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Wearing Two Hats: Dual Practices and Ancillary Businesses

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Although attorneys have historically been allowed both to practice law and to pursue other business activities, the rendering of nonlegal services by attorneys or entities in which attorneys have an ownership interest raises several ethical concerns. These so called "dual practice" or "ancillary business" issues commonly arise where a practicing attorney holds another professional license or owns or has an interest in a company that provides services that are arguably "law-related." While the Massachusetts Rules of Professional Conduct do not contain a specific prohibition on the simultaneous participation of attorneys in other businesses and professions, they do place constraints.

Rule 5.7 of the Massachusetts Rules of Professional Conduct identifies the responsibilities of an attorney who provides law-related services, defined 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 provided by a non-lawyer." Examples of law-related services include "providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting." Mass. R. Prof'l C. 5.7, comment 9. It is permissible, and probably advisable, for lawyers to provide law-related services through "an entity that is distinct from that through which the lawyer provides legal services." Rule 5.7, comment 4.

Where an attorney provides law-related services through the law firm "in circumstances that are not distinct from the lawyer's provision of legal services to clients," the attorney's conduct is subject to the Rules of Professional Conduct. Rule 5.7(a)(1). For example, a sole practitioner who is also a Certified Public Accountant ("CPA") may want to list both professions on the law firm letterhead and in law firm advertisements. If an attorney's dual professional status is made known to clients or potential clients of the firm, or listed on firm letterhead, or in advertisements or solicitations for the law firm, the attorney's activities in providing CPA services may be governed by all of the ethical rules such as, for example, those on conflicts of interest, confidentiality, and business transactions with clients.

If this same attorney provides CPA services through a separate entity, the attorney still will be subject to all of the Rules of Professional Conduct unless the attorney takes "reasonable measures" to ensure that the recipient of the financial services "knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist." If such measures are taken, the Rules of Professional Conduct that relate to the client-lawyer relationship do not apply. See Rule 5.7(a)(2) and comment 4. "Reasonable measures" should include a sufficient explanation to the recipient of the services, preferably in writing, that the additional services are not legal services and that the ethical rules, including the attorney-client privilege, do not apply. See Rule 5.7 comments 4 and 6-8.

In either event, a lawyer's conduct in all business transactions is always subject to those ethical rules that apply generally to a lawyer's conduct, irrespective of whether the conduct relates to the provision of legal services. For example, lawyers may not engage in dishonesty, fraud or misrepresentation or violate criminal statutes regardless of whether they are acting as lawyers or in some other capacity. See Rule 5.7 comments 2, 11 and Rule 8.4.

If an attorney forms a partnership or other business entity with nonlawyer professionals to offer law-related services, the business entity cannot provide legal services to the public or to clients without raising numerous ethical dilemmas. The Rules of Professional Conduct strictly prohibit attorneys from forming "a partnership or other business entity with a nonlawyer if any of the activities of the entity consist of the practice of law." Rule 5.4(b); see also Boston Bar Association, Ethics Op. 1999-B (noting that an entity owned by lawyers and nonlawyers "cannot offer any legal services to its customers").

Advertising

A law firm and an ancillary business that has nonlawyer owners cannot advertise together. The public may perceive, correctly or incorrectly, that the ancillary business and the law practice are combined. See State Bar of Mich. Standing Comm. on Prof'l and Judicial Ethics, Op. RI-135 (1992) (1992 WL 510826); N.J. Sup. Ct. Advisory Comm. on Prof'l Ethics, Op. 657 (1992) (1992WL257816) (prohibiting law firm from advertising jointly with ancillary business). Creating such a public misperception could violate Rules 7.1 through 7.5, which prohibit misleading advertisements or solicitations.

Sharing Legal Fees

Attorneys are also prohibited from sharing legal fees with nonlawyers or assisting nonlawyers in the unauthorized practice of law. Rule 5.4(a) and Rule 5.5(b). Accordingly, the CPA/attorney in our example could only consider employment with, or a partnership in, a CPA firm if the sole business of the CPA firm is the provision of accounting or related financial services. If the CPA/attorney provided legal services to the CPA firm's clients and any portion of the fee for legal services went to the CPA firm, the attorney might be in violation of Rules 5.4(a) and 5.5(b).

The CPA/attorney's ethical dilemma would not necessarily be remedied if he or she provided "free" or "discounted" legal services to the CPA firm's clients through his or her law practice. Under Rule 7.3(f), an attorney cannot give "anything of value to any person or organization to solicit professional employment for the lawyer from a prospective client." See Sup. Ct. of Ohio Bd. of Comm'rs on Grievances and Disp., Op. 92-17 (1992) (1992 WL 796110); Sup. Ct. of Texas Prof'l Ethics Comm., Op. 531 (1999) (1999 WL 1007267). Advisory ethics opinions in at least one jurisdiction have held that giving free or discounted legal services to clients of the ancillary business transfers the value of the legal services to the package of services the ancillary business sells to its clients, and as such constitutes an impermissible "reward" or "compensation" to the ancillary business, in violation of attorney ethical rules. See Sup. Ct. of Ohio Bd. of Comm'rs on Grievances and Disp., Op. 92-17 (1992) (1992 WL 796110); Sup. Ct. of Ohio Bd. of Comm'rs on Grievances and Discp., Op. 88-012 (1988) (1988 WL 508803) (if attorney provides a free consult to funeral director's clients, the attorney impermissibly compensates the funeral director by adding value to the package of services the funeral director sells to his or her customers).

