 5.05](#), unauthorized practice of law; and [1.07](#), conflict of interest (intermediary). Each rule will be considered separately and applied to the fact situation presented above.

DR 1.06 — Conflict of Interest (General Rule)

In relevant part, [DR 1.06](#) reads as follows:

- a. A lawyer shall not represent opposing parties to the same litigation.
- b. In other situations and except to the extent permitted by paragraph
 1. involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or
 2. reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.
- c. A lawyer may represent a client in the circumstances described in (b) if:

1. the lawyer reasonably believes the representation of each client will not be materially affected; and
2. each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.

In the fact situation presented, the "loaned" in-house counsel must recognize that the joint venture is his client ([DR 1.12](#)) and that loyalty is an essential element in the lawyer's relationship with that client ([DR 1.06](#), Comment 1). The potential conflict does not arise by virtue of the extent of control or ownership that the corporation has in the joint venture, or because the corporation charges or does not charge an amount for providing the in-house lawyer. It is the simultaneous representation of the joint venture and the corporation that presents the potential for conflict under DR 1.06(b)(2). The rule prohibits a lawyer from representing a person if the representation "reasonably appears to be or become adversely limited by the lawyer's responsibilities to another client to or a third person" (DR 1.06(b)(2)). However, even though a conflict, or a potential conflict, may exist in simultaneous representation of the corporation and the joint venture, such multiple representation is permissible if there is compliance with DR 1.06(c). That is, the lawyer must reasonably believe that the representation of each client will not be materially affected and the corporation and the joint venture must consent to such representation after full disclosure. In these circumstances, the required consent could not be given on behalf of the joint venture by the corporation employing the lawyer; instead, consent must be obtained from an authorized employee of the joint venture, if the joint venture has its own employees, or from the other joint venturers (DR 1.12, See Comment 5). The disclosure to the joint venture and the joint venture's consent should also include the fact that the lawyer may be paid by the corporation and not the joint venture. Under [DR 1.08\(e\)](#), a lawyer may be paid from a source other than the client if (1) the client is informed of that fact and consents, (2) the arrangement does not compromise the lawyer's duty of loyalty to the client, and (3) confidential information is treated properly under [DR 1.05](#).

It is only when a potential or actual conflict develops into an impermissible conflict that the lawyer should withdraw. If such a situation should develop after properly accepting multiple representation under DR 1.06, the lawyer must promptly withdraw from one or more representations to the extent necessary for any representation not to be in violation of the rules (DR 1.06(e)). In the situation presented, the lawyer would normally withdraw from representation of the joint venture.

DR 5.05—Unauthorized Practice of Law

[Rule 5.05](#) provides as follows:

"A lawyer shall not:

- a. practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
- b. assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law." The intent of DR 5.05 is to protect individuals and the public from the mistakes of the untrained and from schemes of the unscrupulous, who are not subject to the judicially imposed disciplinary standards of competence, responsibility, and accountability (DR 5.05, Comment 1). In the fact situation presented herein, the corporation proposes to "loan" its in-house lawyer to a related joint venture and not to the public in general. As such, the intent of DR 5.05 would not be automatically violated by any of the described arrangements.

In the factual situations presented, the Committee believes that the lawyer involved would not be

assisting his employer corporation in the unauthorized practice of law. This conclusion is based on the assumption that, when the lawyer is providing legal services to the joint venture as a client, (1) the lawyer is not directed by the corporation in the provision of these services (other than by the corporation explicitly acting on behalf of the joint venture as a managing venturer of the joint venture) and (2) any reimbursement by the joint venture or the other venturers for the compensation paid by the corporation to the lawyer is calculated in good faith to pay no more than the full costs to the corporation of the portion of the lawyer's time that is devoted to services for the joint venture.

In such circumstances, regardless of whether or not the corporate employer is reimbursed by the joint venture for the cost of the lawyer's services, the lawyer is properly viewed as providing legal services directly to the joint venture, which is the lawyer's client. If the joint venture reimburses the corporation for the salary and benefits paid to the lawyer, such reimbursement does not constitute payment by the joint venture to the corporation for the corporation's provision of legal services since only the lawyer and not the corporation is providing services as a lawyer to the joint venture. This conclusion applies equally if the employer/corporation is not reimbursed for the cost of employing the lawyer who is loaned to the joint venture; in that case, the corporation is contributing legal services to the joint venture, but the lawyer's client is the joint venture and the lawyer, not the corporation, is providing legal services to the joint venture. Texas Professional Ethics Committee [Opinion 343](#) (23 *Baylor Law Review*, 827-898 (1972)) dealt with a situation similar to the question presented herein. Although the opinion was published before enactment of the present Texas Disciplinary Rules of Professional Conduct, its logic and reasoning are still sound. In holding that the possibility that the in-house lawyer was assisting his corporate employer in the unauthorized practice of law was "more imaginary than real," the opinion stated:

