HEADNOTE

A lawyer who supplies legal analysis of a consultant's clients' personnel policies through the consultant, and who then accepts the consultant's referral to him of those clients who have been told they have legal problems, may be aiding in the unauthorized practice of law and the division of legal fees, and will be engaging in improper solicitation in violation of DR2-103(B), (C) and (D).

FACTS

Lawyer proposes to enter into the following relationship with a consulting business ("Consultant"): Consultant is a firm of medical and marketing professionals. Although Lawyer does not specify, it appears that Consultant is organized for profit. Consultant markets its services to employers for whom Consultant will review their medical and health policies and procedures and provide a written report on their adequacy. Lawyer does not explain what forms of solicitation Consultant uses. Consultant will also provide medical services to the employer if it desires.

Under the proposed relationship, Consultant would engage Lawyer, on retainer, to assist it in the reviews and reports that it performs for employers. Consultant will offer its clients a legal review of their personnel policies and will advise its employer clients that it has retained legal counsel to assist in the review and report. Apparently Consultant would not identify Lawyer to its clients and would not offer the legal review as a separate service. Lawyer would prepare that portion of Consultant's report to the employer which assesses the employer's administration of its medical and health policies from a legal perspective.
Lawyer would not participate in the solicitation of clients or the quoting or collection of the fee from them. Lawyer does not explain whether Lawyer would have any direct contact with the clients, but implies that Lawyer would rely upon information passed on by Consultant.

Consultant's report to the employer will either advise the employer that its policies are legally adequate, or that they are not. In reports which advise the employer that its policies are inadequate from a legal perspective, Consultant would describe the legal issues and problems and recommend Lawyer.

QUESTIONS PRESENTED

Does the proposed arrangement constitute assistance in the unauthorized practice of law in violation of DR3-101(A) of the Ohio Code of Professional Responsibility (the "Code")?

Does the proposed arrangement constitute a division of legal fees with a non-lawyer prohibited by DR2-102 of the Code?

Does the proposed arrangement constitute improper solicitation under DR2-103(C) and DR2-103(D) of the Code?

CONCLUSION

On the basis of our understanding of the relationship between Lawyer and Consultant, that relationship would be improper and governed directly by the analysis given in Cleveland Bar Association Professional Ethics Opinion 86-3.

The proposed relationship between Lawyer and Consultant may violate the proscriptions of the Code against assistance in the unauthorized practice of law and
improper division of legal fees. The proposed arrangement also appears to constitute improper solicitation by a non-lawyer for legal services. It creates the potential for a conflict between the lawyer's obligation to give advice independent of self-interest, and lawyer's stake in Consultant's recommendation of his employment. The proposed relationship also raises concerns as to Lawyer's ability to provide confidential, loyal and competent service to the employer-client.

**DISCUSSION**

1. **Unauthorized Practice of Law**

   Canon 3 of the Code provides in relevant part:

   DR3-101(A) A lawyer shall not aid a non-lawyer in the unauthorized practice of law . . .

   DR3-102(A) A lawyer or firm shall not share legal fees with a non-lawyer . . .

   DR3-103(A) a lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consists of the practice of law.

   As the proposed relationship between Lawyer and Consultant is structured, it appears that Lawyer may be violating DR3-101(A), DR3-102(A), and DR3-103(A) by assisting Consultant in the unauthorized practice of law and permitting Consultant to be compensated for providing legal advice which originated from Lawyer.

   The unauthorized practice of law is defined by Ohio Revised Code §4705.01 and cases thereunder. Whether Consultant would be engaging in the unauthorized practice of law is, strictly speaking, a legal issue which is beyond the scope of the Committee to address. However, Consultant's offering and providing to its clients an opinion
as to whether the client's particular policies and procedures comply with applicable law could be considered the unauthorized practice of law. e.g., Green v. The Huntington National Bank, 4 Ohio St. 2d 78 (1964) (syllabus 1: "A bank or trust company which provides specific legal information in relation to the specific facts of a particular person's estate for the purpose of obtaining a more beneficial estate condition in relation to . . . legal consequences of death is giving legal advice"); syllabus 2: "One who repeatedly gives legal advice to others with the expectation of being compensated thereafter is thereby engaged in the practice of law.")

The problem is not mitigated by the fact that Lawyer characterizes Consultant as its client. Lawyer is not advising Consultant about Consultant's problems, but is giving Consultant advice to enable Consultant to render an opinion about the legal consequences of the practices and procedures of the employer. In ABA Formal Opinion 297 (Feb. 24, 1961), the ABA Committee on Professional Ethics concluded that such a practice did violate the prohibition against aiding the unauthorized practice of law. That Committee stated: "It is proper for [an attorney employee of a public accounting firm] to give legal advice to his lay employer on legal matters personal to the employer. If, however, the legal advice given to the employer is to enable the employer to perform services to the employer's client, then such advice may be aiding or making possible the practice of law by the employer and, if so, the lawyer will have violated Canon 47 [assistance in unauthorized practice]."

