

**ETHICS OPINION NUMBER 232
OF THE MISSISSIPPI BAR
RENDERED JUNE 18, 1996**

SOLICITATION - A lawyer may not use a corporation to solicit tax consulting clients for a non-lawyer consulting firm when that consulting firm will use the lawyer to provide professional services in such matters.

The Committee has been asked to consider whether it is permissible under the Mississippi Rules of Professional Conduct for a lawyer, identified as "B" below, to engage in the following activity:

A is an incorporated tax consulting firm. B, an attorney, does not practice law at this time. B forms C, a corporation, for the purpose of conducting tax consulting. A proposes to contract with C: (1) to solicit agreements with potential clients for A to represent the clients in seeking tax relief for the clients before tax officials, and, if necessary, local and state tax agencies, (2) to perform other nonlegal matters involved in the tax consulting business. C's compensation is a percentage of A's consulting fee, which is a percentage of the tax relief obtained for the client.

A's agreements with clients, in effect, provide that A will analyze the client's tax situation and represent the client before tax officials, and, if necessary, local and state tax agencies. Thereunder, A is authorized, at its own expense, to employ an attorney or law firm of its choosing to handle legal matters, if any, concerning tax relief sought. Thereunder, A will be responsible for the legal fees and court expenses incurred for legal services performed on the Client's behalf. Thereunder, a decision to continue legal proceedings after appeals on local, county, and/or state levels have been exhausted will be decided mutually by the parties to the agreement. Clients typically execute a declaration appointing A as their "attorney-in-fact" to represent them before such officials and agencies. Said declaration designates A as a "Professional Tax Representative," therein specifically excluding A as an "Attorney-at-Law." In less than 1 of every 500 agreements, is legal representation required by A. The legal issues involved in such representation are confined to tax issues, and never involve the terms of the agreement, the solicitation or negotiation thereof.

A asks B to be available to represent A in every such case in which A decides to pursue a tax matter on behalf of A's clients: (1) before an agency which requires that attorneys perform certain matters before the agency, and (2) in court, contesting the

tax decisions below. A proposes that B become a salaried in-house legal counsel for A. Alternatively, A proposes to compensate B, by salary, or on an hourly basis or by a percentage of the consulting fee, as an in-house legal counsel. Alternatively, A proposes to retain B as an outside-counsel, and to compensate B on an hourly basis or by a percentage of the consulting fee. B's compensation for legal services would be separate from, and in addition to, C's compensation for consulting activities for A. B would consider performing such legal services pro bono for A. B does not intend to practice law in any other respect in the foreseeable future. B would never be a witness in such litigation.

Whether B currently "practices law" or ever intends to practice other than in the manner set out in the above fact scenario makes no difference to the inquiry. As a member of the bar, B is bound by the Mississippi Rules of Professional Conduct at all times. Whether the rules apply to a particular situation depends upon the facts. The more closely related a situation is to the practice of law, the more likely it is that the lawyer's conduct is governed by ethical principles by which members of the bar are bound. Thus, for example, Opinion No. 108 held that a lawyer could carry on an independent real estate business but must conduct such business in compliance with the legal profession's ethical guidelines.

Similarly, a member of the bar is bound by the Mississippi Rules of Professional Conduct without regard to the type of business entity through which he conducts his activities. The fact statement presented to the Committee does not specify the relationship between lawyer B and corporation C after C is organized. However, on the basis of the questions asked and other information given, the Committee assumes that lawyer B is to operate corporation C, and that B is, in effect, the "alter ego" of C. In such event, in accordance with Opinion No. 108, corporation C must abide by the Mississippi Rules of Professional Conduct.

Against this background, it is obvious that the stated purpose of the arrangement in question runs afoul of the Mississippi Rules of Professional Conduct. The statement of facts indicates that firm A, identified as "an incorporated tax consulting firm" proposes to contract with corporation C (which was formed by lawyer B for the purpose of tax consulting) to "solicit agreements with potential clients for A to represent . . . in seeking tax relief . . . before tax officials . . .". These agreements describe firm A as a "professional tax representative" and specifically disclaim that A is a lawyer. Because lawyer B is the operative of corporation C, and tax consulting is, at the very least, closely related to the practice of law, the activities of corporation C are subject to the Mississippi Rules of Professional Conduct. Rule 7.3 provides:

A lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client with whom the lawyer has no family, close personal, or prior professional relationship when a significant motive of the lawyer's doing so is the lawyer's pecuniary gain.

A lawyer shall not solicit professional employment from a prospective client by written or recorded communication or by in-person or telephone contact even when not otherwise prohibited by paragraph (a), if:

Prospective client has made known to the lawyer the desire not to be solicited by the lawyer or;

The solicitation involves coercion, duress or harassment.

A rewritten or recorded communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter, with whom the lawyer has no family, close personal, or prior relationship, shall include the words "solicitation material" on the outside envelope or at the beginning and ending of any recorded communication.

Notwithstanding the prohibitions of paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer which uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

In the Committee's view, unless the solicitation by corporation C is limited to the sending of letters and advertising circulars to persons not known to need tax advice, the proposed arrangement violates Rule 7.3. It does not matter that corporation C is soliciting business for firm A rather than for itself or for lawyer B. Even limiting the definition of "legal services" in the very restrictive manner used in this fact situation, the rule is still violated. Under the facts, any time A's efforts to obtain "tax relief" for its clients requires legal representation, B will be employed. Thus, corporation C's solicitation would violate Rule 7.3.

The manner in which firm A engages lawyer B--as in-house counsel or as outside counsel, whether paid by salary or on an hourly basis or by a percentage of the fee--is also irrelevant to the analysis. However B's employment by firm A is structured, B would still be providing legal services on a matter for which B's alter ego, C corporation, solicited the prospective client for A.

Various other aspects of the described arrangement implicate other rules and ethical precepts by which members of the bar are to be guided. Firm A is to be compensated by being paid a percentage of the recovery obtained, and Corporation C is to receive a percentage of Firm A's fee. If C is, in essence, the "alter ego" of Lawyer B, then C's participation in this contingent fee arrangement is subject to Rule 1.5(c). That rule requires that the fee arrangement with the client:

shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

Further, the fact that Firm A has a veto over whether to continue legal proceedings beyond tax agency appeals makes the arrangement suspect under Rule 1.8(j), which forbids lawyers from acquiring a proprietary interest in the cause of action.

In addition, various aspects of the arrangement raise questions under Rule 1.7, the prohibition against feeder activities, Rule 5.4, and the prohibitions of Rule 5.5 regarding the unauthorized practice of law. Moreover, to the extent that information about the arrangement is withheld from the client, Rule 8.4(c) prohibiting conduct involving dishonesty, fraud, deceit or misrepresentation, could be affected.

While many lawyers devote a large part of their practice helping clients structure transactions and arrangements so as to avoid the application of various rules and regulations, lawyers cannot create arrangements that remove their conduct from scrutiny under the ethical precepts of the legal profession.