

**Wisconsin Informal Ethics Opinion IE-16-01:
Advertising and Solicitation in Law-Related Services Owned by Lawyer**

July 18, 2016

Facts

A Wisconsin lawyer plans to engage in estate and business planning in her law practice. She will also be a partial owner of a separate business in which she plans to engage in financial planning and counseling.

The lawyer plans to advertise that she is an estate planning attorney in written advertisements and materials for her financial planning and counseling business. She also plans to mention that she is an estate planning attorney in the financial planning presentations that she gives and when talking about her qualifications and background.

The lawyer asks to what extent her law office may accept employment from clients of her financial planning and counseling business.

Questions

1. May a lawyer who is engaged in the dual practice of law and law-related occupation or service indicate that the lawyer has a law practice in the marketing materials for the law-related occupation or service?
2. May a lawyer who owns a financial planning business which operates separately from her law practice directly offer to provide legal services to the clients of the financial planning business.
3. May a lawyer agree to provide legal services to clients of her separate financial planning and counseling business when she has recommended that they retain the services of a lawyer but has not directly offered to provide the service?

Answers

1. Yes, a lawyer who is engaged in the dual practice of law and law-related occupation or service may indicate that the lawyer has a law practice in the marketing materials for the law-related occupation or service if the marketing materials comply with SCR 20:7.1 and 7.2.
2. No, a lawyer may not by in-person contact offer to provide legal services to the clients of the financial planning business. SCR 20:7.3(a), which prohibits a lawyer from soliciting legal employment from a potential client by in-person contact, preserves the right of a person seeking legal services to select a lawyer of his or her choice without being encumbered by the intimidation or overreaching that may result from in-person solicitation, especially when that solicitation is done by the person's financial planner. Unlike SCR 20:7.3(a), SCR 20:1.7 and SCR 20:1.8(a) are not adequate to protect the rights of a nonlaw business client from intimidation or overreaching. Consequently, the term "professional relationship" does not include the relationships created

from a lawyer's nonlaw business.

3. Yes. The acceptance of an unsolicited request for legal representation by a nonlaw business client would not violate SCR 20:7.3. The lawyer should, however, exercise caution because professional employment obtained in such manner on more than an infrequent basis may establish that such employment was based on solicitation in violation of Rule 7.3

Introduction: A Lawyer's Responsibilities Regarding Law-Related Services

To provide context for the questions posed, the Committee believes that it is helpful to review the Rules of Professional Conduct relating to law-related services.

The dual practice of law and another occupation is generally permissible provided that certain conditions are met. Numerous ethics opinions, including Wisconsin Ethics Opinion E-82-11, have concluded that the ABA Model Rules of Professional Conduct as well as the Wisconsin Rules do not contain any explicit prohibition of dual practice.

Lawyers often choose second occupations that enable them to draw upon their legal experience, and consequently, most instances of dual practice involve the provision of law-related services to legal clients. A law-related service or occupation is any "business where the lawyer-participant's activity would be likely to involve frequent solution of problems that are essentially legal in nature..."¹ Occupations or services that have been found to be law-related include real estate brokerage, Wisconsin Formal Ethics Op. E-86-03; sale of title insurance, Wisconsin Formal Ethics Op. E-85-05; services to trucking companies such as the preparation of forms relating to licensing, registration, fuel tax reporting, and tariffs, Wisconsin Formal Ethics Op. E-83-14; and "marriage counseling, accountancy, labor relations consulting, and the operation of an insurance agency ... or a loan or mortgage brokerage office," ABA Formal Op. 382 (1972).²

¹ Wisconsin Formal Ethics Op. E-83-14. In contrast, an unrelated service or occupation is "one where the products or services provided to customers or clients would not involve either services or the need for services which would be essentially legal in nature..." Wisconsin Formal Ethics Op. E-83-14.

