New York State Bar Association
Committee on Professional Ethics

Opinion 832 (12/3/09)

Topic: Attorney's provision of nonlegal services

Digest: Where a lawyer sells shelf corporations (a nonlegal service) to people he regards as non-clients, and provides no legal services in connection with those nonlegal services, but the lawyer's status as a lawyer is visible to the public, then absent a disclaimer or other steps, the recipients of the nonlegal services could reasonably believe there is an attorney-client relationship and thus the Rules of Professional Conduct would apply.

Rules**:** 5.7

Comments: Comments 1 & 3 to Rule 5.7

QUESTION

1. A sole practitioner would like to provide what the lawyer describes as a "nonlegal service" to non-clients. The "nonlegal service" is the sale of "shelf corporations." (The term "shelf corporation" means a company that has had no recent activity or that was created to be "put on the shelf" to age. Shelf corporations are often sold to investors who want to start a company but do not want to go through the incorporation process.) Do the New York Rules of Professional Conduct (the "Rules") relating to advertising and solicitation apply to the sale of shelf corporations to non-clients?

OPINION

2. Rule 5.7 contains rules relating to nonlegal services provided by lawyers. (The Appellate Divisions adopted new Rules of Professional Conduct effective April 1, 2009.) The first two subparagraphs – Rule 5.7(a)(1) and (a)(2) -- apply if an attorney is providing both legal and nonlegal services to clients. Under Rule 5.7(a)(1) if the nonlegal services are "not distinct" from the legal services provided by the lawyer to the client, then the Rules apply to both the legal and the nonlegal services. Under Rule 5.7(a)(2), if the nonlegal services and the legal services provided by the lawyer to the client are "distinct" from each other, then the Rules apply to both the legal and nonlegal services only "if the person receiving the services could reasonably believe that the nonlegal services are the subject of an attorney-client relationship."

3. Rule 5.7(a)(4) addresses whether a person receiving nonlegal services "could reasonably believe that those services are the subject of an attorney-client relationship." Specifically, the rule states that even where the legal and nonlegal services provided to the client are distinct from each other, it is "presumed that the person receiving nonlegal services believes the services to be the subject of a client-lawyer relationship *unless* the lawyer or law firm has advised the person

Commented [A1]: 1. Separating the digest from the facts makes this opinion sound extremely broad. It would mean a lawyer selling flowers would need a disclaimer if the lawyer's status as a lawyer is disclosed. This needs to be limited to the kind of services provided, which are close to legal services so that someone could think that the lawyer was doing something legal. That is the reason for the suggestion to add the facts here and in the conclusion.
2. The first two sentences of the digest were really just part of our reasoning and were confusing when set forth separately in the digest. They were not really talking about the situation the opinion is addressing. I suggest collapsing them into the final sentence as shown.

receiving the services in writing that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the nonlegal services …." (Emphasis added.) However, the specified writing only serves to reverse the presumption, not to prove conclusively that the services are not legal services. As we noted in N.Y. State 755 (2002):

> We are not suggesting by this opinion that the mere statement, even in writing, to that effect is an automatic safe harbor, and DR 1-106 does not say so. The writing serves to reverse the presumption against the lawyer that would otherwise exist. It is possible that in certain circumstances, such as where the client is unsophisticated and has had a long relationship with the lawyer and where, despite the existence of a separate entity, the nonlegal services are not completely separated from the rendition of legal services, the writing would be insufficient to disabuse the client of a reasonable belief that the lawyer would be acting to protect the client.

Id. at 5; *see also* Rule 5.7, cmt. 3.

4. The lawyer's intention to sell shelf corporations only to people he regards as non-clients (and not to clients) appears to assume that he would not provide legal advice to the non-client purchasers of the corporations. That assumption may not be warranted. To test that assumption, we consider below three different ways in which the shelf corporations might be sold.

Scenario One: Lawyer Provides Legal Services

5. We first consider the possibility that the lawyer provides legal advice about shelf corporations to the purchasers, such as giving a prospective purchaser the attorney's views about (i) the legality of shelf corporations in general, (ii) the validity of a specific corporation, (iii) the advantages, rights, or benefits of shelf corporations, or (iv) the tax consequences of purchasing or owning a shelf corporation. The Rules do not define legal services, and many services do not fall neatly into the category of legal services because they may legally be undertaken by both lawyers and nonlawyers. However, "when such services are performed by a lawyer who holds himself out as a lawyer, they constitute the practice of law and the lawyer, in performing them, is governed by the Code." N.Y. State 557 (1984) at p. 2.

