NEW YORK STATE BAR ASSOCIATION
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New York State Bar Association
Committee on Professional Ethics

Opinion 1200 (07/21/2020)

Topic: Dual practice as a lawyer and wealth management provider; conflicts of interest

Digest: A lawyer may not simultaneously provide legal services and wealth management services to a client for separate fees. A lawyer may provide wealth management services to non-law clients, subject to Rule 5.7. A lawyer may not refer a law client to a financial planner for a fee, even if the services are unrelated, as the referral fee may compromise the loyalty and independent judgment owed to the client.

Rules: 1.7(a) & (b); 1.8(f); 5.7

FACTS

1. The inquirer, a non-practicing attorney admitted in New York, has maintained a twenty-year career as a wealth manager, providing fee-based planning, life insurance sales, and asset management. The inquirer would like to resume practicing law in a firm or solo practice and also to continue to provide investment advisory services and/or design and broker financial products for a commission. The wealth management services would be provided through an entirely separate entity from the legal services entity. The inquirer asks several questions about the permissibility of providing these services to legal and non-legal clients, including, for example, charging separate fees for creating a life insurance trust for a law client and selling the client a new life insurance policy.

QUESTIONS

2. The inquirer asks three questions:

(a) May a lawyer simultaneously provide wealth management services to law clients for separate fees?

(b) May a lawyer provide wealth management services to non-law clients?

(c) May a lawyer, during a representation, refer a law client to a third-party financial planner and receive a referral fee?

OPINIONS

Simultaneous Provision of Legal and Non-Legal Services to the Same Client for Separate Fees

3. In the circumstances at issue, the answer to the first question – the rendition of dual services to the same client for separate fees – is no. Traditionally, lawyers have provided both legal and non-legal services to the same client. See N.Y. State 206 (1971) (lawyer-accountant services). The

N.Y. Rules of Professional Conduct ("Rules") expressly allow a lawyer to do so. *See* Rule 5.7.

4. This does not end the inquiry. Rule 1.7(a) prohibits a lawyer from representing a client if a reasonable lawyer would conclude that a significant risk exists that the lawyer's professional judgment on the client's behalf will be adversely affected by the lawyer's own financial or business interests. Providing legal and non-legal services to a client for separate fees presents a conflict of interest. This conflict of interest may be cured only if client consent is permissible under Rule 1.7(b), after full disclosure, confirmed in writing. In some circumstances, such consent may be sufficient to remedy the conflict. *See* N.Y. State 1155 ¶ 5 (2018) (informed consent permissible in some cases); *e.g.,* N.Y. State 784 (2005) (if an entertainment management company in which a lawyer has an interest that provides non-legal services to a client of the lawyer's firm, the law firm may continue to represent the client only if a disinterested lawyer would believe that the representation of the client will not be thereby adversely affected and the client consents to the representation after full disclosure of the implications of the lawyer's interest in the management company).

5. This Committee has previously opined, however, that some dual practice conflicts are so serious as to preclude the possibility of informed consent. In a series of opinions, we have found that, in certain cases, the conflict between the legal and non-legal services is so severe that informed consent cannot cure it. Most of these opinions involve acting as a lawyer and a real estate broker in the same transaction. See N.Y. State 1015 ¶ 7 (2014); N.Y. State 1013 ¶ 5 (2014); N.Y. State 933 ¶ 7 (2012); N.Y. State 919 ¶ 3 (2012); N.Y. State 752 (2002) (after adoption of the predecessor to Rule 5.7, the conflict provisions of the Code of Professional Responsibility still prohibited a lawyer from acting as a lawyer and a real estate broker in the same transaction, even with the consent of the client); N.Y. State 208 (1971).

