



# Ohio Board of Professional Conduct

## OPINION 2024-01

Issued February 2, 2024

Withdraws Adv. Op. 92-17

### **In-House Lawyer Representation of Corporation's Customers**

**SYLLABUS:** In most circumstances, a corporation's in-house lawyer should avoid providing legal representation to a corporation's customers on matters relating to issues which the corporation has previously provided general services.

This nonbinding advisory opinion is issued by the Ohio Board of Professional Conduct in response to a prospective or hypothetical question regarding the application of ethics rules applicable to Ohio judges and lawyers. The Ohio Board of Professional Conduct is solely responsible for the content of this advisory opinion, and the advice contained in this opinion does not reflect and should not be construed as reflecting the opinion of the Supreme Court of Ohio. Questions regarding this advisory opinion should be directed to the staff of the Ohio Board of Professional Conduct.



# Ohio Board of Professional Conduct

THOMAS J. MOYER OHIO JUDICIAL CENTER  
65 SOUTH FRONT STREET, 5<sup>TH</sup> FLOOR, COLUMBUS, OH 43215-3431  
614.387.9370  
[www.bpc.ohio.gov](http://www.bpc.ohio.gov)

HON. D. CHRIS COOK  
CHAIR  
PATRICK M. McLAUGHLIN  
VICE-CHAIR

RICHARD A. DOVE  
DIRECTOR  
D. ALLAN ASBURY  
SENIOR COUNSEL  
KRISTI R. McANAU  
COUNSEL

## OPINION 2024-01

Issued February 2, 2024  
Withdraws Adv. Op. 92-17

### **In-House Lawyer Representation of Corporation's Customers**

**SYLLABUS:** In most circumstances, a corporation's in-house lawyer should avoid providing legal representation to a corporation's customers on matters relating to issues which the corporation has previously provided general services.

**APPLICABLE RULES:** Prof. Cond. R. 1.7, 1.13, 5.4, 5.5, 7.2, 7.3

#### **QUESTION PRESENTED:**

May a lawyer, who is employed as in-house counsel for a corporation that provides tax consulting services, privately represent customers of the corporation in legal proceedings with tax officials concerning matters related to issues on which the corporation has provided services?

#### **ANALYSIS:**

The question presented raises several issues under the Rules of Professional Conduct including conflicts of interest, the recommendation of professional employment, sharing fees, and the assisting of another in the unauthorized practice of law.

#### *Conflict of Interest*

Corporations may employ in-house lawyers as employees to represent corporate interests. "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." Prof. Cond. R. 1.13. The constituents of

a corporation are the directors, officers, trustees, and employees of the corporation but not the customers or clients of the corporation. *See* Prof.Cond.R. 1.13(a). If an in-house lawyer is permitted by the lawyer's employer to represent its customers in legal proceedings related to services the corporation has provided, a material limitation conflict can arise from the dual representation. Prof.Cond.R. 1.7(a)(2).

A material limitation conflict exists when there is a significant risk that the lawyer's ability to represent a client is materially limited by the interests of another client. *Id.* "An inherent conflict of interest [exists] when a service provider's own attorneys \* \* \* furnish legal services to the provider's customers." *In re First Escrow, Inc.*, 840 S.W.2d 839, 1992 Mo. LEXIS 123, citing *Land Title Abstract & Trust Co. v. Dworken*, 129 Ohio St. 23, 193 N.E. 650 (1934). The lawyer would owe simultaneous duties of loyalty to the corporation's customers and to the lawyer's corporate client and employer, both of which may have differing interests in the future. Me.Adv. Op. 180 (November 14, 2002). A material limitation conflict may also exist due to the in-house lawyer's personal interests in his or her continued employment with the corporation. *See Cincinnati Bar Ass'n. v. Kathman*, 92 Ohio St.3d 92, 2001-Ohio-157 (the interests of a lawyer employed by a trust marketing company are divided between working for the company and representing the company's clients.) Although a material limitation conflict may be waived by both the corporation and its customer, other ethical considerations, discussed below, must be evaluated by the in-house lawyer prior to any representation of the corporation's customers on matters related to the general services provided by the corporation.

