KENTUCKY BAR ASSOCIATION

Proposed Ethics Opinion KBA E-456
Issued: **March 17, 2023**

The Rules of Professional Conduct are amended periodically. Lawyers should consult the current version of the rule and comments, SCR 3.130 (available at http://www.kybar.org/237), before relying on this opinion.

Question #1: What are law-related services?

Answer: Services that may be performed in conjunction with the provision of legal services and are not prohibited as the unauthorized practice of law.

Question #2: What are the lawyer's obligations to the recipient of law-related services when the recipient does not know that law-related services are not legal services?

Answer: The lawyer is obligated to comply with all of the Rules of Professional Conduct.

Question #3: When providing law-related services is the lawyer required to have a separate office for performing legal services?

Answer: No. As a result of Rule 5.8 we overrule KBA E-417 to the extent it is inconsistent with Rule 5.8; however, we affirm KBA E-417 with regards to those situations where a lawyer "sublets" office space to nonlawyers.

Question #4: What measures should a lawyer take to avoid the application of the Rules of Professional Conduct when performing law-related legal services?

Answer: The lawyer should assure that law-related services are distinct from the lawyer's practice of law; to take measures to assure that the person obtaining the services knows that the services are not legal services; and advise the client/consumer that the protections of the client-lawyer relationship do not exist.

Question #5: If the client/customer receives the required explanation and gives written informed consent, then what are the lawyer's remaining ethical obligations to the client/customer?

Answer: A lawyer is still subject to certain of the Rules of Professional Conduct even when not providing legal services. We adopt the philosophy that "once a lawyer always a lawyer." See Opinion for further clarification.

References

RULES OF SUPREME COURT OF KENTUCKY:

Supreme Court Order 2022-11, effective April 1, 2022; Rules 5.8; 1.7;1.8; 1.10;

CASES:

Lovell v. Winchester, 941 S.W.2d 466 (Ky. 1997); *Marcum v. Scorsone*, 457 S.W.3d 710 (Ky. 2015); *In re Rost*, 211 P.3d 145 (Kan. 2009); *Bauer v. Pa. State Bd. of Auctioneer Exam'rs*, 154 A.3d 899 (Pa. Commw. Ct. 2017); *The Florida Bar v. Della-Donna, 583 So. 2d 307 (1991).*

ETHICS OPINIONS

KBA E-449 (March 14, 2019); KBA E-264 (November 1982); Me. Ethics Op. 185 (2004); Mich. Informal Ethics Op. RI-363 (2013); N.Y. State Ethics Op. 1026 (2014); N.C. Ethics Op. 2014-10 (2015; Ohio State Bar Ethics Op. 2011-02 (2011); S.C. Ethics Op. 13-03 (n.d.); Tenn. Formal Ethics Op. 2017F-164 (2017); Vt. Ethics Op. 2011-1 (n.d.); N.Y. State Ethics Op. 951 (2012); Me. Ethics Op. 200 (2010); Mass. Ethics Op. 2009- 01 (2009); FL Ethics Opinion 02-8 (January 16, 2004); Ohio Ethics Opinion 2020-08 (August 7, 2020); Oklahoma Bar Association Ethics Opinion 316 (December 14, 2001); Utah Ethics Op. 17-07 (2017).

Introduction

The Supreme Court of Kentucky recently adopted a new Rule of Professional Conduct regarding law-related services and the Committee intends that this Opinion serve as a source of discussion of new Rule, SCR 3.130(5.8) – Responsibilities regarding law-related services.[1] Kentucky's Rules of Professional Conduct are found in SCR 3.130 and in this opinion are referred to by the number of the Rule.

Rule 5.8[2] imposes the following requirements when a lawyer is providing law-related services:

> (1) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in subsection (2), if the law-related services are provided:
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> (a) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or
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> (b) 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.
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> (2) 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.

[1] *See* Supreme Court Order 2022-11, effective April 1, 2022.

[2] Rule 5.8 in Kentucky is Rule 5.7 in the ABA Model Rules of Professional Conduct as well as most of our sister states; accordingly, when reference is made to law-related services in Kentucky it is to Rule 5.8 and in other states to the comparable rule of that state's Rules of Professional Conduct.

