ADVISORY ETHICS OPINION 95-15

SYNOPSIS:

An attorney is permitted to share office space with a nonlawyer with whom the attorney maintains an ongoing business relationship in addition to the attorney's separate and ongoing practice of law provided the arrangements and relationship are such that client confidences and secrets are preserved, improper solicitation and fee splitting are avoided, and proper care is taken to maintain the exercise of independent professional judgment on behalf of the client, to avoid misleading the public and to avoid the appearance of impropriety in the arrangement.

FACTS:

The inquiring attorney has described a proposed relationship between a financial planner and an attorney as follows:

> Financial planner (FP) is an established business that provides a variety of financial services on a fee or transaction compensation basis to clients. FP has space available for an additional professional to help develop the business. A securities license is required. A person with a CFP designation or a legal background would be a plus.
>
> Attorney (ATTY) is a licensed attorney in Vermont, conducts an emerging general practice and has a financial services background. He has a securities license and a CFP designation.
>
> ATTY would like to use the space FP has available to conduct his legal practice.
>
> ATTY would also assist FP in the financial planning business in administrative or client service capacities. Compensation would, most likely, be on a commission basis.
>
> It is possible that FP would give clients an opportunity to consider using the services of ATTY for financial or non-financial transactions. ATTY would service and bill client directly. It is not contemplated that ATTY and FP would split any legal fees.
>
> ATTY may refer persons who may or may not be clients of ATTY to FP for possible financial planning services. Such persons [will] pay for services on a fee or commission basis in accordance with the normal practice of FP.

We are asked to comment on the relationship and to provide suggestions to the attorney.

DISCUSSION:

The arrangement as described involves two broad but distinct areas of concern. First, is the propriety of sharing office space with a nonlawyer. Second, is the propriety of operating "dual professions" within the shared office complex. We are of the opinion that neither activity separately or together is *per se* prohibited by our code of professional conduct, but, at the same time, each activity has the potential of invoking many and substantial Code considerations and rules. An attorney involved in either activity is required on an ongoing basis to monitor and control every detail of any such arrangement to ensure complete adherence to applicable Code considerations and rules. We expressly decline to express an opinion that the above described arrangement or any arrangement generally and adequately addresses all Code concerns without a clear and complete understanding of all facts and circumstances surrounding the relationship.

I

The inquiring attorney in this case has not provided any specifics of the proposed office sharing with the financial planner, thus, in this area, we can and will provide only the general comment and guidance requested.

This Committee has not had occasion to address directly the issues surrounding sharing arrangements with nonlawyers. In dealing with a sharing arrangement between unaffiliated attorneys, this Committee found the proposed sharing of a secretary and filing cabinets coupled with occasional discussions of cases and strategies between attorneys without naming clients and not sufficiently separate and distinct to avoid the conflict of interest proscriptions attributable to attorneys actually affiliated because it was too likely in practice to result in a breach of the attorneys' duty to preserve the confidences and secrets of their respective clients under EC 4-1 and because we found the circumstances also violated the duty to avoid the appearance of impropriety under EC 9-6.[1] A year later, this Committed found a sharing arrangement between unaffiliated attorneys involving

[1] See Opinion 79-22.

adjacent offices and the sharing of library, conference room, and office equipment sufficiently separate and distinct to avoid conflict of interest proscriptions because the arrangement involved only "manageable risk" to confidences and secrets of their respective clients.[2]

In both of these Opinions, the ultimate issue was one of conflict of interest, which distinguishes the Opinions from the facts and inquiry here. Nonetheless, we believe these Opinions are instructive in cases involving sharing arrangements with a nonlawyer, particularly as these Opinions relate to and discuss the duty to preserve client confidences and secrets.[3] As in these Opinions, we view the proper test of compliance with Canon 4 in sharing arrangements to be an objective one of practical effect and manageable risk. The question is whether adequate and recognizable safeguards will exist to ensure the preservation of client confidences and secrets. If practicable, the safeguards should be physical, systemic, and apparent (e.g. separate secretaries, separate communications lines, separate filing and billing systems, barriers to prevent overhearing of conversations). And, if this level of safeguard is not feasible with respect to any aspect of the arrangement, the inquiry becomes whether the risk of violation arising from that aspect is manageable through procedures duly instituted and practiced.

