



Ohio Board of Professional Conduct

OPINION 2020-08

Issued August 7, 2020

Withdraws Adv. Op. 2000-4; Adv. Op. 2001-4

Providing Financial Planning Services and Products Through a Law Firm

SYLLABUS: A lawyer may provide financial planning services through a law firm on a fixed fee, flat or hourly, basis. When a lawyer provides financial planning services through a law firm in connection with legal services, all services provided by the firm are subject to the Rules of Professional Conduct. A lawyer may not charge a fee for financial planning services provided through a law firm based on a percentage of the assets managed for a client. A lawyer may not sell financial products, such as annuities, through the law firm to estate planning and business clients. Client consent cannot ameliorate the conflicts present when a lawyer provides financial planning services through a law firm based on a percentage of assets managed basis or when a lawyer sells financial products to clients.

This nonbinding advisory opinion is issued by the Ohio Board of Professional Conduct in response to a prospective or hypothetical question regarding the application of ethics rules applicable to Ohio judges and lawyers. The Ohio Board of Professional Conduct is solely responsible for the content of this advisory opinion, and the advice contained in this opinion does not reflect and should not be construed as reflecting the opinion of the Supreme Court of Ohio. Questions regarding this advisory opinion should be directed to the staff of the Ohio Board of Professional Conduct.



Ohio Board of Professional Conduct

65 SOUTH FRONT STREET, 5TH FLOOR, COLUMBUS, OH 43215-3431

Telephone: 614.387.9370 Fax: 614.387.9379

www.bpc.ohio.gov

HON. JOHN W. WISE

CHAIR

PATRICIA A. WISE

VICE-CHAIR

RICHARD A. DOVE

DIRECTOR

D. ALLAN ASBURY

SENIOR COUNSEL

KRISTI R. MCANAU

COUNSEL

OPINION 2020-08

Issued August 7, 2020

Withdraws Adv. Op. 2000-4; Adv. Op. 2001-4

Providing Financial Planning Services and Products Through a Law Firm

SYLLABUS: A lawyer may provide financial planning services through a law firm on a fixed fee, flat or hourly, basis. When a lawyer provides financial planning services through a law firm in connection with legal services, all services provided by the firm are subject to the Rules of Professional Conduct. A lawyer may not charge a fee for financial planning services provided through a law firm based on a percentage of the assets managed for a client. A lawyer may not sell financial products, such as annuities, through the law firm to estate planning and business clients. Client consent cannot ameliorate the conflicts present when a lawyer provides financial planning services through a law firm based on a percentage of assets managed basis or when a lawyer sells financial products to clients.

QUESTION PRESENTED: A lawyer proposes providing financial planning services and products to business and estate planning clients of the lawyer's law firm. The financial planning services would include risk management; investment management; including asset allocation and selection; retirement planning; estate planning, and personal financial statements.

1. May a lawyer provide financial planning services through the lawyer's law firm to business and estate planning clients of the lawyer's law firm?
2. May a lawyer charge a fee to a legal client for financial planning services, basing the fee on a percentage of the assets managed for the client?

3. May a lawyer, who is also a licensed insurance agent, sell annuities, for a fixed commission, through the law firm to estate planning clients of the lawyer?

APPLICABLE RULES: Prof. Cond.R. 1.7, 1.8, 2.1, 5.7

OPINION: This opinion addresses whether the proposed conduct outlined above is subject to the Ohio Rules of Professional Conduct. The opinion does not address state or federal laws or regulations governing financial planning services or investment advisers. Ohio lawyers providing financial planning services must be fully aware of and adhere to state and federal laws and regulations regarding investment advisory services. Failure to comply with the same may violate the Ohio Rules of Professional Conduct.

Financial Planning is a Permitted Law-Related Service

Prof.Cond.R. 5.7 acknowledges that lawyers may provide law-related services either in circumstances that are not distinct from the lawyer's provision of legal services or through a separate entity. The rule identifies law-related services as services that might reasonably be performed in conjunction with the provision of legal services and that are not prohibited as the unauthorized practice of law by a nonlawyer. Prof.Cond.R. 5.7(e). Financial planning is a law-related service. *Id.* at cmt. [9]. If the law-related services are not distinct from the lawyer's legal practice, the lawyer's conduct in performing the law-related services is subject to the Ohio Rules of Professional Conduct. Prof.Cond.R 5.7(a)(1).

