



**New York State Bar Association  
Committee on Professional Ethics**

**Opinion 1231 (10/06/2021)**

**Topic:** Estate-planning lawyer's financial interest in a company that manages trust assets.

**Digest:** An estate-planning lawyer who has an interest in a nonlegal financial management company that the lawyer hopes to recommend to estate-planning clients as financial manager for the trust assets, has a conflict of interest requiring clients' informed consent, confirmed in writing, at the outset of the representation. Further, if the financial management services and the legal services provided to clients are not distinct from each other, the lawyer is subject to the Rules governing the attorney-client relationship with respect to the nonlegal financial management services. Whether the legal services and nonlegal services are distinct or nondistinct from each other, the lawyer must also comply with the Rules governing business transactions with clients whenever an entity with which the lawyer is affiliated or owns an interest in offers nonlegal services to a client.

**Rules:** 1.0(e), (j), (q) & (r), 1.7(a) & (b), 1.8(a), 5.7(a).

**FACTS**

1. The inquirer provides legal services to clients with respect to estate planning. In that connection, the inquirer sometimes assists clients in establishing revocable or irrevocable trusts. These trusts might subsequently benefit from the inquirer's professional assistance in managing trust assets, and the clients have sometimes expressed interest in receiving that assistance from the inquirer. Rather than providing this assistance through the inquirer's law firm, the inquirer proposes establishing a separate financial management company in which the inquirer would have an ownership interest to be retained by the trustees. The trustees ordinarily are the client-settlors of the trust or the client's family members. The financial management company would charge each trust a fixed percentage of the value of the total assets under management and would not charge any transaction or product-based fees or commissions. The company would disclose to clients that members of the law firm have an interest in the company, and that the company is not rendering legal services. In some cases, the inquirer and the inquirer's law firm would provide ongoing estate planning services to its clients while the financial management company provided financial management services to those same clients or their family members in their role as trustees. The inquirer believes that the inquirer's holding an ownership interest in the financial management company will not affect the advice the inquirer gives in estate planning matters.

**QUESTION:**

2. Under the New York Rules of Professional Conduct ("Rules"), may a lawyer who provides estate planning advice and assistance, and who establishes revocable and irrevocable trusts for clients, have a financial interest in a separate company that manages the assets held in the trusts?

## OPINION:

3. In N.Y. State 1155 (2018), this Committee recognized that, in many circumstances, a lawyer may provide both legal and nonlegal services to the same client, and that Rule 5.7 provides a framework for a lawyer to provide nonlegal services to a client through a separate entity. However, the lawyer must initially determine whether doing so would violate Rule 1.7, which addresses conflicts of interest arising out of a lawyer's personal interests, including the lawyer's business and financial interests. Further, providing both legal and nonlegal services, if otherwise permissible, may also implicate Rule 1.8(a), which concerns lawyers' business transactions with clients. This opinion addresses each of these Rules.

### Rule 1.7

4. Rule 1.7(a) provides that a lawyer has a concurrent conflict of interest if a "reasonable lawyer would conclude that ... there is a significant risk that the lawyer's professional judgment on behalf of the client will be adversely affected by the lawyer's own financial [or] business interests." In that event, the lawyer may undertake the representation only if, pursuant to Rule 1.7(b)(1), "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation" and, pursuant to Rule 1.7(b)(4), the client gives "informed consent, confirmed in writing". In some circumstances, however, the conflict of interest created by the lawyer's financial or business interest may be so severe that it cannot be cured by consent.

5. In N.Y. State 1155 ¶ 5, we recognized that a lawyer's interest in an ancillary business does not invariably give rise to a conflict of interest under Rule 1.7(a): "In many circumstances, whether there is a significant risk that the lawyer's professional judgment will be adversely affected will depend on the size of the lawyer's financial interest in the nonlegal services, and whether the lawyer's actions in the legal matter may affect the lawyer's ability to receive the nonlegal fees."

6. In other situations, even if a reasonable lawyer would conclude that there is a "significant risk" that a lawyer's professional judgment in representing a client will be adversely affected by the lawyer's financial interest in the nonlegal services, it may be reasonable for the lawyer to believe that competent and diligent representation can nonetheless be provided. In that event, it would be permissible under Rule 1.7 for a lawyer both to practice law and to own, operate or otherwise affiliate with an entity that provides nonlegal services to some of the lawyer's clients. However, before providing both legal and nonlegal services to a client, the lawyer must disclose the lawyer's financial interest in the nonlegal business, as well as the material risks posed by using a nonlegal entity in which the lawyer has an interest, and reasonably available alternatives to using that entity. *See* Rule 1.7(b)(4) (requiring a client's informed consent to a consentable conflict of interest) and Rule 1.0(j) (defining "informed consent") and Comments [6] and [7] to Rule 1.0 (explaining "informed consent"). After making that full disclosure, the lawyer must secure the clients' informed consent before proceeding further. *See, e.g.*, N.Y. State 784 (2005) (addressing the provision of nonlegal services to the lawyer's clients through an entertainment management company in which a lawyer has an interest).