#### *Impairment of Independent Professional Judgment*

Assuming that an in-house lawyer is otherwise ethically permitted to represent a customer of his or her corporate employer, the lawyer would need to maintain the requisite independent professional judgment during the dual representation. The interests of the corporation and its customer initially may be aligned under the facts presented, especially since the corporation's services and the in-house lawyer's subsequent legal representation are intertwined to a certain degree. However, the lawyer's independent professional judgment may become impaired during the dual representation. *See* Prof.Cond.R. 1.7, cmt. [14]. There is a risk that a corporation officer, director, or employee may seek to direct or regulate the professional judgment of the lawyer during the legal representation of the corporation's customer for the overall

benefit of the corporation's relationship with the customer. For example, a corporation may instruct a lawyer to take a position that better serves the corporation's interests rather than the customer's interests. Prof.Cond. R. 5.4(c) requires a lawyer to not permit a person who recommends or employs the lawyer to direct the lawyer's professional judgment in the representation of another. Under these circumstances, Prof.Cond.R. 5.4(c) would require the lawyer to avoid interference by the corporation during the lawyer's representation of the corporation's customer, thereby enhancing the potential for a material limitation conflict that may arise from the dual representation.

#### *Recommendation of Professional Employment*

Another potential ethical concern is the improper recommendation of professional employment. First, an in-house lawyer cannot recommend his employment to a person who has not sought the lawyer's advice. Prof.Cond.R. 7.3(a). Nor should the lawyer request that the corporation recommend or promote to its customers the use of his or her services as private counsel. Lastly, the in-house lawyer may not give anything of value to the corporation for recommending the lawyer's services or referring professional work. Prof.Cond.R. 7.2(b), cmt. [5].

#### *Sharing of Fees*

The question presented does not indicate whether the lawyer's private representation of the customer would be directly billed to the customer by the corporation or by the lawyer. If the former, such an arrangement implicates the Prof.Cond.R. 5.4(a) prohibition against a lawyer sharing fees with a nonlawyer. Direct billing by the lawyer for services to the corporation's customer avoids the issue associated with sharing fees with a nonlawyer.

#### *Unauthorized Practice of Law*

A lawyer may be employed by a nongovernmental employer whose business does not consist of the practice of law or the provision of legal services. Gov.Bar R. VI, Sec. 6(A)(2). However, "[a] corporation cannot lawfully engage in the practice of law; nor can it do so indirectly through the employment of qualified lawyers." *Judd v. City Trust & Sav. Bank*, 133 Ohio St. 81, 12 N.E.2d 288 (1937), paragraph two of the syllabus; Adv. Op. 1989-31 (a lawyer may not be employed by a certified accountant's firm to practice law for the

firm's clients.) Nor may a lawyer assist another in a violation of the regulation of the legal profession. Prof.Cond.R. 5.5(a). Only persons admitted to the Ohio bar by the Supreme Court of Ohio may engage in the practice of law. R.C. 4705.01.

The Supreme Court has previously addressed fact patterns similar to the question presented in the context of the unauthorized practice of law. For example, in *Cincinnati Bar Ass'n v. Mullaney*, 119 Ohio St.3d 412, 2008-Ohio-4541, the respondents were disciplined for assisting a Pennsylvania corporation in the provision of debt-resolution services to its client. The corporation collected a fee for its general services to customers and simultaneously hired lawyers to represent the customers in legal proceedings to challenge pending foreclosure actions. Part of the fee collected by the corporation was paid to the respondents for their legal services. The respondents were found by the Court to have facilitated, by their representation of the corporations' customers in legal proceedings, the company's ongoing negotiations with their clients' creditors, an activity the Court deemed to be the practice of law.

Here, the provision of private legal services to customers of the corporation made available through the corporation's in-house lawyers can raise the likelihood that the corporation is directly or indirectly engaging in the unauthorized practice of law. The in-house lawyer's representation of a customer in a legal proceeding related to the services provided by the corporation serves to enhance the underlying services of the corporation by indirectly providing a legal service not otherwise available to the customer through the corporation. Under such an arrangement, the in-house lawyer may be at risk for assisting his corporate employer in the unauthorized practice of law. Prof.Cond.R. 5.5(a); *see* Adv. Op. 89-31 (1989) (a lawyer may not be employed by a certified public account's firm to practice law for the firm's accounting clients.); *Il. Adv. Op. 14-03* (2014) (in-house lawyer's legal representation of financial services company's customers in social-security appeals improper.)

Based on the foregoing, the Board recommends that in-house lawyers avoid the representation of its corporate employer's customers on issues related to the services previously provided by the corporation. However, in limited circumstances it may be ethically permissible for an in-house lawyer to represent a customer of the lawyer's corporate employer. A lawyer asked to assist a customer of the corporation must navigate the ethical issues identified herein. For example, the lawyer must resolve the potential or

actual material limitation conflict with appropriate waivers, the lawyer must guard against corporate interference with the lawyer's representation of the customer, the lawyer cannot provide anything of value to the corporation for the recommendation or referral of the lawyer's services, and the lawyer must ensure that the corporation is not offering legal services by and through the lawyer that violates Ohio law against the unauthorized practice of law.