In considering analogous arrangements more recently, state bar associations have generally found that a lawyer's cooperation with a consulting firm which provides legal advice to its clients could involve the lawyer in the unauthorized practice of law. E.g., Comm. on Ethics, Maryland State Bar Ass'n, Opinion 86-45, ABA/BNA Law. Man. Prof. Conduct 901:4305 (Sept. 11, 1986) (proposed consulting firm which would provide
financial, counseling, and legal services to clients who have been wrongfully discharged would amount to the improper joining of lawyers and non-lawyers in the practice of law; Professional Ethics Comm. of Kansas Bar Ass'n, Opinion 85-13, ABA/BNA Law. Man. Prof. Conduct 801:3822 (May 21, 1985) (for lawyer to be employed and compensated by collection agency to collect customers' claims aids unauthorized practice of law); Virginia State Bar Standing Comm. on Legal Ethics, Opinion 513, ABA/BNA Law Man. Prof. Conduct 801:8816 (Sept. 8, 1983) (lawyer may not give legal advice to therapist who passes it on to parties in a divorce mediation); Comm. on Professional Ethics, Illinois State Bar Ass’n, Opinion 707, ABA/BNA Law. Man. Prof. Conduct 801:3006 (April 30, 1981) (law firm creation of arbitration evaluation and grievance research service to be run by two agencies aids unauthorized practice of law); See Missouri Bar Advisory Comm., Informal Opinion 3, ABA/BNA Law Man. Prof. Conduct 801:5250 (Sept. 12, 1980) (accountant and insurance broker should not counsel physicians on the advantages of a professional corporation because such counseling constitutes the practice of law); Legal Ethics Comm. of Oregon State Bar, Opinion 447, ABA/BNA Law. Man. Prof. Conduct 801:7104 (July 1980) (to avoid the possibility of unauthorized practice of law when financial and estate planning consultants who referred lawyer meet with lawyer and client, the lawyer must retain complete control of the product which contains his legal analysis); compare Connecticut Bar Ass'n Informal Opinion 83-27, ABA/BNA Law. Man. Prof. Conduct 801:2061 (no date) (business owned by lawyers and non-lawyers which organized seminars providing general legal information did not violate bar against the unauthorized practice of law).
2. **Division of legal fees**

As in the situation discussed in Professional Ethics Opinion 86-3, the proposed arrangement here may also violate DR3-102(A). If Consultant's medical and legal analysis is offered as a package for a single fee, and the amounts which the employers pay for the legal services to them exceed the retainer which Consultant pays Lawyer, then Consultant would be receiving income from the provision of legal services. For Lawyer to be party to this arrangement would violate DR3-102(A).

3. **Improper Solicitation.**

Canon 2 of the Code governs a lawyer's solicitation of business. The Code allows attorneys to advertise their services "in written or printed material distributed to consumers through the mail or otherwise; or over radio or television". DR2-101(B). On the other hand, the Code restricts an attorney's use of third parties to solicit business for him or her. The Code prohibits an attorney from giving anything of value to a person to recommend or secure his employment (DR2-103(B)), from requesting persons other than qualified lawyer referral services or legal services organizations to recommend his employment (DR2-103(C)), and from assisting any person "that furnishes or pays for legal services to others" to promote his services (DR2-103(D)), except as specifically authorized.

Here, Lawyer does not propose to advertise his services directly. Rather, Consultant will solicit clients and refer those clients to Lawyer after Consultant has told them that they have legal problems, based upon Lawyer's own analysis given to Consultant. Clearly, Consultant's referral is not disinterested, as urged by EC2-8. More importantly, Lawyer's initial legal advice may not be given without regard to his own self-interest, as urged by EC2-3 and EC2-4, and required by DR5-101(A). Under Lawyer's proposal, Lawyer will receive Consultant's referral only if Lawyer finds legal problems
with the employer's policies. Moreover, the employer will apparently be unaware that Lawyer is the source of the Consultant's legal advice.

This combination of circumstances -- third-party solicitation, the nondisclosure of Lawyer's role in Consultant's advice, and Consultant's recommendation, all as part of an ongoing relationship -- leads us to conclude that the proposed arrangement would involve Lawyer in improper solicitation whether or not his initial work for Consultant aided the unauthorized practice of law.

