

BBA ETHICS COMMITTEE OPINION 2002-B

Summary

A lawyer working in a non-lawyer capacity for a business corporation that provides financial planning services to customers may accept - or even suggest (in writing) and accept - occasional engagement as a lawyer by the customers, provided certain safeguards are followed: the relationships of customer-corporation and client-lawyer are maintained distinct; the lawyer maintains a separate infrastructure for the practice of law from his financial planning business office; adequate notice is given; no fees for legal services are shared with non-lawyers; and any discussion with a legal services client or potential client of a need for legal services or suitability of the inquirer-lawyer to provide such services is not misleading. The lawyer's duties regarding competence, confidentiality, conflicts, and advertising/solicitation are affected by the fact of providing business and legal services to the same persons as business customers and legal clients.

Responding to the narrow circumstances of the present inquiry, we do not reach the broader questions of multi-disciplinary practice (MDP) that have roiled the American bar for several years and are under consideration now by a separate BBA task force.

Facts

The present inquiry poses the opposite situation to that presented by BBA Ethics Committee Opinion 1999-B. The prior opinion dealt with provision of law-related services ancillary to legal services and the present inquiry concerns legal services provided ancillary to a business providing law-related services. The inquirer is a member of the Massachusetts bar in good standing, but does not and will not practice law except for the intended ancillary legal services described below. He is a financial planner with all necessary certifications/licenses. He works for a corporation owned by his father that focuses on advising retirees on asset management.

He does not get commissions for brokering insurance, stocks, mutual funds or the like but the corporation does get such commissions. He receives a salary from the corporation, not a percentage of its fees. Implementation of the strategies made as a result of financial assessment of customers' needs may require legal services in drafting or review of estate documents - wills, powers of attorney, health care proxies, living wills, trusts. In the past the inquirer has referred customers to lawyers for such services. Now he would like to provide those services himself where appropriate.

Discussion

1. Ancillary Business Principles Generally

The Rules permit lawyers and firms to develop ancillary businesses that offer law-related services (or other services), subject to limitations, many of which were noted in BBA Opinion 1999-B. First, the person or entity practicing law may not permit any ownership interests to be held by any non-lawyer. Second, the person or entity may not share legal fees with a non-lawyer. Third, lawyer-client confidentiality must be preserved. Fourth, lawyer standards of integrity apply. Fifth, the lawyer must keep the financial business distinct from the law practice.

We begin our analysis with Rule 5.7. Investment advice services offered by the inquirer here qualify as a "law related services." Such services are described as:

Services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when performed by a non-lawyer. (Rule 5.7(b))

Performing law-related services makes a lawyer subject to the Rules as a whole (1) if those services are provided by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients (Rule 5.7(a)(1) or (2) if the lawyer fails to convey to customers of the law related services that such services are provided without protection of the lawyer-client relationship (Rule 5.7(a)(2)). See, also, Philadelphia Bar Ass'n Ethics Opinion 97-11 (www.phllabar.org/public/ethics/displayethics.asp?id=1461321200) defining "non-legal services" (essentially law-related services). That opinion gives as examples "insurance, financial planning, accounting, trust services ...[and others]," referencing a comment to the Pennsylvania version of Rule 5.7. The present inquirer could provide such services as part of legal representation, but elects, instead, to do the law-related services as his primary occupation while also making himself available for legal services. We conclude that this is permissible if he avoids implicating the conditions in parts (a)(1) and (a)(2) of Rules 5.7 while complying with other applicable rules.

That conclusion in turn raises several detailed professional ethics questions. In this Opinion we address the following:

- a) substance and timing of disclosures to prospective clients;
- b) whether a 'referral' of a customer by the inquirer to himself constitutes a "business transaction" between the lawyer and the client, triggering the provisions of Rule 1.8 or a solicitation limited by Rule 7.3;
- c) obligations of the inquirer;
- d) conflict of interest issues; and
- e) advertising and solicitation issues.

2. **Legal Services as a Follow-on to Law-Related Services**

- (a) Substance and Timing of Disclosures:

Comment 6 to Rule 5.7 requires that a lawyer disclose the limitations on the lawyer's services before entering into the arrangement for law-related services.

In taking the reasonable measures referred to [above] to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Rules of Professional Conduct, the lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be made before entering into an agreement for provision of or providing law-related services where the provision of legal services is also contemplated or likely and preferably should be in writing. (emphasis added)

We recognize the difficulty that the inquirer here may not know at the outset of providing financial planning services whether his legal services will be needed. However, before financial services are provided, the inquirer is obligated to determine if it is "contemplated or likely" that legal services will be provided as well. If so, a written disclosure, described below, should appropriately be made at that time. If not, such a disclosure should be provided at any later time that it appears that legal services are contemplated or likely.¹ The disclosure should be in writing and should spell out the availability of privilege for communications in the course of legal services, the absence of privilege in the provision of law-related services and the danger of loss of such privilege by mixture or confusion of the respective services. In appropriate cases, the writing should make clear that conflict-of-interest protections also do not apply to the provision of law related services (for example, when other members of the customer's family receive services). In addition, the writing should make clear that the inquirer and his father have a financial interest in the law-related services provided, which may affect the inquirer's ability to view those services objectively when acting in his lawyer capacity.