² The dual provision of legal services and law-related services to a client is normally a business transaction with a client and creates a conflict of interest. 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). ABA Comment [5] to Model Rule 5.7. In addition, Comment [1] to SCR 20:1.8 indicates that the rule on business transactions applies when lawyers provide ancillary services or products, such as investment services or title insurance, to clients of their law practice. In agreement is the *Restatement of the Law (Third) Governing Lawyers* §126 cmt. c. For the most part, ethics committees likewise take the view that Rule 1.8(a) is applicable to lawyers who provide ancillary products or services to their legal clients. Several ethics opinions have addressed the dual provision of legal services and law-related services. For example, in Arizona Ethics Opinion 05-01, a lawyer who wanted to contract with an investment advisory firm to provide investment-related services planned to register as an investment advisor but maintain this business separate from his law practice. The investment advisory firm would pay the lawyer a percentage of any fees from nonclients he referred to it. The lawyer could not, however, refer a current client to the firm in exchange for a referral fee unless he reasonably believed that he would still be able to provide competent representation to the client, and the transaction would meet Rule 1.8(a)'s requirements of fairness, reasonableness, disclosure, and consent. Pursuant to Rule 5.7, the ethics rules would not apply to the lawyer's provision of investment services as long as the lawyer operated these services through a separate entity and took reasonable steps to ensure that nonclient customers knew that they were not receiving legal services or the protections of the lawyer-client relationship. Utah Ethics Opinion 04-05 concluded that a lawyer may form a cooperative organization that offers nonlegal but law-related services, such as trust administration and investment management, and may refer clients to the organization and participate in the organization's profit-sharing plan, provided that the lawyer complies with Rules 1.7 and 1.8. The opinion reasoned that compliance with these rules will be ensured

Most ethics opinions take the position that if a lawyer provides law-related services to a client in addition to legal services, then the lawyer is bound by the Rules of Professional Conduct when providing both the legal services and the law-related services. The lawyer must be able to reconcile the Rules of Professional Conduct with the rules and regulations governing the law-related occupation. For example, a lawyer providing real estate brokerage services must be able to reconcile a lawyer's duty, pursuant to SCR 20:1.6, to not disclose information relating to the representation of a client with any disclosure requirements imposed on brokers. A lawyer must carefully analyze each particular situation because there are situations in which the provisions of those services would not be permissible under the Rules.

Under some circumstances, however, it may not be reasonable to apply the Rules of Professional Conduct to the provision of law-related services. For example, a lawyer owns a mortgage brokerage and has referred a personal injury client who is looking for a house to the mortgage brokerage. The brokerage is completely separate and distinct from the lawyer's law practice in its operation, its personnel, and its location. The lawyer informs the client that the protections of the attorney-client relationship will not apply to the brokerage services. Under these circumstances, the brokerage client should not be treated as a legal client. However, the lawyer must tell the client that the protections of the attorney-client relationship do not apply.

SCR 20:5.8, which is identical to ABA Model Rule 5.7, becomes effective on January 1, 2017.³ ABA Model Rule 5.7 provides a framework for determining when a lawyer providing law-related services is bound by the Rules of Professional Conduct. Under the Model Rule, a lawyer who provides law-related services from his or her law office is bound by the Rules. However, a lawyer who owns a law-related services firm that is separate and apart from the law office and who refers clients to that law-related services firm is not bound by the Rules of Professional Conduct when providing the law-related services if the lawyer fully advises the client of this fact and its ramifications.

Model Rule 5.7 Responsibilities Regarding Law-Related Services provides:

(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.

if the lawyer referring the client to the organization (1) objectively concludes that any identifiable conflicts between the lawyer and organization would not materially affect the representation of that client; (2) affirms in writing to the client that the referral will not compromise the client's interests in any way; (3) fairly concludes that the fees charged by the organization are fair and reasonable; (4) discloses to the client that the lawyer will receive a share of the profits from the organization; (5) advises the client to seek independent counsel with regard to the referral; and (6) obtains the client's consent. See also, Oklahoma Ethics Op. 316 (2001) (financial products); Indiana Ethics Op. 1 of 2002 (financial planning services); Kansas Ethics Op. 00-05 (2001) (financial planning services); New Hampshire Ethics Op. 1998-99/14 (2000) (insurance products).

³ On May 12, 2016, the Wisconsin Supreme Court voted unanimously to adopt Rule Petition 15-03. This petition includes the new SCR 20:5.8.

(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.