We present the following questions and answers to provide our members with guidance as they endeavor to comply with this new Rule. We will use the Supreme Court's Comments as we review various aspects of the Rule.

Question #1

What are law-related services?

The Court's first Comment to Rule 5.8 explains law-related services as follows:

> 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, mediation,[3] legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.

In addition to the Supreme Court's Comments, we believe that the following case examples of law-related services from the ABA text, Annotated Model Rules of Professional Practice (*Ninth Edition* – 2019) may be helpful in providing a lawyer with guidance, however, before relying on the following short statements we recommend that a reader wanting more definitive guidance carefully review the case.

- Accounting services and business advice provided by a lawyer who is on retired status are law-related;[4]
- Auctioning toy trains is not law-related;[5]
- File storage business is a law-related service;[6]
- Law- related services do not include provision of basic administrative services normally associated with supporting a law office;[7]
- Mediation is a law-related service;[8]
- For-profit adoption agency provides law- related services;[9]
- A business that provides human resource services is law-related;[10]
- Title insurance agency is a law-related service;[11]
- Real estate title company is a law-related service;[12] and,
- Online data storage service is law-related.[13]

The ABA's text also adds the following comments to which we agree:

> Sometimes the ancillary services are deemed to be legal services, rather than law-related services. This may be due to the fact that a lawyer is providing them, or because

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[3] As to mediation services being a law-related service, we suggest that those who provide mediation services consider CR 99 and our recent Ethics Opinion KBA E-449 (March 14, 2019).
[4] *In re Rost*, 211 P.3d 145 (Kan. 2009).
[5] *Bauer v. Pa. State Bd. of Auctioneer Exam'rs*, 154 A.3d 899 (Pa. Commw. Ct. 2017).
[6] Me. Ethics Op. 185 (2004).
[7] Mich. Informal Ethics Op. RI-363 (2013).
[8] N.Y. State Ethics Op. 1026 (2014).
[9] N.C. Ethics Op. 2014-10 (2015.
[10] Ohio State Bar Ethics Op. 2011-02 (2011).
[11] S.C. Ethics Op. 13-03 (n.d.).
[12] Tenn. Formal Ethics Op. 2017F-164 (2017).
[13] Vt. Ethics Op. 2011-1 (n.d.).

of the nature of the services themselves. In those situations, Rule 5.7 cannot be used to preclude the application of the Rules of Professional Conduct.[14] [Pages 578-579.]

As to the nature of how a service or product[15] is sold to a client, it does not make a difference if: (1) the lawyer sells the product directly to a client; (2) refers the client to another employee of the lawyer's law firm who then makes the sale; (3) has the product sold through a non-law entity which the lawyer either alone or with others has a controlling proprietary interest; or (4) the lawyer is compensated by third parties for the lawyer's performance of law-related services without having provided substantive services as further hereinafter explained in this opinion. In sum, it is irrelevant how the product or service is sold to the client because in each instance the lawyer has ethical obligations under the Rules of Professional Conduct.

Question #2

What are the lawyer's obligations to the recipient of law-related services when the recipient does not know that law-related services lawyer are not legal services?

Unless the lawyer ensures that the client/consumer knows that the lawyer's law-related services are not legal services and the Rules of Professional Conduct will not apply, the lawyer's conduct is subject to all the Rules of Professional Conduct. Further, when services are provided through a separate entity the lawyer will be responsible for such entity's actions if the lawyer or the lawyer with others control the entity.[16] Additionally, Rule 5.8 applies to the provision of law-related services even when the lawyer limits her/his services to only law-related services and does not provide legal services.

As noted below, Rule 8.4 applies even outside the context of the practice of law. There are other Rules, for example, that the lawyer will want to consider when intending to comply with Rule 5.8, such as Rule 1.6(a) regarding confidential client information, Rule 1.7 regarding conflicts with clients, and Rule 1.8(a) regarding a lawyer who enters into a business transaction with a client or knowingly acquires an ownership interest, etc., with a client.

