New York State Bar Association
Committee on Professional Ethics

Opinion 1155 (08/27/18)

Topic: Dual practice as lawyer and financial planner

Digest: Whether a lawyer may provide both legal services and nonlegal services to a single client depends on whether the lawyer's professional judgment on behalf of the client will be adversely affected by the lawyer's financial interest in the nonlegal services. If there is no significant risk that it will, then the lawyer may provide both. Whether the nonlegal services will be subject to the provisions of the Rules depends on whether the nonlegal services are distinct from the legal services, which turns on the nature of the legal and nonlegal services and how integrated they are. But receiving brokerage commissions with respect to nonlegal products would constitute a nonconsentable conflict of interest.

Rules: 1.7(a) & (b), 1.8 (a) & (f), 5.4 (a) & (b), 5.7(a), 5.8, 7.1, 7.4(a) & (c), 8.4(b).

FACTS

1. The inquirer is a family/matrimonial lawyer. In that connection, the inquirer may prepare Statements of Net Worth and value assets for settlement purposes. The inquirer recently received certification from a non-governmental entity as a "Certified Financial Planner," and would like to provide stand-alone financial planning services to new and existing clients. The services would include recommendations for investments and insurance as well as education and retirement planning. The inquirer asks a number of questions about whether the provision of such services is permitted by the New York Rules of Professional Conduct (the "Rules").

QUESTIONS

2. A. May a lawyer provide stand-alone financial services under a financial planning agreement to clients of the law firm and also to persons who do not receive legal services from the lawyer?

B. May the lawyer provide legal and financial services to the same client simultaneously?

C. May the lawyer include information about financial planning services in the lawyer's newsletter and website, as long as the lawyer makes clear that these are non-legal services and do not create a lawyer-client relationship?

D. May the lawyer refer financial planning clients to an asset management or insurance firm (an "investment firm") that pays the lawyer a referral fee for products purchased from the company, as long as the referral relationship is non-exclusive and the company or the lawyer discloses to the client that the lawyer will receive a commission? Must the disclosure be in writing?

E. Is the relationship between the lawyer and the investment firm subject to Rule 5.8?

OPINION

3. Lawyers have traditionally provided both legal and nonlegal services to their clients. See N.Y.

State 206 (1971) (conditions under which dual practice is permissible). Two issues are raised by that practice: (1) the potential conflict of interest under Rule 1.7 if the lawyer's interest in the nonlegal services will have an adverse effect on his or her independent professional legal judgment on behalf of the client, and (2) whether the Rules of Professional Conduct apply to the nonlegal services as well as the legal services.

The Potential Conflict of Interest

4. Before a lawyer may provide both legal and nonlegal services to the same client, the lawyer must determine whether doing so would violate Rule 1.7(a), which 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 behalf of the client will be adversely affected by the lawyer's own financial or business interests (unless client consent is possible and the client gives informed consent). See N.Y. State 784 (2005) (if an entertainment management company in which a lawyer has an interest will provide 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 adversely affected thereby and the client consents to the representation after full disclosure of the implications of the lawyer's interest in the management company).

5. In many circumstances, whether there is a significant risk that the lawyer's professional judgment will be adversely affected will depend on the size of the lawyer's financial interest in the nonlegal services, and whether the lawyer's actions in the legal matter may affect the lawyer's ability to receive the nonlegal fees. If there is a significant risk that the lawyer's professional judgment will be adversely affected by the non-legal financial interests, the lawyer must disclose that possibility to the client and obtain informed consent, confirmed in writing.

6. Some conflicts are deemed to be so serious that client consent is not possible. In a series of opinions, we have found that, in certain cases, the conflict between the legal and nonlegal services is so severe that it cannot be cured by consent. Most of these opinions involve acting as a lawyer and a real estate broker in the same transaction. See 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); N.Y. State 919 ¶ 3 (2012); N.Y. State 933 ¶ 7 (2012); N.Y. State 1013 ¶ 5 (2014); N.Y. State 1015 ¶ 7 (2014). The nonconsentable conflict 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 595 (1988); N.Y. State 621 (1991); 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).

