American Bar Association

Section on Real Property, Trusts and Estates

Non-Tax Estate Planning Considerations Group

Ethical Considerations for Attorneys Who Offer Financial or Insurance Products

Presented by:

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Mr. LeVine received his B.A. with highest distinction from Northwestern University, his J.D. cum laude from Harvard Law School, and his LL.M. in Taxation from New York University.
I. INTRODUCTION

The increasing sophistication and complexity of estate and individual tax planning, and concurrent sophistication and complexity of financial and insurance products that integrate into such planning, creates a desire by Clients for "one-stop shopping", i.e., a firm that both takes care of all these estate and tax planning issues as well as sells these financial and insurance products. Of course, there is a substantial incentive for Attorneys to offer financial and insurance products, since the commissions paid and/or "trails" often will substantially outweigh the ordinary fees earned for the legal planning.

But where the monetary interests converge, so do the conflicts-of-interest: Is the Attorney implementing a particular type of estate plan to benefit the client or to drive commissions? What if the Attorney could use an estate planning strategy that generates no more fees, but doesn't require any financial or insurance products to implement?

Then, there are the myriad questions that arise from so-called "practice groups" of Attorneys and financial planners, some groups being formally organized while others are simply cross-referral networks, and fee sharing or discounts between the participants in those groups. The bottom line is that an attorney probably can sell financial and insurance products and services, and probably can participate in certain "practice groups" arrangements -- but this landscape is chock-full of ethical mines known and unknown that threaten to blow up the Attorney's career.

With a few exceptions, the Attorney's most useful tool in avoiding these mines will be the trifecta of (1) written disclosure of potential conflicts, (2) advice to seek independent counsel, and (3) written waiver by the Client. Easily said; but some Attorneys may find it unpalatable to disclose their side-commissions to their clientele.
References herein to "Rule" or "Rules" unless otherwise stated refer to the Model Rules of Professional Conduct. Caution, of course, that each state that has adopted the Model Rules has also adopted their own additions and exceptions to the Model Rules, and that specific state variations are not considered herein.

References herein to "Financial Advisor" collectively includes a stockbroker, commodities broker, financial planner, life and annuity agent, property/casualty agent, and similar financial and insurance advisors.

RULE 1.8 CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.
Official Comment to Rule 1.8

Business Transactions Between Client and Lawyer

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client.

The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client.

The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See Rule 5.7.

In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.
Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood.

Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice.

Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role.

When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(e) (definition of informed consent).

The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction.

Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the
lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client.

Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

[4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel.

The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

**Use of Information Related to Representation**

[5] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer.

** * * * **

Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.

** RULE 2.1 ADVISOR **
In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Comment to Rule 2.1

Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront.

In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits.

However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

* * *

RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

(a) A lawyer or law firm shall not share legal fees with a nonlawyer . . . .

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:
(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the 
estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time 
during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of 
similar responsibility in any form of association other than a corporation; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Official Comment to Rule 5.4

[1] The provisions of this Rule express traditional limitations on sharing fees. These 
limitations are to protect the lawyer's professional independence of judgment. 
Where someone other than the client pays the lawyer's fee or salary, or 
recommends employment of the lawyer, that arrangement does not modify the 
lawyer's obligation to the client. As stated in paragraph (c), such arrangements 
should not interfere with the lawyer's professional judgment.

[2] This Rule also expresses traditional limitations on permitting a third party to 
direct or regulate the lawyer's professional judgment in rendering legal services to 
another. See also Rule 1.8(f) (lawyer may accept compensation from a third party 
as long as there is no interference with the lawyer's independent professional 
judgment and the client gives informed consent).

RULE 5.7 RESPONSIBILITIES REGARDING LAW-RELATED SERVICES

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the 
provision of law-related services, as defined in paragraph (b), if the law-related 
services are provided:
(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes 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 nonlawyer.

Official Comment to Rule 5.7

[1] When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.

[2] Rule 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related
services are performed and whether the law-related services are performed through a law firm or a separate entity.

The Rule identifies the circumstances in which all of the Rules of Professional Conduct apply to the provision of law-related services.

Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those Rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, e.g., Rule 8.4.

[3] When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer in providing the law-related services must adhere to the requirements of the Rules of Professional Conduct as provided in paragraph (a)(1).

Even when the law-related and legal services are provided in circumstances that are distinct from each other, for example through separate entities or different support staff within the law firm, the Rules of Professional Conduct apply to the lawyer as provided in paragraph (a)(2) unless the lawyer takes reasonable measures to assure that the recipient of the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not apply.

