

OPINION NO. 2011-1

Synopsis

An attorney who is a principal owner of a separate online service for the organization and storage of personal information and documents may refer clients and others to the service provided that the attorney takes objectively reasonable measures to assure that the referred individuals know that this law related online service does not provide legal services and that the protections of the client-lawyer relationship do not exist.

Facts

The requesting attorney has an estate planning practice and proposes to recommend to clients that they take advantage of an online web service that the attorney believes will benefit clients in organizing and storing their personal information and various types of documents.

The attorney is the principal owner of the web service; and is aware that there are ethical obligations imposed by Rule 5.7 of the Rules of Professional Conduct Regarding Law-Related Services.

Therefore, the attorney proposes to make the following statement to clients and others who are recommended to use the service:

“{Requesting Attorney} Esq. is a principal owner of [Name of online services], LLC, a for-profit business organized in the State of Vermont...[that]....does not provide legal services; accordingly, there is no attorney-client relationship or protections afforded to any individual interacting with the company or utilizing its services.

Questions Presented

1. Is the online service a law related service?
2. May the attorney refer clients and others to the online service?
3. Is the proposed disclosure adequate to meet the attorney’s ethical obligations under the Rules of Professional Responsibility?

Relevant Rules

Rule 5.7, 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; and

(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 person obtaining the law-related services know 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.

Discussion

1. Law Related Service. While the Committee has not previously reviewed the type of service described by the instant request, we conclude that it is a “law related service” because it enables clients who wish to use it to organize and save personal information that is relevant to the legal services that they may receive; and, for others who do not choose to obtain legal services from the requesting attorney, the on line service can be owned and/or operated by the attorney or persons who are not lawyers without engaging in the unauthorized practice of law.

2. Referral Obligations. Opinion No. 2009-2 reviewed a request concerning a separate business to be operated by an attorney involving a non-legal financial planning for college costs that might involve the sale of insurance products; we concluded that the lawyer could conduct such business provided reasonable measures were taken to assure that clients of the law practice or the financial planning practice understood that the businesses were separate and that the financial planning business did not provide legal advice with its attendant lawyer-client protections. The Opinion quoted directly from Rule 5.7 and its Comments (which we do not repeat here); and recommended that the attorney (a) advise the clients of the financial planning business who wished to obtain legal services that they were not obligated to use the services of the requesting attorney; and (b) bill separately for legal services and law-related services.

While the law related service involved in this request is quite different from that in 2009-2, we believe that the attorney may ethically recommend that clients and others use the online information storage service owned by the attorney and by non-attorneys. However, the attorney must take objectively reasonable measures, in writing, to assure that an individual obtaining the online services knows that the he or she is not receiving legal services with the attendant protections of the lawyer client relationship.

Rule 1.0(f) defines “knows” as “...actual knowledge of the fact in question...[which] may be inferred from the circumstances.

In order to discharge the requirements of “reasonable measures,” the attorney needs to exercise professional judgment and tailor the information to the specifics of the service recommended.

In this request, the Rules offer some guidance, in the context of duties related to informed consent. Rule 1.0(e) states:

(e) “Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

3. Is the proposed disclosure adequate? To answer this question, the lawyer must provide enough information about what elements of client protections the lawyer-client relationship affords so that the individual can make an informed decision about whether, in deciding to use the recommended on line service, the individual wishes to forego such protections. See Rule 5.7 and Comments. If the lawyer does not fully discharge the obligation to assure that the client or another who is using the online service understands that legal services are not being provided, then the lawyer-owner of the law-related business will be treated as providing legal service and be subject to the Rules in all respects.

The requesting attorney does not provide any detail, other than the proposed two-sentence disclosure, to address the duty to reasonably assure understanding by persons obtaining the online service.

Inasmuch as the burden is on the lawyer to tailor the information to specific individuals and their degree of sophistication, Rule 5.7, Comment [7], we do not believe that the proposed disclosure, standing alone, will fulfill the lawyer’s obligations in all cases. Therefore, the requesting attorney should supplement the proposed disclosure with individualized information to each client, on a case-by-case basis, as well as advise individuals that they are not obligated to use the lawyer’s legal services if they choose to subscribe to the law related service.