Lawyer's proposal does not fit any of the forms of clearly permissible solicitation. First, because Lawyer will not himself be advertising to seek clients, Consultant's actions are not authorized by DR2-101(B), and Lawyer's acceptance of Consultant's referral is not permitted by DR2-104(B).

Second, although Lawyer's initial analysis for Consultant assists laymen in recognizing legal problems, it is not the type of educational work which is permissible under DR2-104(2), (3) or (4). DR2-104(A)(4), which permits a lawyer to accept business derived from his public speaking or writing, is inapplicable because it is subject to the requirement that the lawyer "does not undertake to give individual advice."

DR2-104(2) and DR2-104(3) are inapplicable because they relate only to a lawyer's educational activities or recommendation by organizations which satisfy the requirements of DR2-103(D)(1) through (4). This section of the Code provides in relevant part:

DR2-103(C) A lawyer shall not request a person or organization to recommend or promote the use of his services or those of his partner or associate, or any other lawyer affiliated with him or his firm, as a private practitioner except that:

(1) He may request referrals from a lawyer referral service operated, sponsored, or approved by a bar association...
(2) He may cooperate with the legal services activities of any of the offices or organizations enumerated in DR2-103(D)(1) through (4) and may perform legal services for those to whom he was recommended by it to do such work if:

(a) The person to whom the recommendation is made is a member or beneficiary of such office or organization; and

(b) the lawyer remains free to exercise his independent professional judgment on behalf of his client.

DR2-103(D) A lawyer shall not knowingly assist a person or organization that furnishes or pays for legal services to others to promote the use of his services or those of his partner or associate or any other lawyer affiliated with him or his firm except as permitted in DR2-101(B). However, this does not prohibit a lawyer or his firm from being recommended, employed or paid by or cooperating with, assisting and providing legal services for, one of the following offices or organizations that promote the use of his services or those of his partner or associate or any other lawyer affiliated with him or his firm if there is no interference with the exercise of independent professional judgment on behalf of his client:

(1) A legal aid office or public defender office. . . ;

(2) A military legal assistance office;

(3) A lawyer referral service operated, sponsored or approved by a bar association;

(4) Any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries provided [certain specified conditions] are satisfied. . .

Consultant is obviously not a legal aid or public defender office, a military legal assistance office or an approved lawyer referral service. Consultant does not qualify under DR2-103(D)(4) for a number of reasons:
(1) Consultant has no members or beneficiaries;

(2) It is apparently organized for profit, and the legal services to be rendered by the lawyer selected by it are not in connection with matters where such organization bears ultimate liability, in violation of DR2-103(D)(4)(a);

(3) Consultant would be operated for the purpose of procuring legal work for the financial benefit for Lawyer as a private practitioner outside of the organization's legal service program, in violation of DR2-103(D)(4)(c);

(4) The person for whom legal services would be rendered would not be considered the client of the lawyer in the matter, in violation of DR2-103(C)(4)(d);

(5) The person receiving legal services through Consultant would not be tendered the opportunity to select other counsel, in violation of DR2-103(D)(4)(e); and

(6) presumably, Consultant has not filed the legal service plan report with the Supreme Court of Ohio required by DR2-103(D)(4)(g).

In our view, Consultant's solicitation of employers, Consultant's advice that such employers have legal problems, and its referral of such clients to Lawyer who provided the initial analysis, more closely resembles improper solicitation under DR2-103 and DR2-104 than it does a legitimate referral. There are undoubtedly many circumstances in which a lawyer may accept referrals from a non-lawyer of his acquaintance, even when this results from general information about the law provided by the lawyer -- e.g., a description of a new statute, regulation, or case which may affect the non-lawyer's business or that of his client. Here, however, Lawyer will not merely supply
information about the law, but will also provide his judgment about the application of law to the particular policies and practices of Consultant's client. Lawyer plans to provide this analysis anonymously through Consultant to persons solicited by Consultant, and then to accept Consultant's referral of those employers to him. This arrangement would violate the intent if not precisely the language of DR2-104(a), which states:

A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except [as to exceptions not applicable here].

DR2-104(B) - (D) also apply. Lawyer is giving something of value — his legal advice — to Consultant for Consultant's recommendation, in violation of DR2-104(B). The ongoing relationship between Lawyer and Consultant implies Lawyer's continuing request that Consultant recommend his services, which is prohibited by DR2-103(C). To the extent that Consultant may be deemed to providing legal services, Lawyer's cooperation with Consultant is improper under DR2-103(D), because Consultant is not a qualified legal services organization.