[4] Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services.

If the lawyer individually or with others has control of such an entity's operations, the Rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services.
and that the Rules of Professional Conduct that relate to the client-lawyer relationship do not apply.

A lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.

[5] When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8(a).

[6] In taking the reasonable measures referred to in paragraph (a)(2) 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, and preferably should be in writing.

[7] The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding.

For instance, a sophisticated user of law-related services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.
Regardless of the sophistication of potential recipients of law-related services, a lawyer should take special care to keep separate the provision of law-related and legal services in order to minimize the risk that the recipient will assume that the law-related services are legal services.

The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter.

Under some circumstances the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by paragraph (a)(2) of the Rule cannot be met.

In such a case a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 5.3, that of nonlawyer employees in the distinct entity that the lawyer controls complies in all respects with the Rules of Professional Conduct.

A broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law-related services.

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.

When a lawyer is obliged to accord the recipients of such services the protections of those Rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the Rules addressing conflict of interest (Rules 1.7 through 1.11, especially Rules 1.7(a)(2) and 1.8(a), (b) and (f)), and to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential information.
The promotion of the law-related services must also in all respects comply with Rules 7.1 through 7.3, dealing with advertising and solicitation.

In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction's decisional law.

[11] When the full protections of all of the Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the Rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. See also Rule 8.4 (Misconduct).

II. OVERARCHING CONCEPTS

A. Duty Of Loyalty

An Attorney owes a duty of undivided loyalty to the Client. Rule 2.1.

B. Duty Of Independence

The advice given by an attorney must be independent and untainted by conflict. Rule 5.4.

C. Duty Of Candor

The advice given by an Attorney should be utterly candid, even if unpleasant to the Client. Rule 2.1.

D. Written Waiver

Where even the potential for a conflict of interest may exist, the Attorney is required to fully disclose in writing to the Client the potential for conflict and advise the Client to seek independent counsel on the issue, and then procure the Client's written waiver
before continuing the representation. Rule 1.8(a). *Most conflicts in this area can be solved by disclosure and waiver!*

**III. ARRANGEMENTS**

**A. ATTORNEY AS LICENSED AGENT**

**1. DIFFERENT CLIENTS, DIFFERENT ROLES**

The situation here is where the Attorney owns another business which performs financial or insurance services for persons who are not legal clients of the Attorney.

(a) Chinese Wall

Here, the Attorney is required to keep the law practice separate from the other business to the greatest degree possible.

(b) Disclosure Requirements

The Attorney must make clear to customers of the non-legal business that legal services are not being performed and that legal protections such as attorney-client privilege do not exist for those services.

**2. SAME CLIENTS, SAME ROLES**

The greatest problems occur when the Attorney wears multiple hats, i.e., is both the Client's Attorney and the Client's Financial Advisor.

(a) Conflict Of Interest Regard Loyalty

(i) Duties Owed To Client

The Attorney owes a duty of complete and unfettered loyalty to the Client.

(ii) Duties Owed To Company Or Broker
The Attorney may also owe certain duties to the Insurance Company or Broker/Dealer.

(iii) Disclosure Requirements

Rule 1.8(a) requires full written disclosure, advice to seek independent counsel, and procurement of a written waiver from the Client.

(iv) Are These Conflicts Non-Waivable?

Under Rule 5.7, these conflicts probably are waivable, subject to the disclosure requirements.

(b) Conflict of Interest re Client Interest

(i) Client's Interest In Reducing Expenses

A Client has an interest in reducing the fees and expenses of planning. This can cut two ways: The commissions earned by the Attorney for financial planning may be used to offset commissions, but the Client may end up investing more money than the Client intended.

(ii) Planner's Interest In Increasing Commissions

(iii) Hidden Compensation: Golf Trips, Etc.

(iv) Disclosure Requirements

Rule 1.8(a) requires full written disclosure, advice to seek independent counsel, and procurement of a written waiver from the Client.

(v) Are These Conflicts Non-Waivable?
The Conflicts probably are waivable under Rule 5.7.

B. ATTORNEY FEE-SPLITTING WITH NON-ATTORNEY AGENT

This area implicates Rule 5.4 which prohibits fee-sharing arrangements with non-lawyers.