Although the rules do not define what makes services distinct, an important factor is the degree of integration of the services into a lawyer's law practice. *See* N.Y. St. Bar Ass'n. Op. 1155 (2018). When determining the integration of the services a lawyer may consider the manner and means through which he or she provides the services to the client, for example, the support staff used and the location from which the services are provided. Prof.Cond.R. 5.7, cmt. [3]. To determine the degree of integration of the services, the lawyer must also consider whether the law-related services the lawyer provides the client will have any impact or connection to any legal services the lawyer provides to the client, and vice versa. When, as here, a lawyer provides financial planning services for clients, that include planning investments affecting the size and composition of an estate or an educational or retirement plan, the law-related services are not distinct from the lawyer's provision of legal services for estate planning and thus all the services

performed are subject to the Rules of Professional Conduct. *See* N.Y. St. Bar Ass'n Op. 1155 (2018).

Conflicts of Interest

As a result of the integration of services, a lawyer providing financial planning services to business or estate planning clients through a law firm must carefully consider the potential for conflicts of interest pursuant to Prof.Cond.R. 1.7(a)(2) and comply with Prof.Cond.R. 1.8(a). Prof.Cond.R. 5.7, cmt. [10]. The lawyer should inform the legal client who needs related financial planning services that the client may obtain financial planning services elsewhere. Prof.Cond.R. 5.7(c).

Financial Planning Fee Based on Percentage of the Total Value of Assets Managed

The financial interest that the lawyer has in providing the nonlegal services will often determine whether there is a material limitation conflict. *See* N.Y. St. Bar Ass'n Op. 1155 (2018). The Board is of the view that when a lawyer charges a financial planning fee based upon a percentage of the total value of assets managed, there is a significant risk that the lawyer's independent judgment will be materially limited because of the lawyer's financial interest. This is especially problematic when the planning includes ongoing management of asset selection and allocation leading to an unlimited source of percentage-based fees and income for the lawyer. The lawyer has a significant personal financial interest in maintaining that type of relationship and source of income that could lead the lawyer to forgo offering an appropriate course of legal action for a client if it would adversely affect the financial planning relationship.

Furthermore, a lawyer may not enter into a business transaction with a client or knowingly acquire a pecuniary interest adverse to a client unless the transaction and terms are fair and reasonable to the client. Prof.Cond.R. 1.8(a). When a lawyer proposes to be compensated by a percentage of assets managed, the business transaction the lawyer desires to enter into with the client is inextricably linked with the provision of legal services. The lawyer's personal financial interest, beyond the compensation for his or her legal services, depends on the legal advice given, accepted and acted on by the client. Given the inherent conflict present, the Board is of the view that the fairness and reasonableness requirements are impossible to satisfy when charging a law firm client for financial planning services based on the percentage of assets managed because the

lawyer's independent professional judgment would be unavoidably and impermissibly affected. *See* R.I. Sup. Ct. Adv. Op. No. 96-26 (1996).

Sale of Annuities

Identical to the analysis above, when a lawyer proposes to sell annuities to law firm clients he or she must determine if a material limitation conflict is present. Prof.Cond.R. 1.7(a)(2). A lawyer who sells annuities to law firm clients has a significant personal financial interest in each sale by way of the commissions received. The lawyer's competing financial interest in the sale of annuities substantially risks the lawyer's ability to provide independent professional judgment regarding the client's estate plan. Thus, a material limitation conflict is present. Moreover, when a lawyer sells annuities to a client of the law firm, a lawyer must consider Prof.Cond.R. 1.8(a). The business transaction the lawyer desires to enter into with the client when selling annuities to estate planning or business clients of the law firm is inextricably linked to the provision of legal services. For the same reasons as above and due to the presence of an inherent conflict, the fairness and reasonableness requirements are impossible to satisfy when a lawyer sells annuities to law firm clients. *Id.*

Permissible Fee Structure

In the alternative, the Board is of the opinion that there is no significant risk that a lawyer's professional judgment will be materially limited when a lawyer provides financing planning services based on a fixed fee, flat or hourly. When a lawyer offers financial planning services on a fixed fee, flat or hourly, the client and lawyer are better able to assess the financial impact to the client by estimating attorney fees at the outset. The material limitation risk is diminished when the lawyer's provision of such services is not motivated by commissions or percentage-based fees.