6. The problem with consent identified in these opinions is that the broker's personal financial interest in losing the brokerage transaction interferes with the lawyer's ability to render independent advice with respect to the transaction. *See also* N.Y. State 738 (2001) (dual role of lawyer for real estate client and abstract title examiner impermissible because of possible need to negotiate exceptions to title); N.Y. State 621 (1991); N.Y. State 595 (1988). For instance, a lawyer may not provide both legal and financial planning advice to clients and receive brokerage commissions with respect to financial products purchased by clients receiving the lawyer's legal advice. *See* N.Y. State 1155 ¶ 6 (2018). By contrast, we concluded that, as long as the financial planning corporation did not offer any products (*e.g.* securities, real estate or insurance) for which it would receive a commission or other form of compensation or act as legal counsel and broker in the same transaction, then the Rules would permit the conduct. *See id.; see also* N.Y. State 619 (1991); N.Y. State 536 (1981).

7. Here, the inquirer seeks to offer legal services for a fee and wealth management services to the same clients from a separate entity for a separate fee – the creation of the life insurance trust coupled with the sale of an insurance policy being only an illustration. This dual practice creates a conflict that, in our opinion, is not amenable to consent for the same reasons set forth in the foregoing opinions, namely, that the legal fees for creating a life insurance trust are likely modest to the commissions for selling a life insurance policy. As a result, based on our prior opinions, we believe the dual practice is not subject to informed consent and hence impermissible.

Provision of Non-Legal Services to Non-Clients

8. The answer to the second question is yes – a lawyer may provide non-legal wealth management services to non-law clients if the lawyer complies with Rule 5.7. Rule 5.7(c) defines a non-legal service to mean "services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law" when provided by a non-lawyer. Although legal issues are beyond our jurisdictional reach, we assume without deciding that a lawyer may legally engage in wealth management services and that such services do not constitute the unauthorized practice of law. Rules 5.7(a)(1) & (2) concern situations in which the lawyer intends to offer such non-legal services to law clients – persons to whom the lawyer is providing legal services. Here, however, the inquirer is interested in providing the non-legal wealth management services to persons who are not law clients and to do so through an entity separate from the inquirer's law practice. In these circumstances, the applicable standard is found in Rule 5.7(a)(3).

9. Rule 5.7(a)(3) says that when, as here, a lawyer or law firm "is an owner, controlling party or agent of, or is otherwise affiliated with, an entity that the lawyer or law firm knows to be providing" non-legal services to someone, then the lawyer or law firm "is subject to these Rules with respect" to the non-legal services "if the person receiving the services could reasonably believe" that the non-legal services are the subject of a client-lawyer relationship. Rule 5.7(a)(4) creates a presumption that the person receiving the non-legal services will believe the non-legal services "to be subject to a client-lawyer relationship unless the lawyer or law firm has advised the person receiving the services in writing that the services are not legal services and that the protection of a client-lawyer relationship does not exist" with respect to the non-legal services.

10. Thus, a lawyer may provide non-legal wealth management services to non-law clients if the lawyer or law firm rebuts the presumption that Rule 5.7(a)(4) creates if, in offering the non-legal services, the lawyer disclaims the existence of a lawyer-client relationship. This disclaimer tells the consumer that such accessories to a lawyer-client relationship as the protection of client confidential information, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence do not apply to the provision of non-legal services.

Receipt of Referral Fees from Third Parties

11. The answer to the inquirer's third question – receipt of a referral fee from a wealth management firm unconnected to the inquirer – was addressed in N.Y. State 1086 (2016). There, we said that the question whether a lawyer may accept a referral fee from a third-party service provider implicates Rules 1.7(a)(2) and 1.8(f). *Id.* ¶ 6. Rule 1.7(a)(2), as we note above, prohibits a representation when a reasonable lawyer would conclude that the lawyer's professional judgment on behalf of the client will be adversely affected by the lawyer's own financial, business, property or other personal interests unless the conflict can be and is waived under Rule 1.7(b).

12. We noted in N.Y. State 1086 that a number of our prior opinions have permitted a lawyer to accept a referral fee or commission from a third-party service provider in a few restricted instances, but that other prior opinions have prohibited a lawyer from accepting such a referral fee or commission, often because the lawyer's personal conflict of interest is so great that disclosure to and consent from the client will not cure the conflict.