(b) Referrals and Rules 1.8 and 5.4:

Although the law-related services are provided by a corporate entity, we do not find a

¹ As noted, Comment 6 to Rule 5.7 requires disclosure of the differences between the law-related services and legal representation before the commencement of the former, but the disclosure obligation arises only "where the provision of legal services is . . . contemplated or likely." Accordingly, unless and until the inquirer reasonably concludes that use of his legal services is anticipated, the Rule imposes no disclosure obligation. Nevertheless, particularly if the financial services provided by the inquiring lawyer's employer typically require legal services to implement the firm's recommendations, it may make sense to make the required disclosure at the commencement of every new customer relationship, even if in some small number of cases ancillary legal services are ultimately not utilized.

referral here from a corporation to the lawyer but rather an issue that essentially involves "solicitation" considerations. We do note that legal fee sharing of any kind by the lawyer with the corporation or with any of its shareholders or employees (apart from himself) is prohibited.

(c) Obligations of the Inquirer:

Codes of conduct of the present inquirer's investment advisor profession must be followed to maintain standing in such other profession and standing as a lawyer might also be affected indirectly, e.g. breach of financial planner standards might implicate fitness to be a lawyer, especially if misrepresentation is implicated. See Rule 8.4(h) and Cmt. [4]. Lawyers have been disciplined for failings in personal life or in business activities other than law practice, applying standards of the Rules (or Code of Professional Responsibility [Code] predecessor) in connection with failure to file personal tax returns, false financial assistance applications, acting out in personal domestic relations situations, drug offenses, misconduct while serving in public office or misconduct as a trustee or other fiduciary.

(d) Conflicts of Interest and Independence:

We note that when the inquirer puts on his lawyer's hat, it should include independent assessment of clients' best interests even if independent legal advice might be contrary to standard approaches of the financial planning business or contrary to the financial interests of the inquirer's employer. We also note that a number of disclosures to any prospective client would be required at the point that the inquirer concludes that he will act, or likely will act, as a lawyer. See § 2(a) above.

(e) Advertising and solicitation:

How should the inquirer communicate with the customers before they engage him as a lawyer? We offer the following observations. A lawyer with an in-house ancillary business must comply with Rule 7.2 in advertising multiple functions. See Rule 5.7, Cmt [10]. It is acceptable for the lawyer to indicate association with the ancillary business on the lawyer's advertising or letterhead. See State Bar of Mich. Standing Comm. On Prof. And Judicial Ethics, Op. RI-135 (1992) (1992 WL 510826); but see N.J. Sup. CT. Advisory Comm. on Prof. Ethics, Op. 657 (1992) (1992 WL 257816) (joint advertising not permitted). While the language of Comment 10 to Rule 5.7 implies that Rule 7.2 applies to all ancillary business arrangements, we disagree with that conclusion as probably not intended, as it is unsupported by any text within Rule 5.7.

But the business in its advertising should not purport to render or in fact render legal services. If the business entity wishes to indicate its affiliation with inquirer as a lawyer in its advertising, the inquirer must ensure that any such advertising will not mislead

customers about the nature of the services provided or otherwise violate Rule 7.2.

As noted above, the Committee concludes that the lawyer must require the business to provide each customer, when legal services are contemplated or likely, with a detailed explanation, in some form of written communication delivered to the customer, of the extent, if any, to which a lawyer's services may be necessary to achieve the customer's financial planning goals; that the inquiring lawyer would be available to provide legal services if requested by the customer; that the customer has no obligation to engage the inquiring lawyer; that the business will not render such legal services; and how the rights and obligations of client and customer would differ. If the business advertisements ever serve as advertising for the lawyer, the lawyer must retain copies as provided in Rules 7.2 and 7.3. Generally we suggest advertisements, if any, should be separated for the two entities.

Lawyers engaged in law-related business may not solicit clients for legal services in violation of Rule 7.3. Rule 7.3(c) bars solicitation in person or by phone. But acceptance of employment with a prospective client who has received a written solicitation of the lawyer's availability in a written communication is permissible, so long as a copy is retained by the lawyer for two years and the communication and follow up conduct of the lawyer is not misleading, harassing or coercive. The lawyer may not pay any person or organization to solicit employment so as to avoid sham or "feeder" services.

Reading portions (c) and (d) of Rule 7.3 together we conclude that a written communication concerning legal services can be handed to a financial planning customer as well as mailed, emailed or telecopied under the narrow circumstances involved here. The main distinctions between written vs. oral solicitation are the presentation and auditability of the former, as well as the lesser prospect for harassment, coercion or deception.

3. Provision of Services through a Separate Entity and Separate Means

Consideration must be given to Rule 5.4(b), precluding business entities from engaging in the practice of law. This requires the inquirer to maintain separate identities and have separate practice infrastructure (i.e. separate files, access, and finances) of (a) his law-related services through the corporation and (b) his legal services. We do not, however, believe that the Rules preclude physical location of the law practices within the same space as the law-related business, as long as the finances of the two enterprises are kept strictly separate and arms'-length. But see Utah State Bar Ethics Advisory Opinion 02-04 (March 15, 2002), available at www.utahbar.org/opinions. In addition, to insure that the two services remain distinct in the mind of the client/customer, we believe it is

appropriate for the lawyer to forward any correspondence about legal matters separately from any financial planning correspondence, even though to the same person, and also for the lawyer to limit phone calls and face to face communications to one capacity or the other.

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