

**New York State Bar Association
COMMITTEE ON PROFESSIONAL ETHICS**

Opinion 824 – 7/2/08

Topic: Conflicts of interest – lawyer’s own interest; providing legal services without compensation

Digest: An attorney may, without compensation, provide a service of monitoring or reviewing a client’s investments to identify any potential claims, even though the attorney may later be considered to handle, with compensation, any resulting litigation.

Code: DR 1-106; 2-103; 5-101.

Formal Opinion 8-08

Draft by: Thomas A. Leghorn

July 1, 2008

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QUESTION

1. May an attorney, at the request of a client, review the client’s investment portfolio in order to identify any potential securities fraud claims that the client might have in connection with its investments, without charging the client a fee for this service?

FACTS

2. A law firm regularly represents plaintiffs in the field of securities fraud litigation. As part of its practice, the firm monitors the investment portfolios of existing institutional, pension fund clients. The service involves the client retaining a law firm to monitor the

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client's investments. The lawyer agrees to notify the client when the lawyer identifies a potential securities fraud claim that, in the opinion of the lawyer, might be pursued by the client. Once notified, the client is free to take no action, hire another lawyer to represent it in connection with the claim, or hire the monitoring lawyer to handle the matter. The monitoring lawyer does not charge any fee to the client for the monitoring service. Should the client select the monitoring firm to represent it, the subsequent litigation is handled pursuant to a separate retainer agreement entered into between the client and the lawyer after the client has made the decision to pursue the matter.

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OPINION

3. There is nothing in the Lawyers' Code of Professional Responsibility prohibiting an attorney from providing legal services without compensation. The fact that the reviewing attorney would be considered to handle any resulting litigation does not change that conclusion. We note that the arrangement to provide a monitoring service creates an attorney-client relationship, with all rights, responsibilities and obligations that apply whenever an attorney-client relationship is established. Among those responsibilities and obligations under the Disciplinary Rules are those pertaining to conflicts of interest and confidences of clients.

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4. DR 5-101 provides that "[a] lawyer shall not accept or continue employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests." We do not believe that a lawyer's interest in being hired to pursue any potential securities fraud claim he or she may uncover creates a conflict under this clause. It is inherent in the attorney-client relationship that a lawyer may benefit from a recommendation that legal services are needed with respect to a particular problem.

5. Because the described monitoring services are legal services involving the professional judgment of a lawyer, the provisions of DR 1-106, relating to the provision of legal and non-legal services by a lawyer or law firm, are not relevant to the inquiry. We note that, while it would be prudent to prepare an engagement letter or retainer agreement with respect to the free monitoring service, none is required by the New York engagement letter rules, because the monitoring lawyer is not expected to charge \$3,000 or more for the service.¹ The practitioner considering undertaking such an arrangement must, however, assure compliance with the rules prohibiting solicitation.² This opinion does not address issues of substantive law.

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CONCLUSION

6. A lawyer may accept retention by a client, without compensation, to review the client's investment portfolio in order to identify any potential securities fraud claims that the client may have, under the circumstances described above, even though the client may retain the lawyer, on a paying basis, to handle any resulting litigation.

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¹ 22 N.Y.C.R.R. § 1215.2(1).
² DR 2-103.

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