13. Our opinions permit such a payment in very limited circumstances. *See, e.g.*, N.Y. State 981 (2013) (referral fee not prohibited by Rule 1.7 when the service is not related to the lawyer's legal services and the lawyer makes no recommendation to use the service); N.Y. State 667 (1994)

(lawyer may accept referral fee from mortgage broker notwithstanding predecessors to Rules 1.7(a) and 1.8(f) as long as client consents and all proceeds are credited to client if client so requests); N.Y. State 626 (1992) (lawyer for lender may retain fees from a title insurance company as long as client consents and amount of the fee is disclosed to the borrower who will pay the cost of the insurance and the total amount of the lawyer's fee is not excessive); N.Y. State 576 (1986) (lawyer may act as agent for title insurance company and also represent the buyer, seller or mortgagee in a real estate transaction consistent with the predecessors to Rules 1.7(a) and 1.8(f) as long as lawyer credits client with amount received from title insurer or the client expressly consents to the lawyer retaining the fee paid by the insurer); N.Y. State 461 (1977) (lawyer may accept part of a fire adjuster's commission consistent with predecessor to Rule 1.7(a) if the client consents and all proceeds are credited to client); and N.Y. State 107 (1969) and N.Y. State 107(a) (1970) (both permitting lawyer to accept a referral fee from a financial company when the lawyer invests the client's funds in certificates of deposit, if client consents after disclosure and lawyer remits the fee to client if client so requests).

14. When these narrow circumstances do not exist, we have opined that receipt of a commission creates a conflict that informed consent cannot cure. *See, e.g.*, N.Y. State 682 (1996) (lawyer may not accept a fee from an investment adviser for referring a client under predecessor to Rule 1.7 because disclosure and consent would not cure the lawyer's direct and substantial conflict); N.Y. State 671 (1994) (lawyer engaged in estate planning may not accept referral fee from insurance company for referring client under predecessor to Rule 1.7 because disclosure and consent could not cure the direct and substantial conflict between the client's and the lawyer's interests); N.Y. State 619 (1991) (when estate planning lawyer's remuneration from the third party would vary with the quantity of the product or services recommended, receipt of the referral fee was impermissible under predecessors to Rules 1.7 and 1.8(a) [business transaction with client] because the lawyer's substantial financial interest conflict could not be cured by disclosure and consent).

15. N.Y. State 682 identifies two factors that determine whether the lawyer's financial interest in a referral fee is so great that disclosure and client consent will be ineffective. A client may give informed consent for a referral fee when (a) the transaction at issue involves a product or service that is fairly uniform among providers and is required in an objectively determinable amount, or (b) when the product or service is fairly uniform among providers and is unconnected to any particular legal services.

16. In this case, we understand that a variety of financial products could meet the financial planning objectives of the clients (*i.e.* the products are not fairly uniform) and that the products are not required in an objectively determinable monetary figure. *See* N.Y. State 1086 ("an attorney may not accept a fee from an investment advisor for referring a client to the advisor, because the services of advisors vary substantially among differing providers and the amount of funds that should ideally be entrusted to any particular adviser is not objectively determinable.") Moreover, when the recipient also is a legal services client, the products are likely connected to the inquirer's legal services. For these reasons, we believe the receipt of referral fees or commissions would be ethically prohibited.

17. Comment [1] of Rule 1.7 highlights the essential aspects of a lawyer's relationship with a client: loyalty and independent judgment. "The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties. Concurrent conflicts of interest, which can impair a

lawyer's professional judgment, can arise from the lawyer's responsibilities to another client, a former client or a third person, or from the lawyer's own interests. A lawyer should not permit these competing responsibilities or interests to impair the lawyer's ability to exercise professional judgment on behalf of each client."

18. Here, there is a possibility that recommending a third-party non-legal services provider for a fee may indeed compromise the attorney's loyalty and independent judgment owed to one's client. Therefore, an attorney may not accept a referral fee from a third-party non-legal services provider from law clients who were referred to and received services from a third-party financial planner.

CONCLUSION

19. A lawyer may not simultaneously provide legal services and wealth management services to a client for separate fees because it is a conflict of interest that consent may not remedy. A lawyer may provide wealth management services to non-law clients subject to Rule 5.7. A lawyer may not refer a law client, even if the services are unrelated, to a financial planner for a referral fee.

(10-20)