Client Consent

The Board is of the view that when a lawyer serves as legal counsel, financial planner and seller of financial products, or works on a percentage-of-assets managed basis, client consent cannot ameliorate the conflicts that are created. The market provides vast availability of financial products that could potentially benefit a client's estate plan. *See* N.Y. St. Bar Ass'n Op. 1155 (2018). Due to the subjective nature of the benefits of certain products, there is disagreement even among leading financial experts about the

benefits of certain financial products. *Id.* Above all, a client is entitled to his or her lawyer's independent professional judgment as to which opportunity is best for the client. Clients should not be subjected to deferential suggestions about products or management of assets that may also financially benefit the lawyer. There is no exercise of independent judgment in such a scenario. In that instance, a lawyer's motives will always be questioned and subjected to scrutiny if a problem arises with regard to the representation. As the Board has previously indicated, Prof.Cond.R. 2.1 does not provide for any type of client consent to absolve a lawyer from exercising the required independent judgment. Adv. Op. 2019-10. Further, as indicated above, the Board is of the opinion that the fairness and reasonableness requirements of Prof.Cond.R. 1.8(a)(1) cannot be satisfied and that client consent cannot fully ameliorate the conflict. However, when a lawyer is providing financial planning services on a flat fee, fixed or hourly basis and not selling financial products to fund the estate plan, the Board is of the opinion that the fairness and reasonableness requirement of Prof.Cond.R. 1.8(a)(1) is met and the lawyer may provide the law-related service through the law firm so long as he or she is able to comply with the remaining requirements of Prof.Cond.R. 1.8(a)(2) and (3) and Prof.Cond.R. 2.1.

Compliance with Other Rules of Professional Conduct

Confidentiality

When providing a client financial planning services through a law firm, the lawyer is prohibited from revealing information related to the representation, including information protected by the attorney-client privilege. Prof.Cond.R. 1.6(a). Thus, a lawyer must consider whether the provision of a law-related service subjects the lawyer's records to inspection by regulatory agencies outside the legal profession.¹ A lawyer should not jeopardize the confidential information of clients of his or her law practice in this manner in order to provide financial planning services through the law firm.

¹ The Ohio Department of Commerce, Division of Securities administers state law regulating investment advisers in Ohio and is available as a resource on investment adviser issues. See also Ohio Revised Code Chapter 1707. The primary sources of federal investment adviser regulation are the Advisers Act, 15 U.S.C. 80b-1 et seq., and the rules thereunder, Title 17, Part 275 of the Code of Federal Regulations.

Excessive Fees Prohibited

When providing financial planning services through a law firm and in connection with legal services, a lawyer shall not charge an illegal or clearly excessive fee. Prof.Cond.R. 5.7 and 1.5. The prohibition against excessive fees is an additional reason the Board recommends that a lawyer use a flat fee, either fixed or hourly, to provide financial planning services to a client of the law firm. Case law indicates that charging a legal fee for nonlegal services is a violation of Prof.Cond.R. 1.5(a). See *Disciplinary Counsel v. Buttars*, ___ Ohio St.3d___, 2020-Ohio-1511. For example, a violation of Prof.Cond.R. 1.5(a) has been found when a lawyer is providing personal services such as lawn maintenance or shopping and charging the client a legal services or paralegal rate. *Id.* A lawyer providing professional financial planning services in connection with legal services should analyze the factors in Prof.Cond.R. 1.5(a)(1)-(8) and determine a reasonable fixed or hourly rate for the provision of professional financial planning services.

Advertising Considerations

A lawyer engaged in the dual profession of practicing law and providing financial planning services through a law firm must comply with Prof.Cond.R. 7.1-7.5. For a discussion of the advertising requirements associated with dual professions see Adv. Op. 2018-06.²

CONCLUSION: A lawyer may provide law-related financial planning services through a law firm to business and estate planning clients. In this instance, the lawyer will be subject to the Ohio Rules of Professional conduct with respect to the provision of both the legal services and the financial planning services because the services are not distinct from the provision of legal services. The lawyer must be mindful of his or her own financial interest in providing the financial planning services as the lawyer's financial interest will often determine whether there is a substantial risk that the lawyer's independent professional judgment will be materially limited. When the lawyer's compensation for law-related financial planning services is based on a percentage of assets managed, or when a lawyer is selling financial products to clients, the lawyer's independent professional judgment will be materially limited. These types of conflicts

² Lawyers are again reminded to complete their own research on advertising or holding oneself out as providing investment advisory services in order to assure compliance with state and federal regulations regarding investment advisers.

cannot be ameliorated by client consent because the terms are not fair and reasonable to the client and the rules do not provide an avenue for a client to consent when a lawyer's independent professional judgment is limited by the lawyer's own financial interest. However, when a lawyer is compensated for financial planning services on a fixed fee, flat or hourly basis, and can meet all the requirements of Prof.Cond.R. 1.8(a), there is no prohibited limitation of independent professional judgment present.