Under the Rule, a lawyer must take reasonable measures to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Rules of Professional Conduct. In doing so, "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."⁴

Moreover, the burden is upon the lawyer to show that he or she 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."⁵

Regardless of the sophistication of a user 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."⁶

1. May a lawyer who is engaged in the dual practice of law and a law-related occupation or service indicate that the lawyer has a law practice in the marketing materials for the law-related occupation or service?

The lawyer who requested our opinion plans to advertise that she is an estate planning attorney in written advertisements and materials for her financial planning and counseling business. She also plans to mention that she is an estate planning attorney in the financial planning presentations that she gives and when talking about her qualifications and background. The Committee cautions that in so doing, there may be a risk that the recipient of the law-related services will assume that the law-related services are legal services.

Any advertising or communication that mentions the lawyer's ability or willingness to provide legal services is governed by the Rules of Professional Conduct. If a lawyer advertises non-legal services and the advertisement states that he or she is a lawyer, then that lawyer is implying that the client will benefit from the lawyer's legal expertise and that the nonlegal services are based on the lawyer's status as a lawyer. As a result, the advertisements are governed by the Rules of Professional Conduct. For example, a lawyer who advertises a real estate business that is "owned by Lawyer Smith" or "affiliated with the Law Offices of Attorney Smith" must comply with the rules governing lawyer advertising. Consequently, if the

⁴ ABA Comment [6] to Model Rule 5.7.

⁵ ABA Comment [7] to Model Rule 5.7.

⁶ ABA Comment [8] to Model Rule 5.7.

advertising materials for the financial planning and counseling business state that the lawyer is an estate planning lawyer, then SCR 20:7.1 and 7.2 apply.

SCR 20:7.1 prohibits lawyers from making any communication about their services that is false or misleading. An advertisement for a financial planning business that states that the financial planner is a practicing lawyer or that the business is owned by a lawyer would imply that legal services could be obtained through the financial planning business and consequently violate SCR 20:7.1. This may be remedied, however, by appropriate disclaimers. “The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client.”⁷

Moreover, even when the law-related services are provided through an entity that is distinct from that through which the lawyer provides legal services, the lawyer must “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 client-lawyer relationship do not apply.”⁸

2. May a lawyer who owns a financial planning business which operates separately from her law practice directly offer to provide legal services to the clients of the financial planning business.

With limited exceptions, SCR 20:7.3(a) prohibits a lawyer from soliciting professional employment from a potential client by in-person contact for the lawyer's pecuniary gain.⁹ The purpose of the prohibition on in-person solicitation is to prevent undue influence, intimidation, and over-reaching by the lawyer.¹⁰ Among the limited exceptions to the rule, a lawyer is not prohibited from soliciting professional employment by direct contact if the person contacted “has a family, close personal, or prior professional relationship with the lawyer.”

⁷ ABA Comment [3] to SCR 20:7.1.

⁸ ABA Comment [4] to Model Rule 5.7.

⁹ SCR 20:7.3(a) states:

- (a) A lawyer shall not by in-person or live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:
- (1) is a lawyer; or
 - (2) has a family, close personal or prior professional relationship with the lawyer.

¹⁰ ABA Comment [2] to SCR 20:7.3 states:

[2] This potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or autodialed make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct in-person, telephone or real-time electronic persuasion that may overwhelm the client's judgment.

“Professional relationship” is not defined in the Rules of Professional Conduct. It seems unlikely, however, that the term “professional” would be defined or interpreted in two distinct ways within the same sentence of the same rule. SCR 20:7.3(a) states that a “lawyer shall not by in-person or live telephone or real-time electronic contact solicit *professional* employment. . . .” (Emphasis added.) Professional in this context refers to employment as a lawyer. One of the exceptions to prohibited in-person solicitation is a “prior *professional* relationship with the lawyer.” (Emphasis added.) When a certain term or phrase is used multiple times throughout a statute or rule, the “whole act rule” of statutory construction states that term or phrase should be interpreted in a consistent manner. This rule assumes that the legislatures draft statutes and the courts adopt rules in a way that is internally consistent in its use of language and in the way its provisions work together.¹¹

The lack of a definition, however, has resulted in disagreement about whether a prior “professional relationship” is limited to a lawyer-client relationship or whether it includes other professional relationships.