The customer's problem of understanding the lawyer's role in performing law-related services may best be explained by Comment 2 to the Rule, as follows:

> 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

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[14] *See* N.Y. State Ethics Op. 951 (2012) (statements disclaiming lawyer- client relationship ineffective if services rendered are actually legal services); Utah Ethics Op. 17-07 (2017) (lawyer serving as real estate agent under supervision of broker is providing law-related services, but would be practicing law if performing nonclerical activities such as drafting contracts or providing advice regarding contract or warranty interpretation or applicability of zoning or environmental laws); Iowa Rule 32:5.7, cmt. [12] (lawyers are bound by ethics rules when providing services treated as practice of law when performed by lawyers, notwithstanding that nonlawyers permitted to provide same services; these include "consummation of real estate transactions, preparation of tax returns, legislative lobbying, and estate planning"). Compare Me. Ethics Op. 200 (2010) (guardian ad litem under Maine law does not act as lawyer and therefore provides law-related services), with Mass. Ethics Op. 2009- 01 (2009) (lawyer appointed as guardian ad litem to represent interests of ward is subject to ethics rules even though nonlawyers may serve as guardians ad litem).

[15] In this opinion we use the words "service" and "product" interchangeably as they both describe the same activity.

[16] *See* Rule 5.8 - Comment (5): "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."

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. [Emphasis added.]

When a lawyer renders law-related services, just like when a lawyer performs legal services, the lawyer remains responsible to a client to ensure that the lawyer is: (1) competent to perform the law-related service; (2) is conflict-free of any personal interest; (3) is able to exercise independent judgment regarding the sale of such service; (4) provides appropriate communication during the performance of such services; and (5) assures that the compensation is appropriate for the services rendered. Specifically, the lawyer's professional obligations may include the following:

- Competency

Rule 3.130(1.1) requires that a lawyer "… provide competent representation to a client." In addition, the performance of some services, like financial planning and selling financial products, require the lawyer to obtain a license to perform or participate in the performance of such services.

- Conflict-Free & Client Consent

In order to remain conflict-free and avoid problems when entering into a business transaction with a client, a lawyer is required to consider Rule 1.7(a)(2) which prohibits lawyers from engaging in a course of conduct when there is a significant risk that the lawyer's personal interests will materially limit the representation. The lawyer may proceed to represent the client/consumer if the lawyer reasonably believes she will be able to provide competent and diligent representation, and the "client gives informed consent, confirmed in writing. The consultation shall include an explanation of the implications of the common representation and the advantages and risks involved."[17] In the cases and ethics opinions we have reviewed the lawyer assumes a substantial burden of showing that her advice (or omission of advice) was free from bias or conflict of interest created by the dual capacities in which the lawyer acted.[18] The issue is whether the lawyer's personal interests will limit the lawyer's "professional judgment in considering alternatives or [foreclosing] courses of action that reasonably should be pursued on behalf of the client."[19]

[17] *See* Rule 1.7(b)(4).

[18] *See* FL Ethics Opinion 02-8 (January 16, 2004) and Ohio Ethics Opinion 2020-08 (August 7, 2020).

[19] Rule 1.7 - Comment (10) The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

- Independent Judgment

Rule 1.8(a)[20] and Comments 3 and 4[21] require that the lawyer exercise independent judgment when selling a product to a client; specifically, whether it is an appropriate product, in what design and/or amount, and from what company. The lawyer is required to obtain the client's informed consent after having "communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Adequate information could include other alternatives, including other products available on the market from companies not associated with the lawyer. These requirements are important when dealing with the sale of financial products, especially when these products are suggested as part of a client's estate plan or long-term-care planning. Courts have also made it clear that this Rule applies when the lawyer sells a product through a third-party company. Basically, the Rule imposes four requirements: (1) that the transaction will be measured for its fairness and reasonableness; (2) the terms of the transaction are disclosed in writing to the client in language that is understandable; (3) the client is advised as to the desirability of getting independent counsel; and (4) the client gives informed written consent to the transaction.

In addition, Rule 1.8(h) prohibits a lawyer from making an agreement prospectively limiting the lawyer's liability for malpractice. We believe this restriction includes a lawyer's performance of law-related services unless the client is independently represented in making the agreement to limit the lawyer's liability.