In addition to the preservation of client confidences and secrets, the Committee finds other Code considerations and rules which should be of concern to any attorney contemplating a sharing arrangement with a nonlawyer. Without intending to be exhaustive, the following provisions are among those clearly relevant to the inquiry:

CANON 3

A Lawyer Should Assist in Preventing the Unauthorized Practice of Law

DR 3-101: Aiding Unauthorized Practice of Law.

(A) A lawyer shall not aid a nonlawyer in the authorized practice of law.

DR 3-102: Diving Legal Fees With a Nonlawyer.

(A) A lawyer of law firm shall not share legal fees with a nonlawye, except (citing certain exceptions not relevant here)

DR 3-103: Forming a Partnership With a Nonlawyer.

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

EC 3-3: A nonlawyer who undertakes to handle matters is not governed as to integrity or legal competence by the same rules that govern the conduct of a lawyer. A lawyer is not only subject to that regulation but also is committed to high standards of ethical conduct. The public interest is best served in legal matters by a regulated profession committed to such standards. The Disciplinary Rules protect the public in that they prohibit a lawyer from seeking employment by improper overtures, from acting in cases of divided loyalties, and from submitting to the control of others in the exercise of his judgment. Moreover, a person who entrusts legal matters to a lawyer is protected by the attorney-client privilege and by the duty of the lawyer to hold inviolate the confidences and secrets of his client (emphasis added).

EC 3-8: Since a lawyer should not aid or encourage a layman to practice law, he should not practice law in association with a layman or otherwise share legal fees with a layman . . .

CANON 2

A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty To Make Legal Counsel Available

DR 2-101: Communications Concerning a Lawyer's Services.

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading; . . .

(4) makes a claim about the lawyer's quality of service, competence, or the like, unless the claim can be factually substantiated.

DR 2-102: Firm Names and Letterheads.

(A) A lawyer shall not use a firm name, letterhead or other professional designation that violates DR 2-101 . . .

[2] See Opinion 80-15.

[3] See Canon 4 and DR 4-101.

DR 2-103: Advertising.

(A) Subject to the requirements of DR 2-101, a lawyer may advertise through public media . . . or through written communication not involving initiation of communication as prohibited by DR 2-104 . . .

(C) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written communication permitted by this rule . . .

DR 2-104: Direct Contact With Prospective Clients.

A lawyer may not initiate communication with a prospective client with the purpose of obtaining professional employment, except that communications may be made:

(2) to persons with whom the lawyer has family or prior professional relationships; or

(3) by means of letters or advertising circulars.

Such communication shall not be initiated in any manner which would violate Disciplinary Rule 2-101, or if the person being contacted has made known to the lawyer the desire not to receive communications from the lawyer, or if the lawyer knows or reasonably should know that the communication involves coercion, duress or harassment.

CANON 9

A Lawyer Should Avoid Even the Appearance of Professional Impropriety

EC 9-8: Every lawyer owes a solemn duty to uphold the integrity of the profession; to encourage respect for the law and for the courts and the judges thereof, to observe the Code of Professional Responsibility; . . . to conduct himself or herself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.

For an opinion conditionally approving an office sharing arrangement with a financial planner see ISBN (Illinois) Opinion No 90-6, November 6, 1990, at Natl. Rptr. on Legal Ethics n.9 1991 (lawyer to use part of the office space occupied by the financial planning business, to identify the two business separately, to maintain separate telephone lines, staff, books, and records, and to share reception area and copying machines).

II

The second area of concern we have identified is the propriety of operating "dual professions" within the shared office complex. In addition to the provisions of the Code noted above, a lawyer should also be mindful of the following provisions and concerns.

CANON 5

A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client

DR 5-101: Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgement.

(A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgement on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

DR 5-104: Limiting Business Relations With a Client.

(A) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

DR 5-107: Avoiding Influence by Others Than the Client.

(A) Except with the consent of his client after full disclosure, a lawyer shall not:

(1) Accept compensation for his legal services from one other than his client.

(2) Accept from one other than his client any thing of value related to his representation of his employment by his client.

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

This Committee continues to find no general proscription in the Code against an attorney having other businesses and/or interests in businesses at the same time s/he actively practices law. In Opinion 79-16, this Committee found it proper for an attorney to act simultaneously as a title insurance agent. In Opinion 81-9, this Committee found it proper for a practicing attorney also to be a practicing real estate broker. Such opinions, however, were not without qualifications. We find the considerations and concerns set forth in these opinions to be applicable here with the exception that former DR 2-102(E) was

subsequently repealed and the outright ban against including references to the other professions on the attorney's letterhead, sign, and/or professional cards no longer applies. Among those considerations and concerns remaining are the duties to protect any attorney-client relationship established, to avoid conflicts of interest, to avoid improper solicitation, to avoid unreasonable fees, to avoid any improper division of fees, to avoid misleading appearances, and in general to ensure adherence to Code notwithstanding "the ethics of the marketplace." We would add to these the attorney's duties to preserve the client's confidences and secrets and to maintain independent professional judgment.