6. Thus, despite the fact that a nonlawyer might be entitled to provide some advice about a shelf corporation without committing the unauthorized practice of law, when a lawyer provides such advice it becomes the provision of legal services. Thus, if the lawyer provides legal advice about shelf corporations to purchasers, the lawyer would be providing legal services to them. In that situation, the Rules of Professional Conduct – including the rules regarding lawyer advertising and solicitation – would apply both to the legal advice and to the sale of the corporations. Moreover, because the lawyer would actually be rendering legal services, the disclaimer in Rule 5.7(a)(4) would not be effective.

Scenario Two: Lawyer Does Not Provide Legal Services

7. We next consider the possibility that the lawyer provides no legal advice whatsoever to the purchasers about the shelf corporations. For the assumption that the lawyer provides no legal advice to remain true, the lawyer could not answer the kinds of questions a prospective customer might ask that are likely to call for legal advice (*e.g.,* What are the tax consequences? How long may I leave the corporation on the shelf? Do I have to notify the state if I buy a shelf corporation? Is the corporation validly formed?). For example, if the shelf corporations were sold over the Internet, and the attorney was not identified anywhere on the web site as a lawyer, and any information about the corporations was provided only in writing (*e.g.,* via FAQs or links to articles), and purchasers never communicated with the lawyer directly and had no opportunity to ask for advice, then the lawyer would not be giving legal advice to purchasers. In that case the Rules would not generally apply to those sales.

8. Even where the lawyer would be generally exempt from the application of the Rules with respect to the sales, however, the exemption would not be absolute. Some Rules of Professional Conduct, such as Rule 8.4(c) (prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation), would still apply. Thus, the lawyer could not engage in dishonest, fraudulent, or deceptive conduct relating to the advertising or solicitation of the nonlegal services.

Scenario Three: Lawyer's Status as a Lawyer Is Visible to the Public

9. Finally, we consider the possibility that the attorney does not provide any legal advice to the purchaser of the shelf corporation but the attorney's status as a lawyer is visible to the public (*e.g.,* the attorney uses a law office name or letterhead, or advertises the sales on the lawyer's web site, or puts "Esq." or "J.D." after the lawyer's name). In that case there is a substantial risk that the purchaser of the shelf corporations will be misled as to whether an attorney-client relationship exists. The risk is great because the client may be confused about the nature of the attorney's role. In speaking about the need for the lawyer to avoid potential confusion between legal and nonlegal services provided to an individual, Comment 1 to Rule 5.7 notes that avoiding confusion is essential

> so that the person for whom the nonlegal services are performed understands that the services may not carry with them the legal and ethical protections that ordinarily accompany a client-lawyer relationship. The recipient of the nonlegal services may expect, for example, that the protection of client confidences and secrets, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of nonlegal services when that may not be the case.

10. The same concerns are relevant when the attorney sells to customers who are aware of the attorney's status as a lawyer. Even if the attorney merely identifies himself as a lawyer when selling shelf corporations but does not promise or provide legal services, the risk of confusion is great and purchasers could reasonably believe that they had an attorney-client relationship with the seller.

11. Where the attorney's status as a lawyer is visible, one way for a lawyer to avoid application of the Rules to the sale of nonlegal services would be to give the purchaser in writing the Rule 5.7(a)(4) disclaimer stating that the no legal services are being rendered and that the protection of an attorney-client relationship does not exist. We emphasize, however, that even if the lawyer provides the disclaimer specified in Rule 5.7(a)(4), it would not be effective if the lawyer actually provided legal advice or other legal services to the customer of the nonlegal business.

CONCLUSION

12. Where a lawyer provides legal services to a client, the Rules of Professional Conduct apply to the legal services. Where a lawyer provides nonlegal services to non-clients, the Rules generally are not applicable to the provision of the nonlegal services although some Rules of Professional Conduct would still apply. Where the attorney provides no legal services in connection with the provision of nonlegal services such as those here – the sale of shelf corporations – but the attorney's status as a lawyer is visible to the public, then absent a disclaimer or other steps, the recipients of the nonlegal services could reasonably believe there is an attorney-client relationship, and thus the Rules would apply.

28-08 (12/3/09)