- Communication

Rule 1.4 requires that the lawyer provide his client with accurate and effective communication that will "permit the client to make informed decisions" that ensure compliance with Rules 1.7 and 1.8(a). We agree with the advice provided by the Oklahoma Ethics Committee[22] when it explained that a lawyer needs to communicate the following when selling financial products to clients:

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[20] 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.

[21] Comments (3) & (4)
(3) The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction or when the lawyer's financial interest poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interests. Hence, the lawyer will want to be mindful of the requirements of paragraph (a), and Rule 1.7 which requires that the lawyer disclose the risks associated with the lawyer's dual role and obtain the client's informed consent. In some cases, the lawyer's personal interests 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.

[22] *See* Oklahoma Bar Association Ethics Opinion 316 (December 14, 2001).

(1) the lawyer has a business and financial relationship with the company whose product the lawyer is selling;
(2) whether the lawyer will receive a commission, fee, or other compensation from the sale of the product;
(3) the interests of the client, the lawyer who is the company's agent and the interests of the company may all be different and may conflict;
(4) whether the lawyer or the financial services company is licensed to sell only certain types of financial products and, if so, why the lawyer is recommending the proposed product instead of other products in which she does not have a financial interest;
(5) if the client authorizes the lawyer to disclose confidential information in the course of obtaining the company's product, that such disclosure may constitute a waiver of the client's right to confidentiality;
(6) whether the company is also the lawyer's client;
(7) in the event a claim or controversy arises, whether the lawyer could be disqualified in representation of both the client and the company; and
(8) the client should consider seeking the opinion of independent counsel concerning the proposed transaction.

- Compensation

Rule 1.5 prohibits an "unreasonable" fee and provides a variety of factors and circumstances that are to be considered in determining what constitutes a lawyer's "reasonable" fee. It would be difficult to understand how a lawyer who merely advises a client to buy a product and then refers the client to an entity selling the product, can assert that the receipt of a commission is not "unreasonable." Although the receipt of a commission may be standard in the financial product world, the Rules of Professional Conduct require that the payment of compensation to a lawyer be substantially related to the factors mentioned in Rule 1.5.[23] Hence, a referral fee without the lawyer performing substantive work has not been approved by our Committee. In KBA E-390 (July 1996), this Committee responded to questions of whether a lawyer may ethically affiliate with an investment advisor in an arrangement whereby the lawyer refers the client to an investment advisor in exchange for a percentage share of the investment advisor's management fees, "even assuming arguendo, the lawyer has fully disclosed the referral fee arrangement and has obtained the client's written consent." We did not approve this arrangement then and we do not now as "this arrangement presents a serious conflict of interest and is likely to involve circumstances where it is impossible for the lawyer to make sufficient disclosure to properly inform the client's consent." Basically, all lawyer compensation is required to be related to the lawyer performing services as set forth in the factors mentioned in Rule 1.5.[24]

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[23] The factors to be considered in determining the reasonableness of a fee include the following:
(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) the fee customarily charged in the locality for similar legal services;
(4) the amount involved and the results obtained;
(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) whether the fee is fixed or contingent.

[24] In KBA E-264 (November 1982) the Committee also objected to a lawyer receiving a referral fee without the lawyer performing substantive services as required by Rule 1.5. The Committee concluded that a referral in this

Another form of lawyer compensation exists when a lawyer performs law-related services as a member of a professional association and receives compensation for making referrals of the lawyer's clients or consumers to that organization, or to companies that financially support that organization. The lawyer should disclose the existence of that relationship and/or the payment of compensation to the lawyer and, as a best practice the disclosure would be made in writing.

Finally, for purposes of this Opinion, "compensation" includes not only the normal forms of payment such as salary or commission, but it also includes other forms of financial or similar incentives including, but not limited to, merchandise, services, trips or other prizes or awards paid to the lawyer by that organization, or by the company that financially supports that organization.

Question #3

When providing law-related services is the lawyer required to have a separate office for performing legal services?