"While it is not the function of this committee to decide what constitutes unauthorized practice of law, we are satisfied that under the facts presented in this inquiry the general corporate employer is not undertaking to furnish legal services to the other corporations; it is not holding itself out as a furnisher of legal services, and it is not exploiting the services of the lawyer. It is merely providing a convenient means whereby the lawyer's services can be made available to the related corporations as they have need for such services, and in these arrangements we see no real likelihood that the lawyer would be aiding his general corporate employer in the practice of law."

DR 1.07—Conflict of Interest (Intermediary)

The committee has also considered whether DR 1.07, conflict of interest: Intermediary, should be deemed to apply to the situations presented. On the facts stated, the lawyer loaned to the joint venture is not being loaned to act as an intermediary between the corporation and the joint venture in any usual sense of the term "intermediary." Instead, the lawyer is being loaned to the joint venture to provide legal services to the joint venture as a separate entity for its ongoing business. The loaned lawyer does not provide legal services jointly to the corporation and the joint venture in the same matter.

Paragraph (d) of [DR 1.07](#) does not require a contrary conclusion. That paragraph provides that "[w]ithin the meaning of this rule, a lawyer acts as intermediary if the lawyer represents two or more parties with potentially conflicting interests." This provision cannot mean that in any case where a lawyer represents in different matters two clients with potentially conflicting interests, the terms of DR 1.07 apply. If DR 1.07 applied in such cases, it would apply to every situation involving potential conflict of interest between clients of a lawyer; in every case where a lawyer represents two clients in substantially related matters in which the clients' interests are adverse, the clients would have potentially conflicting interests.

A result in which DR 1.07 would, in effect, "swallow up" [DR 1.06](#) as to client conflicts of interest is

directly contrary to the intent of DR 1.06 as expressed in the comments to that rule. For example, Comment 3 to DR 1.06 states that Rule 1.06(b) (and by implication not DR 1.07) governs representation of co-plaintiffs or codefendants in the same litigation matter. Comment 3 concludes as follows:

On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met. Compare [DR 1.07](#) involving intermediation between clients.

To avoid an interpretation under which DR 1.07 would supplant DR 1.06 in all conflict situations, DR 1.07 must be interpreted to mean that a lawyer is acting as an intermediary only when the lawyer is representing in the same matter two clients with potentially conflicting interests who seek to consummate a transaction or resolve a dispute between or among themselves.[FN1] In that circumstance, the lawyer will usually be acting as an intermediary between the two clients with respect to the single matter. Even in such circumstances, however, the lawyer would not be acting as intermediary between the clients with respect to other matters dealing with third parties, as to which the lawyer represents only one of the two clients.[FN2]

Conclusion

[DR 1.06](#) (conflict of interest: (general rule))

—Under the facts presented, even though a conflict or potential conflict of interest exists in the lawyer's representation of the employing corporation and the joint venture to which the lawyer is loaned, such multiple representation is permissible if (1) the corporation and joint venture consent after full disclosure and (2) the lawyer reasonably believes that the lawyer's representations of the corporation and of the joint venture will not be materially affected.

[DR 5.05](#) (unauthorized practice of law) — Provided that the corporation/employer does not direct the lawyer in the performance of legal services for the joint venture (other than explicitly as a managing venturer of the joint venture) and provided that the joint venture or other venturers do not reimburse the corporation for more than the estimated full costs to the corporation/employer of the lawyer's time devoted to services for the joint venture, a lawyer/employee who is loaned to a joint venture to perform legal services for the joint venture is not deemed to be assisting the employing corporation in the unauthorized practice of law.

[DR 1.07](#) (conflict of interest (intermediary)) — Provided that the loaned lawyer is representing only the joint venture entity in the matter or matters for which the lawyer has been loaned to the joint venture, rather than two clients who seek to consummate a transaction or resolve a dispute between themselves, the requirements applicable to intermediaries set forth in DR 1.07 do not apply.

[FN1] The interpretation that DR 1.07 is to be confined to cases of a lawyer's representation of two clients in the same matter finds additional support in the reference in DR 1.07(c) to "the matter that was the subject of the intermediation."

[FN2] In most situations involving co-plaintiffs or codefendants in a litigation matter in which the clients are adverse to a third party, the lawyer would not be acting as an intermediary between the clients. However, if the representation at any point involves resolving a dispute between the two clients, the lawyer would become an intermediary as to the matter in dispute between the clients and the requirements of DR 1.07 would apply.