A number of ethics opinions have concluded that a lawyer may own and operate a business that provides nonlegal services, but may not use the business to solicit legal employment¹² or “in practical terms become a ‘business originator.’”¹³ Consequently, these opinions limit the term “professional relationship” to a lawyer-client relationship, recognizing that “[t]here is far less likelihood that a lawyer would engage in abusive practices . . . in situations in which the lawyer is motivated by considerations other than the lawyer’s pecuniary gain.”¹⁴

One scholarly work suggests, however, that the “prior professional relationship” exception to in-person solicitation “appears to apply to former professional relationships that the lawyer had when the lawyer was in another career prior to becoming a lawyer.”¹⁵ For example, if a lawyer was an accountant before going to law school and is now developing a tax litigation practice, the lawyer may contact former accounting clients to inform them of his or her new career.¹⁶ This analysis emphasizes the prior aspect of the relationship.

¹¹ William N. Eskridge, Jr., Philip P. Frickey, & Elizabeth Garrett, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* at 820(3d. ed. 2001).

¹² Alabama Ethics Op. 86-101 (1986) (lawyer may take job as private investigator but may not solicit legal business for himself or have detective agency solicit for him); Nevada Ethics Op. 45 (2011) (lawyer may own and operate business that provides nonlegal services but must not use business to solicit legal employment); Pennsylvania Ethics Op. 90-157 (1990) (law firm partners and associates of lawyer practicing as accountant, and lawyer himself, may violate Rule 7.3 if law firm accepts employment from client of lawyer’s accounting firm who was referred to law firm by lawyer); Pennsylvania Ethics Op. 2008-07 (part-time lawyer for nonprofit debt settlement and consolidation organization may not personally represent persons he cold-calls on organization’s behalf); South Carolina Ethics Op. 02-06 (2002) (practicing lawyer may own mortgage brokerage business but may not use business to solicit clients for law practice).

¹³ South Carolina Ethics Op. 02-06 (2002).

¹⁴ ABA Comment [4] to SCR 20:7.3.

¹⁵ Ronald D. Rotunda & John S. Dzienkowski, *Legal Ethics: The Lawyer’s Deskbook on Professional Responsibility* 1269 (ABA Center for Professional Responsibility 2015-2016).

¹⁶ *Id.*

Consequently, “prior professional relationship” would not include relationships from a lawyer’s nonlaw business that is contemporaneous with the lawyer’s law practice. It is not difficult to imagine how a current client, rather than a prior client, of the nonlaw business might feel intimidated or unduly influenced when solicited by the lawyer for legal employment.

Yet, other ethics opinions have concluded that a lawyer may accept legal employment stemming from solicitation of nonlaw professional clients after full disclosure and compliance with the conflicts of interest rules.¹⁷ Consequently, these opinions, with no analysis, conclude that the term “professional relationship” is not limited to a lawyer-client relationship.

To ask only whether a “professional relationship” is limited to a lawyer-client relationship seems inadequate. Underlying the definition or interpretation of “professional relationship” is the issue of whether the protections offered by SCR 20:1.7 and 1.8(a) are adequate to prevent undue influence, intimidation, and over-reaching by the lawyer who has a nonlaw business and wants to solicit law clients from that nonlaw business.

We conclude that SCR 20:1.7 and SCR 20:1.8(a)¹⁸ are not adequate to prevent undue influence, intimidation, and over-reaching that SCR 20:7.3 was designed to prevent. Consequently, the term “professional relationship” does not include the relationships from a lawyer’s nonlaw business.

First, a lawyer is not bound by the Rules of Professional Conduct in his or her nonlaw business if the lawyer’s law practice and nonlaw business are separate and distinct, and if the lawyer takes reasonable steps to assure that the person receiving the nonlaw services knows that the services are not legal services and that the protections of the client-lawyer relationship do not apply. Consequently, the duties that the lawyer owes to the person receiving nonlaw services are not the same as the duties that the lawyer owes to his or her legal clients.