1. LEGAL FEES TO NON-ATTORNEY PLANNER

The situation here is where the Attorney is sharing legal planning fees with the non-attorney advisor, such as a Financial Advisor who refers the client to the Attorney for planning. The problem is often one of "I split commissions with you on financial products, so you should split commissions back with me on legal fees."

(a) Fee-Splitting Not Permitted

Rule 5.4(a) prohibits fee-splitting with non-lawyers. This is a disciplinable offense; disbarments have occurred for the violation of this rule.

The restrictions of 5.4(a) probably cannot be cured by disclosure to and written waiver by the Client.

(b) Expenses to Paid Expert or Consultant

An Attorney could pay a Financial Advisor reasonable compensation for bona fide services rendered to assist the Attorney.

2. FINANCIAL/INSURANCE COMMISSIONS TO ATTORNEY

Rule 5.4(c) prohibits an Attorney who accepts compensation from a third-party from being directed or controlled by the third-party.

(a) Potential For Conflict
Where the Financial Advisor is paying commissions to the Attorney, there is a concern that the commissions will impair the independent advice of the attorney.

(b) Disclosure Requirements

Rule 1.8(a) requires full written disclosure, advice to seek independent counsel, and procurement of a written waiver from the Client.

3. ATTORNEY FEES PAID BY FINANCIAL PLANNER

Rule 5.4(c) prohibits an Attorney who accepts compensation from a third-party from being directed or controlled by the third-party. (a) Potential For Conflict

(b) Disclosure Requirements

Rule 1.8(a) requires full written disclosure, advice to seek independent counsel, and procurement of a written waiver from the Client.

(c) Independence Of Lawyer

The threat of course is that the Attorney's independence will be jeopardized by the payment of fees by the Financial Planner.

(i) Latent Influence

Even if the payment the Attorney's fees will not directly influence the Attorney, there is always the potential for latent influence on the Attorney's decision-making, particularly if the Financial Advisor regularly pays the Attorney -- Who is the real "Client"?

4. SET-OFFS
The situation here is where the Attorney is owed commissions, and the Financial Planner expects to share in the Attorney's fees, and so there is effectively a "set off" of commissions against fees.

(a) Potential For Conflict

Although no money (or less money) changes hands, the potential for conflict still exists.

(b) Disclosure Requirements

Rule 1.8(a) requires full written disclosure, advice to seek independent counsel, and procurement of a written waiver from the Client.

(c) Independence of Lawyer

C. FORMAL PRACTICE GROUP WITH NON-ATTORNEYS

1. IN-HOUSE ATTORNEY FOR FINANCIAL FIRM

(a) Attorney Performing Legal Work For Clients

(b) Conflict-Of-Interest Issues

(c) Fee Sharing Issues

(d) Disclosure Issues

Rule 1.8(a) requires full written disclosure, advice to seek independent counsel, and procurement of a written waiver from the Client.

2. HOLISTIC FIRM

Some groups have organized themselves as one-stop-shop planning groups that offer all of legal and financial services under one roof.

(a) Independence Issues
Such groups pose significant issues relating to the independent judgment of the attorney.

(b) Conflict-Of-Interest Issues

These arrangements are fraught with conflict-of-interest issues.

(c) Fee Sharing Issues

Similarly, the fee sharing within the group may violate Rule 5.4.

(d) Disclosure Issues

IF these conflicts can be waived, Rule 1.8(a) requires full written disclosure, advice to seek independent counsel, and procurement of a written waiver from the Client.

D. INFORMAL PRACTICE GROUP WITH NON-ATTORNEYS

The not-formally-affiliated practice group of mixed professionals is probably the most common arrangement.

1. MARKETING AND DISCLOSURE

2. DE FACTO PARTNERSHIP

E. RECIPROCAL REFERRAL RELATIONSHIP

IV. SUNDRY OTHER DISCUSSION ISSUES

A. DUTIES AND RESPONSIBILITIES

1. VETTING OF AGENT

2. VETTING OF COMPANY

3. VETTING OF PRODUCT

4. REVIEW OF STRATEGY

5. REVIEW OF INTEGRATION
B. LIABILITY AND INSURANCE

1. PARTY TO WHOM LIABILITY OWED

2. INSURANCE RELATIONSHIPS

3. EXCLUSIONS AND COORDINATION

C. PROFESSIONAL DISCIPLINE

1. BAR

2. FINRA

3. STATE SECURITIES REGULATOR

4. STATE INSURANCE REGULATOR