Lawyer suggests that his arrangement would be permissible under Brotherhood of Railroad Trainmen v. Virginia State Bar, 377 U.S. 1 (1964), and UMW, District 12 v. Illinois State Bar Association, 389 U.S. 217 (1967). His reliance on these cases is misplaced. Both cases involved the recommendation of attorney services by organizations of the type which may recommend lawyers to its members or beneficiaries under DR2-103(D)(4). Both cases held that the defendant organizations could recommend counsel to their members as part of their freedom of association. Consultant is not qualified under DR2-103(D)(4) for the reasons set forth above.

Other state bar associations considering similar relationships between a lawyer and a non-lawyer consultant have struggled to define the boundary between
permissible referral and improper third-party solicitation. Although some states have opposed any close association between a lawyer and consulting firm or any continuing pattern of referrals (questions which are not squarely presented here), bar associations appear to be unanimous in requiring that referral relationships (1) do not involve the non-lawyer referrer in the practice of law; (2) do not interject the non-lawyer into the lawyer-client relationship; and (3) fully disclose the lawyer's relationship with the consultant to the extent that that relationship and the lawyer's interest in continued referrals may reasonably affect the exercise of the lawyer's independent professional judgment. Compare Comm. on Ethics of the Maryland State Bar Ass'n, Opinion 86-45, supra (lawyer's participation in a consulting firm which would provide financial counseling and legal services to clients who have been wrongfully discharged involves potential problems of barratry, champerty and maintenance); Comm. on Professional and Judicial Ethics of the State Bar of Michigan ("Michigan Bar"), Opinion CI-1056, ABA/BNA Law. Man. Prof. Conduct 801:4889 (Jan. 29, 1985) (law firm may not permit land contract servicing company to refer vendors to firm as part of prepaid legal service plan by which firm would provide deeds and process forfeitures, foreclosures and related collection matters); Michigan Bar Opinion CI-1058, ABA/BNA Law. Man. Prof. Conduct 801:4890 (Feb. 11, 1985) (lawyer may not permit debt consolidation corporation to refer interviewees to him if they request legal services); Comm. on Professional Ethics, Illinois State Bar Ass'n, Opinion 745, ABA/BNA Law Man. Prof. Conduct 801:3009 (Mar. 26, 1982) (lawyer may not organize firm to provide mediation, arbitration and counseling services to couples whose divorce is handled by the same firm because practice would lead to accusations of solicitation); Comm. on Professional Responsibility, Chicago Bar Ass'n, Opinion 82-3, ABA/BNA Law Man. Prof. Conduct 801:3202 (law firm may not
arrange for client bank to solicit bank’s customers to use firm’s free estate planning service and then to retain firm to prepare documents) to Virginia State Bar Standing Comm. on Legal Ethics, Opinion 512, ABA/BNA Law Man. Prof. Conduct 801:8816 (Sept. 8, 1983) (mediation and counseling service may refer clients to law firm if no referral fee is paid and clients pay for legal services directly); Missouri Advisory Comm. Informal Opinion 3, supra (CPA or insurance broker may recommend to their clients that they consult with lawyer); Legal Ethics Comm. of Oregon State Bar, Opinion 447, supra (lawyer may not accept referrals from a financial and estate planning firm unless referrals clearly encourage potential client to select counsel of his choice, lawyer’s advice is provided separately, and firm does not state that it has access to a lawyer, refer to the recommended lawyer by name, refer to the experience of lawyer or display a photograph of lawyer).

4. **Confidential, Competent, and Loyal Service**

The relationship which Lawyer proposes, in which the beneficiary of legal advice has no direct contact with the lawyer imparting it, also raises concerns under Canons 4, 5, and 6 of the Code.

If Consultant serves as an intermediary in relaying facts from the employer to the attorney, and legal analysis from the attorney to the employer, a third party is introduced into what should be a confidential relationship. If Consultant transmits an employers’ secrets to Lawyer or Lawyer’s advice to the employer, DR4-101(B)(1) would be violated.

In addition, the fact that Lawyer considers Consultant its client, as well as the presence of Consultant as an intermediary between the employer and Lawyer raises questions about the ability of Lawyer to exercise his professional judgment solely on
behalf of the beneficiary of his advice as required by Canon 5. Lawyer should not represent both Consultant and employer unless his independent judgment will not be adversely affected (DR5-105), or unless it is obvious that he can represent both and both consent after full disclosure of the possible effect of such dual representation. (DR5-105(C)).

Finally, if Lawyer has no direct contact with the employer prior to giving his opinion, it is possible that Lawyer will not obtain the information necessary to provide competent legal services as required by DR6-101(A)(2).