Second, the harms protected against by SCR 20:1.7 and SCR 20:7.3 are not identical. SCR 20:1.7(a)(2)¹⁹ prohibits a lawyer from representing a client if there is a significant risk that the lawyer’s ability to

¹⁷ 2015 North Carolina Ethics Op. 7 (2015) (the phrase “prior professional relationship” as used in Rule 7.3(a) is not limited to prior client-lawyer relationships, but includes business relationship developed as a health care consultant); 2000 North Carolina Ethics Op. 9 (2000) (lawyer, who is also a certified public accountant working for an accounting firm, may call or visit a prospective client to solicit legal business if the lawyer established a “prior professional relationship” with the individual as a client of the accounting firm, provided lawyer fully discloses his self-interest in making a referral to himself and the referral is in the best interest of the client).

¹⁸ It is also instructive to refer to SCR 20:1.8(a), which applies to referrals from the lawyer’s law practice to the lawyer’s nonlaw business. This Rule prohibits a lawyer from entering into a business transaction with a lawyer unless three requirements are met: (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.

¹⁹ SCR 20:1.7 Conflicts of interest current clients states:

- (a) Except as provided in par. (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
 - (1) the representation of one client will be directly adverse to another client; or

consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other interests, such as the lawyer's nonlaw business. ABA Comment [10] following SCR 20:1.7 cautions that "a lawyer may not allow related business interests to affect representation." For example, a lawyer who advises a client in dealing with the nonlaw business that is owned by the lawyer may not have the independent judgment needed to give sound advice, such as to terminate the nonlaw business relationship. The conflict in effect forecloses alternatives that would otherwise be available to the client.

SCR 20:1.7 and SCR 20:1.8(a) do not, however, prohibit a lawyer in his or her nonlaw business from overreaching or asserting undue influence to solicit the representation. SCR 20:7.3 preserves the right of a person seeking legal services to select a lawyer of his or her choice without being encumbered by the intimidation or overreaching that may result from in-person solicitation, especially when that solicitation is done by the person's accountant or financial planner. This right is distinct from the conflicts of interest that may result from representation. Consequently, the term "professional relationship" does not include the relationships from a lawyer's nonlaw business.

3. May a lawyer agree to provide legal services to clients of her separate financial planning and counseling business when she has recommended that they retain the services of a lawyer but has not directly offered to provide the service?

The acceptance of an unsolicited request for legal representation by a nonlaw business client would not violate SCR 20:7.3. The lawyer should exercise caution: "If the attorney were to obtain professional employment in such manner on more than an infrequent basis, however, it would be difficult to establish that such employment was not based on solicitation in violation of Rule 7.3."²⁰

Conclusion

A lawyer who is engaged in the dual practice of law and law-related occupation or service may indicate that the lawyer has a law practice in the marketing materials for the law-related occupation or service if the marketing materials comply with SCR 20:7.1 and 7.2. When a lawyer advertises non-legal services and the advertisement states that he or she is a lawyer, then that lawyer is implying that the client will benefit from the lawyer's legal expertise and that the nonlegal services are based on the lawyer's status as a lawyer. As a result, the advertisements are governed by the Rules of Professional Conduct.

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under par. (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in a writing signed by the client.

²⁰ South Carolina Ethics Advisory Op. 02-06.

A lawyer may not by in-person contact offer to provide legal services to the clients of the financial planning business. SCR 20:7.3(a), which prohibits a lawyer from soliciting legal employment from a potential client by in-person contact, preserves the right of a person seeking legal services to select a lawyer of his or her choice without being encumbered by the intimidation or overreaching that may result from in-person solicitation, especially when that solicitation is done by the person's accountant or financial planner. Unlike SCR 20:7.3(a), SCR 20:1.7 and SCR 20:1.8(a) are not adequate to protect the rights of a nonlaw business client from intimidation or overreaching: they do not prohibit a lawyer in his or her nonlaw business from intimidating or asserting undue influence to solicit law clients from that nonlaw business. Consequently, the term "professional relationship" does not include the relationships from a lawyer's nonlaw business.

The acceptance of an unsolicited request for legal representation by a nonlaw business client would not violate SCR 20:7.3. However, the lawyer should exercise caution because professional employment obtained in such manner on more than an infrequent basis may establish that such employment was based on solicitation in violation of Rule 7.3.