Prior to the adoption of Rule 5.8 we provided guidance to Kentucky lawyers regarding the location of where they may perform legal services and where nonlawyers may provide nonlegal services. In KBA E-417 (July 2001), we considered the question of whether a lawyer may share office space with persons or organizations engaged in activities other than the practice of law. We responded to this question as follows:

> Answer: A lawyer may not share office space with persons or organizations engaged in such other activities unless the office-sharing arrangement, in its physical layout and its functional operation, will:
>
> (a) safeguard confidential information of the lawyer's clients, by preventing unauthorized access;
>
> (b) preserve the lawyer's professional independence, by keeping the law practice separate and distinct from other activities and by avoiding impermissible conflicts of interest; and
>
> (c) conform to rules governing information about legal services, by avoiding improper advertising and referral or solicitation of prospective clients.
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> Ordinarily, office sharing arrangements will satisfy these requirements if they:
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> (i) provide exclusive and secure facilities for the lawyer to meet clients,

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situation was inappropriate and raised a strong presumption of at least an appearance of professional impropriety. The opinion presented the following three questions:

1. Did the client really need the product or service?
2. Is the product or service the best to which the attorney could have directed the client?
3. Could the client have obtained the product or service more cheaply absent the fee paid to the attorney?"

The Opinion concluded that a referral fee without the performance of services was improper as creating an appearance of impropriety. Subsequent to the issuance of E-264, the Supreme Court, in *Lovell v. Winchester*, 941 S.W.2d 466 (Ky. 1997), confirmed that the "appearance of impropriety" standard would apply when considering a motion to disqualify an attorney, however, in *Marcum v. Scorsone*, 457 S.W.3d 710 (Ky. 2015) the Court overruled *Lovell,* and stated:

> *Lovell* applied a standard that is no longer a part of the Rules of Professional Conduct and is simply inadequate to preserve the interests involved when a conflict of interest is alleged. To the extent that *Lovell* and other cases have approved the appearance-of-impropriety standard, they are overruled.

Hence, while we recognize that the basis for the Committee's conclusion in KBA E-264 may no longer be valid we reiterate our position that it is improper for a lawyer to collect a referral fee without the performance of "reasonable" services as required by Rule 1.5.

communicate with them, and store information relating to their representation;

(ii) establish the distinct identity of the law practice by furnishing clearly differentiated signage and entry to the law office and by avoiding uses of common employees or facilities in ways that suggest the practice and other activities are somehow affiliated; and

(iii) allow no misleading communications on the premises regarding legal services, no communications suggesting that the law practice is affiliated with another activity, no improper advertising or contacts by the lawyer with prospective clients, and no scheme by which the law practice and other activities give or receive anything of value in return for client referrals.

As a result of new Rule 5.8 we feel that the essence of the Rule requires that we overrule KBA E-417 to the extent it is inconsistent with the intent of Rule 5.8. Specifically, we do not feel that Rule 5.8 requires that a lawyer separate the location of where they perform legal services and where they perform law-related services. We do, however, affirm KBA E-417 with regards to those situations where a lawyer "sublets" their office space to nonlawyers, for example, insurance agents, tax preparers and the like who are not lawyers and who are not subject to the requirements of Kentucky's Rules of Professional Conduct. When the lawyer provides law-related services and complies with Rule 5.8, then it is to this extent that KBA E-417 is overruled. If the lawyer is not providing law-related services and wants to office share with persons who are not lawyers, then KBA E-417 remains applicable. For the purpose of having a guide of "best practices," we recommend that consideration be given to the fact that in some of our sister states their law-related services rule requires a lawyer to have separate offices for the performance of legal services and law-related services and provide disclaimers in advertisements and have separate letterheads for each separate activity.[25]

Question #4

What measures should the lawyer take to avoid the application of the Rules of Professional Conduct when performing law-related legal services?

A lawyer may be released from most, but not all, of the obligations imposed by Kentucky's Rules of Professional when the lawyer is engaged in "law-related" activities *if*:

- The lawyer's law-related services are sufficiently distinct from the lawyer's practice of law;
- The lawyer takes reasonable measures to assure that the person obtaining the law-related services knows that the services are not legal services; and,
- The lawyer specifically advises the client/consumer that the protections of the client-lawyer relationship do not exist.

Comment 7 provides the following clarifying advice:

> In taking the reasonable measures referred to in paragraph (1)(b) 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

[25] *See,* for example Oklahoma Rule 5.7, Comment [6].

made before entering into an agreement for provision of or providing law-related services, and preferably should be in writing. [Emphasis added.]