Referrals and Solicitation

When an attorney participates both in a law practice and a business that provides law-related services, a commonly asked question is whether the ethical rules allow the referral of business between the two professional practices. Referrals from the law firm to a law-related business in which the lawyer has an ownership interest constitute business transactions with a client. Comment 5 to Rule 5.7 requires a lawyer to comply with the requirements of Rule

1.8(a) on entering into business transactions with clients when referring a client "to a separate law-related service entity controlled by the lawyer, individually or with others." If the attorney complies with the requirements of Rule 1.8(a) that the transaction be fair and reasonable and that there be full disclosure and consent in writing, referrals from the law firm to the ancillary business may be permissible in some situations. See Boston Bar Association, Ethics Op. 1999-B; Cal. State Bar Standing Comm. on Prof'l Resp. and Conduct, Op. 154 (1999) (1999 WL 692059); State Bar of Mich. Standing Comm. on Prof'l and Judicial Ethics, Op. RI-135 (1992) (1992 WL 510826).

When the ancillary business refers its clients to the attorney's law firm, or the attorney while wearing his or her "business hat" seeks to solicit legal business from the clients of the ancillary business, arguably the ethical rules on advertising and solicitation apply. See Boston Bar Association, Ethics Op. 1999-B. The attorney must first ensure, as previously discussed, that there has been no violation of Mass. R. Prof. C. 7.3(f) by giving something of value in return for solicitation of the client.

Beyond the problems raised by Rule 7.3(f), the attorney may not be able to engage in personal or in-person solicitation. Although Rule 7.3(c) allows attorneys to solicit prospective clients with written communications if those communications comply with the provisions of that rule, Rule 7.3(c) prohibits solicitation through personal communication unless those "prospective clients are persons with whom the lawyer had a prior attorney-client relationship," or are persons that fall under other exceptions not applicable here. At least two advisory ethics opinions have reasoned that an attorney who renders services to clients through a separate law-related business does not have a "prior attorney-client relationship" with those clients for the purposes of making future solicitations on behalf of the attorney's law firm. See California State Bar Standing Comm. on Prof'l Resp. and Conduct, Op. 1995-141 (1995) (1995 WL 530260 p.10, footnote 12); State Bar of Mich. Standing Comm. on Prof'l and Judicial Ethics, Op. RI-135 (1992) (1992 WL 510826); cf. Boston Bar Association, Ethics Op. 2002-B (lawyers may not solicit clients of the ancillary business for legal business in violation of Rule 7.3).

The key point, however, concerning referrals from the business to the law practice, is that even when the ancillary business is appropriately separated from the attorney's law practice (such that the attorney's business conduct is not subject to all of the Rules of Professional Conduct), the attorney is always subject to the Rules of Professional Conduct in his or her law practice. See N.Y. State Bar. Ass'n Comm. on Prof'l Ethics, Op. 752 (2002) (2002 WL 1303478). Thus, when soliciting or considering a person as a prospective client for the law practice, the attorney's ownership interest in, or even employment with, an ancillary business creates the potential for numerous, possibly unwaivable, conflicts. See Rules 1.7 through 1.10; see also N.Y. State Bar. Ass'n Comm. on Prof'l Ethics, Op. 752 (2002) (2002 WL 1303478) (discussing dual roles of an attorney to which a client cannot consent); cf. Boston Bar Association, Ethics Op. 2002-B.

Conflicts

Conflicts can arise when a business client becomes a law firm client or when an unrelated party seeks to pursue a claim against or involving a business client. In either situation, the attorney's provision of business services, or interest in maintaining a good relationship with an ancillary business and its clients, may well constitute a "responsibility" to a third person or a "personal interest" of the attorney subject to scrutiny under Rule 1.7(b). At least one jurisdiction has opined that if the attorney "possesses confidences of the business customer which could be compromised by undertaking a legal matter which is adverse to the business customer[,]" the attorney may have to decline the new legal matter. See State Bar of Mich. Standing Comm. on Prof'l and Judicial Ethics, Op. RI-135 (1992) (1992 WL 510826).

Some conflicts cannot be waived. Other conflicts can be waived with the informed consent of the clients involved. Under Rule 1.7(b), "if the representation of [a] client may be materially limited by the lawyer's responsibilities . . . to a third person, or by the lawyer's own

interests[,]" the attorney must decline representation unless the lawyer reasonably believes that the legal representation will not be affected and the client gives informed consent. See Rule 1.7(b) and comments 7,12, & 12A; see also Boston Bar Association, Ethics Op. 2002-B (when acting as an attorney, rules require independent assessment of client's best interests); N.Y. State Bar. Ass'n Comm. on Prof'l Ethics, Op. 752 (2002) (2002 WL 1303478).

Along the same lines, the attorney's ethical duties to existing or prior clients of the law practice may prevent an attorney from rendering nonlegal services to prospective business clients if doing so would conflict with the attorney's duties of loyalty to law practice clients. Rules 1.6 through 1.10. And, of course, if the attorney's independent assessment of a prospective client's best interests would result in legal advice that would be contrary to the financial or other interests of the ancillary business, the lawyer should decline to represent the prospective client. See Rule 1.7(b); see also Boston Bar Association, Opinion 2002-B; State Bar of Mich. Standing Comm. on Prof'l and Judicial Ethics, Op. RI-135 (1992) (1992 WL 510826).

As the discussion in this article illustrates, the provision of business services in many areas may overlap with the rendering of legal services, such that business services that might otherwise be performed by laypersons may be subject to the Rules of Professional Conduct when performed by an attorney. Engaging in dual professional practices may be a desirable and profitable undertaking, but only after a careful evaluation of the ethical concerns.

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