7. We have reached similar conclusions with respect to brokers of financial products. In N.Y. State 536 (1981), we were asked whether the members of a law firm could conduct a financial planning business from the same office in which they practiced law, and whether they could provide both legal and financial planning services to the same clients. We concluded that engaging in such dual practice would not be unethical, 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. We reached a similar conclusion in N.Y. State 619 (1991). There, a lawyer engaged in estate planning wanted to recommend to the lawyer's clients the purchase of life insurance products that were an appropriate means to achieve the client's financial or estate planning goals, but the lawyer had a financial interest in the sale of the products recommended. We concluded that this situation presented a

nonconsentable conflict of interest:

A frequent topic in trust and estate planning is whether and to what extent life insurance products should be used to satisfy some of the client's financial objectives and, is so, which ones. Where a lawyer has a financial interest or affiliation with a particular life insurance agency or company, the lawyer's independent professional judgment would unavoidably be affected in considering the appropriateness of or recommending, life insurance products for a particular client. . . . Given the wide array of life insurance products sold by various companies at differing prices, not to mention the threshold question of whether life insurance products are the most appropriate or economical way to best satisfy the client's needs, however, we do not believe that there could be meaningful consent by the client to the lawyer having a separate business interest of this kind.

8. Consequently, we believe the inquirer could conclude that a lawyer may provide both legal and financial planning advice to clients, but could not also receive brokerage commissions with respect to financial products purchased by clients receiving the lawyer's legal advice.

Application of the Rules of Professional Conduct to Lawyer's Nonlegal Services

9. The remainder of this opinion assumes that the lawyer will not receive commissions for recommending particular financial products to a client who also receives legal services and that a reasonable lawyer would not conclude that there is a significant risk that the inquirer's professional judgment on behalf of a client would be adversely affected by the lawyer's own financial or business interests in the financial planning fees. As noted above, lawyers have long provided both legal and nonlegal services to their clients. A lawyer who does so, however, must take care that the clients are not confused about whether the lawyer is acting as a lawyer and must determine whether the provisions of the Rules apply to the nonlegal services as well as to the legal services. The issues are set forth in Comment [1] to Rule 5.7:

Whenever a lawyer directly provides nonlegal services, the lawyer must avoid confusion on the part of the client as to the nature of the lawyer's role, so that the person for whom the nonlegal services are performed understands that the services may not carry with them the legal and ethical protections that ordinarily accompany a client-lawyer relationship. The recipient of the nonlegal services may expect, for example, that the protection of client confidences and secrets, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of nonlegal services when that may not be the case. The risk of confusion is especially acute when the lawyer renders both legal and nonlegal services with respect to the same matter.

10. Rule 5.7(a) sets forth the lawyer's responsibilities when the lawyer or her law firm provides nonlegal services to clients or other persons:

(a) With respect to lawyers or law firms providing nonlegal services to clients or other persons:

(1) A lawyer or law firm that provides nonlegal services to a person that are not distinct from legal services being provided to that person by the lawyer or law firm is subject to these Rules with respect to the provision of both legal and nonlegal services.

(2) A lawyer or law firm that provides nonlegal services to a person that are distinct from legal services being provided to that person by the lawyer or law firm is subject to these Rules with respect to the nonlegal services if the person receiving the services could reasonably believe

that the nonlegal services are the subject of a client-lawyer relationship.

(3) A lawyer or law firm that is an owner, controlling party or agent of, or that is otherwise affiliated with, an entity that the lawyer or law firm knows to be providing nonlegal services to a person is subject to these Rules with respect to the nonlegal services if the person receiving the services could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship.

(4) For purposes of paragraphs (a)(2) and (a)(3), it will be presumed that the person receiving nonlegal services believes the services to be the subject of 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 nonlegal services, or if the interest of the lawyer or law firm in the entity providing nonlegal services is de minimis.

11. Paragraph (a)(1) of Rule 5.7 governs nonlegal services that are not distinct from legal services. Those nonlegal services are always subject to the Rules, no matter what disclaimer a lawyer may provide about the nonlegal services. Although the comment quoted above points to the protection of client confidences and secrets, the prohibition against representation of persons with conflicting interests, and the obligations of the lawyer to maintain professional independence, those are not the only Rule provisions that would apply to the provision of nonlegal services that are not distinct. See, e.g., N.Y. State 1135 ¶¶ 8-9 (2017) (CPA services are not distinct from legal services; consequently, under Rule 7.3, the lawyer who provides CPA services may not engage in in-person or telephone solicitation for clients).

12. Rule 5.7(a)(2) governs nonlegal services that are distinct from legal services. Those nonlegal services are still subject to the Rules if the recipient could reasonably believe that they are the subject of a client-lawyer relationship, unless the lawyer has advised the recipient in writing that the protection of the client-lawyer relationship does not apply to the nonlegal services. Paragraph (a)(3) applies where the lawyer is the owner or agent of any entity that provides nonlegal services to a recipient. Those nonlegal services are still subject to the Rules if the recipient could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship, unless the lawyer has advised the recipient that the protection of the client-lawyer relationship does not apply to the nonlegal services.