For another recitation of possible considerations and concerns we point approvingly to the discussion contained in Florida Proposed Advisory Opinion 88-15[4]. In that opinion, an attorney's practice of dual professions from the same premises also shared with a nonlawyer was approved with most of the same limitations noted in this Opinion. On the issue of improper solicitation both as it relates to office sharing with a nonlawyer and as it relates to an attorney carrying on dual professions, the Florida Opinion stated as follows:

> Th[e] rules therefore prohibit an attorney from using a non-lawyer with whom he or she shares space as an agent for the solicitation of legal employment or from paying the nonlawyer for referrals. An attorney who operates dual professions out of the same location must avoid using his nonlegal business as a vehicle for improper solicitation of legal employment.

These statements correspond to one of the considerations we quoted from ABA Informal Opinion 775 (1965) in our Opinion 81-9 warning against a proposed dual professional arrangement which would "inevitably serve as a feeder" to the law practice.

Under the facts presented in this inquiry the exact nature of the attorney's proposed interest in the financial planning business is not clear. However, under the facts presented it is clear that the attorney proposes to be an active participant in serving clients of the financial planning business as a professional financial planner. It is equally clear that cross referrals are contemplated between the businesses. We not the term "refer" was not used in the facts in reference to the financial planner directing business to the attorney. However, we infer that the phrase "FP would give clients an opportunity to consider" means the same and no more. Perhaps the most telling fact given as far as the intensity of the contemplated cross referrals is concerned is the indication that the financial planner may refer clients to the attorney "for financial or non-financial transactions" (emphasis added). This, of course, implies possible general referrals of FP's clients to the attorney. In all such instances, the attorney must be careful to adhere to Canon 5 of its strict disclosure and consent provisions where applicable.

We find nothing inherently and unavoidably improper with this arrangement. Its propriety, as far as the attorney is concerned, is a function of all the details surrounding the arrangement which we do not have. Suffice it so say, the closer the web is woven, the greater the opportunity exists for attorney misconduct due to the increased number of ethical rules implicated, a number of which are mentioned above.

The specific facts given in this inquiry indicate that referrals may be made between the attorney and the financial planning business but that there will be no splitting of fees for services rendered by each professional. In general, we see nothing wrong with the attorney accepting referrals from the financial planner if, in each instance, the referral is warranted, not paid for, and doesn't carry luggage such as an expectation of a reciprocal referral, generation of business, or position of control for the financial planner and also provided the attorney makes such disclosures and obtains such consent as may be required under Canon 5. For example, if FP deems it appropriate to suggest a pour-over will and a funded living trust for a client, the attorney may accept a referral to perform these services if qualified to do so. Before accepting the employment, however, the attorney should be sure that all disclosures required under DR 5-101(A) are made and the appropriate consent is obtained. If engaged, there can be no splitting of fees and circumstances independently and render the appropriate advice regardless of impact on the business of the financial planner. The attorney's advice must result from the exercise of the attorney's independent professional judgment. Either continuing this example, or in any other case, if the attorney makes a referral to financial planner in the course of representing a client who needs a service provided by financial planner, attorney must first make the disclosures and obtain the consent required under DR 5-107(A)(2). In either example, the tighter the web, the more there is to disclose and the greater the likelihood that something material will be omitted resulting in a violation of the disciplinary rule.

We decline to speculate as to the other elements of the relationship between the attorney and the financial planner in this case. Further, we will not guess as to the significance of the other facts given (e.g. the attorney holding a securities license) without knowing whether or in what manner and to what extent that fact will impact on the nature of the attorney's relationship with the financial planner. Given the number of ethical concerns implicated in these matters and the potential for complex interplay between facts, this Committee will await more detailed inquiries before expressing an opinion as to whether a particular act, arrangement, fact, or other matter violates the Code. In the meantime, this Opinion may serve to provide general guidance in the areas discussed.

[4] Florida Proposed Advisory Opinion 88-15, at Natl. Rptr. on Legal Ethics n.5, 1989.