The careful lawyer would give their customer/client an explanation in terms that are understandable to the customer without regard to that person's sophistication, or business experience because it should not be expected that a client/customer will know the nuances of Kentucky's Rules of Professional Conduct, and their relationship to the lawyer's performance of non-related legal services.[26] Also, Comment 8 to Rule 5.8 recognizes that "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." The lawyer may want to consider bringing another lawyer into the consultation with the client/customer to assist in the explanation that legal services are not being rendered. The lawyer could also update the lawyer's business cards/stationery to indicate the separate line of businesses.

In the following Question #5 and Answer we explain that a lawyer is still obligated to comply with various aspects of Kentucky's Rules of Professional Conduct.

Question #5

If the client/customer receives the required explanation and gives his written consent, then what are the lawyer's remaining ethical obligations to the client/customer?

Notwithstanding the lawyer's compliance with Rule 5.8 regarding "law-related" activities and having obtained the client's written consent to proceed, a lawyer is still subject to certain of the Rules of Professional Conduct even when the lawyer's conduct does not involve providing legal services to a client. In this regard the following advice of Comment 3 should be considered:

> Rule 5.8 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.

We adopt the philosophy that "once a lawyer always a lawyer."[27] In our view, even if a lawyer is not otherwise subject to the Rules of Professional Conduct in providing investment

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[26] *See* Rule 5.8 - Comment 9 - 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 (1)(b) 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.

[27] *See The Florida Bar v. Della-Donna*, 583 So. 2d 307 (1991). In this disciplinary action against attorney Della-Donna he claimed he could not be disciplined when he did not act as a lawyer representing a client. The Florida Supreme Court stated that "conduct while not acting as an attorney can subject one to disciplinary proceedings."

services to non-clients, it would be professional misconduct under Rule 8.4 for a lawyer to engage in fraud or deceit with regard to such services.

In addition to our Rules, the lawyer will be mindful to comply with other laws that are independent of our Rules. For example, obligations that may exist under state or federal securities laws or consumer protection laws, and the law of principal and agent.[28] In this regard a lawyer needs to be mindful that an agent has a duty not to deal with the principal on behalf of an adverse party in a transaction connected with the agency relationship, nor use the principal's confidential information for the agent's own purposes.[29]

Conclusion

While new Rule 5.8 authorizes a lawyer to perform law-related services that might reasonably be performed in conjunction with the lawyer's performance of legal services, the possible scope of such services has not yet been fully explored and the performance of such services will continue to evolve. Hence, the lawyer trying to decide whether to create a "dual practice" and sell products to clients and/or non-client customers, should consider whether the dual practice is designed to benefit clients, or is it being done merely for the lawyer's personal financial gain. Will selling products to a client compromise the lawyer's independent judgment? Will the amount received from selling products compared to the fees to be received for providing legal services be "reasonable"?

Kentucky's new Rule is a notable change in perspective from the opinion we expressed more than 25 years ago in KBA E-390 (July 1996). Nonetheless, in light of the issues discussed above we advise our members to exercise caution when rendering law-related services. While it may be possible to provide a disclosure that is sufficient to inform the client of all these differences and thus make the Rules of Professional Conduct not apply, the extent of the disclosure and obtaining the client's informed written consent may not be easily obtained because certain of our Rules of Professional Conduct remain in full force.

In summary, a lawyer may engage in a wide variety of law-related services but when doing so should be mindful of the notice and disclosure requirements so as to keep the client's best interests at the forefront and avoid conflicts of interests. If a potential law-related service or transaction makes you uncomfortable or unsure, then it may be best to avoid it.

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530. This Rule provides that formal opinions are advisory only.

Specifically, "an attorney is an attorney is an attorney." … "Even in personal transactions and when not acting as an attorney, attorneys must avoid tarnishing the professional image or damaging the public. The practice of law is a privilege which carries with it responsibilities as well as rights. That an attorney might, as it were, wear different hats at different times does not mean that professional ethics can be checked at the door or that unethical or unprofessional conduct by a member of the legal profession can be tolerated."

[28] *See* Comment 11 to Rule 5.8.

[29] *See Restatement (Third) of Agency* §§ 8.03 & 8.05 (2006).