13. Because a disclaimer by the lawyer that the Rules apply to nonlegal services applies only if the legal and nonlegal services are distinct, it is important to determine whether the services are distinct. The inquirer here is a family and matrimonial lawyer. The proposed nonlegal services are those that might be provided by a financial planner, including recommendations for investments, insurance, and education and retirement planning.

Are the services distinct?

14. In NY State 1135 ¶ 7, noting that the Rules do not define "distinct," we used the dictionary meaning: To be "distinct" is to be "not alike, different, not the same, separate, clearly marked off." Webster's Unabridged Dictionary 534 (2d ed. 1979). Rule 5.7(a) identifies the subjects to compare -- the service provider (the lawyer), the substance of the service to be provided (legal or nonlegal), the proposed recipient of the service (the potential client), and the manner or means by which the lawyer offers the services (that is, the degree of integration of the two services). When the lawyer provides both the legal and nonlegal services, the most important factor in determining distinctness is the degree of integration of the services. See N.Y. State 1135 ¶ 8 (state and local tax services

involving tax law and accounting, including tax audit defense and certain administrative matters before tax authorities, are integrated "not distinct" services); N.Y. State 1026 ¶ 10 (2014) (services are "not distinct" when a lawyer offered nonlegal mediation services in domestic relations matters in which the retainer agreement offered to "represent the parties in drafting and filing the court papers to obtain a divorce if the mediation results in a settlement; thus the legal and nonlegal services were "intimately bound up with each other"); N.Y. State 1015 ¶ 14 (legal and nonlegal real estate services provided in the very same matter are not distinct).

15. When a patron of the nonlegal services business uses only that service and not legal services, there is no integrated whole and the nonlegal services are by definition distinct. When, however, the patron of nonlegal financial planning services is also using or has received related legal services of the lawyer, whether the legal and nonlegal services are distinct will depend on the nature of the legal and nonlegal services. When the legal services involve estate planning and the financial planning services include planning investments that would affect the size and composition of the estate or the educational or retirement plan, even if the nonlegal services are provided from a separate entity and at times are not overlapping, we believe the services would be nondistinct. Therefore, the provisions of the Rules will apply to the nonlegal services.

Information about Investment Services in the Lawyer's Newsletters and Website

16. In N.Y. State 1135 (2017), we noted that, where the nonlegal services are not distinct from legal services, and thus the Rules would apply to the nonlegal services, the advertising and solicitation rules would apply to the nonlegal services. Thus, the link and the related text here would be "advertisements" and would have to comply with Rule 7.1 governing advertisements. The same would be true if the information were not in a link but in the lawyer's actual website or newsletter.

17. Under Rule 7.1, a lawyer may use the phrase "Certified Financial Planner" on a website, newsletter, and other advertisements subject to the Rules. In N.Y. State 1100 ¶ 3 (2016), the inquirer wanted to use the designation "Accredited Estate Planner" on a website and on business cards. We opined that such use would be a claim of specialization in violation of Rule 7.4(a), which prohibits a lawyer or law firm from identifying one or more areas of the law in which the lawyer or law firm practices, and from stating that the lawyer is a specialist in a particular field, except as provided in Rule 7.4(c). We noted that the term "certified" implied expertise. By contrast, we do not regard "financial planning" as an area of law practice, even when that service is not distinct from other services provided by the lawyer. Accordingly, we believe that a lawyer could use the designation "certified financial planner" in the firm newsletter and on its website without running afoul of Rule 7.4, as long as the advertising makes clear that financial planning is not a legal service and that the service does not involve an attorney-client relationship.

Referring Financial Planning Clients to a Third-Party Investment Firm

18. The inquirer asks whether a lawyer may refer financial planning clients to an asset management or insurance firm that pays the lawyer a referral fee for products purchased from the company, as long as the referral relationship is non-exclusive and the company or the lawyer discloses to the client that the lawyer will receive a commission. We assume that the investment firm may legally pay the attorney a fee or commission and that such payment is not otherwise illegal, because, if the fee is illegal and reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer, receipt of the payment would violate Rule 8.4(b).

19. The answer to this question is controlled by N.Y. State 1086 (2016), discussing whether a lawyer may accept a fee or commission from an investment firm for referring a client to that firm. In N.Y.

State 1086, we pointed out that the question of whether a lawyer may accept a referral fee from a third-party service provider generally involves analysis of Rules 1.7(a)(2) and 1.8(f). Id. ¶ 6. As we noted above, Rule 1.7(a)(2) governs conflicts involving a lawyer's personal interest and generally prohibits a representation where a reasonable lawyer would conclude that the representation would involve the lawyer in representing differing interests or that there is a significant risk 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 – in either case, unless the conflict can be and is waived under Rule 1.7(b).

20. 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.

21. 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 where 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 client consents and all proceeds thereof 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 where 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).

22. When these narrow circumstances do not exist, we have opined that receipt of a commission creates a nonconsentable conflict. 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) (where 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).

23. In particular, 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 (1) the transaction at issue involves a product or service that is fairly uniform among providers and is required in an objectively determinable quantity, or (2) when the product or service is fairly uniform among providers and is unconnected to any particular legal services.

24. 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 quantity. See N.Y. State 1086 ("In N.Y. State 682 (1996) we determined that 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, where 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.

25. Rule 1.8(f) provides that:

(f) A lawyer shall not accept compensation for representing a client, or anything of value related to the lawyer's representation of the client, from one other than the client unless:

(1) the client gives informed consent;
(2) there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship; and

(3) the client's confidential information is protected as required by Rule 1.6.

As we explained in N.Y. State 1086 ¶ 16 (2016), when a non-waivable conflict exists under Rule 1.7(b), we need not reach the issue whether the lawyer could meet the requirements of Rule 1.8(f).

Does it Matter that the Referral Relationship Would be Non-Exclusive?

26. The inquirer notes that the referral relationship with financial services providers would be non-exclusive. Non-exclusivity is relevant under Rule 5.8, which prohibits contractual relationships between lawyers and providers of nonlegal services, except in very limited circumstances. Rule 5.8(c) states that the restrictions of Rule 5.8 do not apply to "relationships consisting solely of non-exclusive reciprocal referral agreements or understandings between a lawyer or aw firm and a nonlegal professional or nonlegal professional service firm." The issue here, however, is not whether Rule 5.8 applies, but rather whether the lawyer has a nonconsentable financial interest. Consequently, the fact that the lawyer would have a non-exclusive relationship with the financial products provider that pays the commissions is irrelevant.

Is the Relationship Between the Lawyer and the Investment Firm Subject to Rule 5.8?

27. The inquirer asks whether the relationship between the lawyer and the investment firm would be subject to Rule 5.8, thus requiring her to give the client the "Statement of Client's Rights In Cooperative Business Arrangements" under section 1205.4 of the Joint Appellate Division Rules. Rule 5.8 governs a contractual relationship between a lawyer and certain designated nonlegal professionals "for the purpose of offering to the public, on a systematic and continuing basis, legal services performed by the lawyer or law firm as well as other nonlegal professional services . . . ." The designated nonlegal professionals are set forth on a list jointly established and maintained by the Appellate Division in Section 1205.5 of the Joint Appellate Division Rules. That list currently includes only architecture, certified public accountancy, professional engineering, land surveying and certified social work. It does not include financial planning. A lawyer therefore could not enter into a contractual relationship with an investment firm to provide, on a systematic and continuing basis, financial planning and legal services.

28. By the terms of Rule 5.8(c), Rule 5.8 does not apply to a relationship consisting solely of nonexclusive reciprocal referral agreements or understanding between a lawyer or law firm and a nonlegal professional. Consequently, since the relationship proposed here is only a nonexclusive referral arrangement, Rule 5.8 does not apply.

CONCLUSION

29. Whether a lawyer may provide both legal services and nonlegal services consisting of financial planning to a single client depends on whether the lawyer's professional judgment on behalf of the client will be adversely affected by the lawyer's financial interest in the financial planning services. If there is no significant risk that the lawyer's professional judgment will be adversely affected, then the lawyer may provide both, but may not also receive brokerage commissions with respect to financial products purchased by clients because that would constitute a nonconsentable conflict of interest. Whether the nonlegal services will be subject to the provisions of the Rules depends on whether the nonlegal services are distinct from the legal services, which depends on the nature of the legal and nonlegal services and how integrated they are. The lawyer may advertise the legal and nonlegal services on the lawyer's website and newsletter as long as the advertising complies with the advertising rules and the advertisements make clear that the nonlegal services are not legal services and are not protected by a client-lawyer relationship. The lawyer may not refer financial planning clients to an asset management firm that pays the lawyer a referral fee for products purchased from the company.
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