7. We have also recognized, however, that lawyers sometimes have an incurable conflict of interest when they refer clients to their businesses or provide services to clients through their businesses. An early decision, predating the adoption of the Rules of Professional Conduct, is N.Y. State 619 (1991), which concluded that a lawyer engaged in estate planning may not

recommend or sell life insurance products to clients if the lawyer has a financial interest in selling those products. We reasoned:

Where a lawyer advises a client on trust and estate matters, a central object of the representation is how best to satisfy the financial needs of the client and of those for whom the client wishes or is obliged to provide. A frequent topic in trust and estate planning is whether and to what extent life insurance products should be used to satisfy some of the client's financial objectives and, if so, which ones. Where a lawyer has a financial interest or affiliation with a particular life insurance agency or company, the lawyer's independent professional judgment would unavoidably be affected in considering the appropriateness of or recommending, life insurance products for a particular client. . . .

8. Although we recognized the general principal that disqualification of a lawyer is ordinarily not required if the client consents to the conflict after full disclosure of the circumstances, based on the particular facts presented in N.Y. State 619, we stated:

Given the wide array of life insurance products sold by various companies at differing prices, not to mention the threshold question of whether life insurance products are the most appropriate or economical way to best satisfy the client's needs, however, we do not believe that there could be meaningful consent by the client to the lawyer having a separate business interest of this kind. Since the client is entitled to rely upon the lawyer's independent professional judgment, the opportunity for overreaching by the lawyer is too great to be tolerated. We do not believe that a lawyer can, consistent with the duty of competent representation . . ., solicit or accept a client's consent to a direct and substantial conflict between the client's and the lawyer's interests.

9. Although other states' ethics committees have taken a different view, for the past three decades this committee has adhered to the view that providing certain types of nonlegal services to law firm clients is fundamentally incompatible with the duty and ability to render independent professional judgment in the provision of legal services. For example, in N.Y. State 1200 (2020), we addressed whether a lawyer may "offer legal services for a fee and wealth management services to the same clients from a separate entity for a separate fee -- the creation of the life insurance trust coupled with the sale of an insurance policy being only an illustration." We reviewed prior opinions where we concluded that "the conflict between the legal and non-legal services is so severe that informed consent cannot cure it," in particular, where the lawyer would serve as both a lawyer and a real estate broker in the same transaction, with the result that "the broker's personal financial interest in losing the brokerage transaction [might] interfere[] with the lawyer's ability to render independent advice with respect to the transaction." *Id.*, ¶¶ 5-6 (citations omitted). With respect to the lawyer providing wealth management services, we concluded: "This dual practice creates a conflict that, in our opinion, is not amenable to consent for the same reasons set forth in the foregoing opinions, namely, that the legal fees for creating a life insurance trust are likely modest [compared] to the commissions for selling a life insurance policy. As a result, based on our prior opinions, we believe the dual practice is not subject to informed consent and hence impermissible." *Id.*, ¶ 7.

10. Opinion 1155 emphasized that a lawyer sometimes has an incurable conflict of interest when also serving as a broker of financial products if the lawyer, as a lawyer, is recommending products in which the lawyer also has a financial interest. *Id.* (citing N.Y. State 619 (1991) & N.Y. State 536 (1981)). However, citing N.Y. State 536 (1981), we recognized that engaging in the dual practice as lawyer and financial planner “would not be unethical, as long as the financial planning corporation did not offer any products (e.g. securities, real estate or insurance) for which it would receive a commission or other form of compensation or act as legal counsel and broker in the same transaction.” Based on the earlier precedent, Opinion 1155 concluded “that a lawyer may provide both legal and financial planning advice to clients, but could not also receive brokerage commissions with respect to financial products purchased by clients receiving the lawyer’s legal advice.”

11. In the present situation, the inquirer asks whether an estate-planning lawyer would have a conflict of interest in advising a client and helping to set up a trust for the client if, after the trust is established, the lawyer recommends, and the client then retains, the lawyer’s separate financial management company to manage funds in the trust. We note that the inquirer does not propose to serve as trustee, a situation that would call for further analysis and possibly a different outcome.

12. The first question this situation raises under Rule 1.7 is whether a reasonable lawyer would conclude that there is a significant risk that the lawyer’s self-interest will adversely affect the lawyer’s professional judgment. We answer this question in the affirmative. If the lawyer intends to recommend the financial management company in which the lawyer has an interest, then the lawyer’s advice regarding whether to establish a trust for estate and tax-planning purposes, as opposed to pursuing an alternative course, may be adversely affected by the lawyer’s interest in the company being retained to manage funds that the client transfers into the trust. A reasonable lawyer could conclude that the lawyer’s interest in providing that later service could influence the decision to recommend establishing a trust rather than recommending an alternative, such as purchasing an annuity or life insurance policy that would not result in a profitable retention of the lawyer’s financial management company. We think that risk is significant, not *de minimis*, so this situation creates a “concurrent conflict of interest” under Rule 1.7(a)(2). *Compare* N.Y. State 712 (1999) (*de minimis* financial interest does not establish a personal-interest conflict).

13. Despite the conflict under Rule 1.7(a)(2), the inquirer may proceed if the conditions of Rule 1.7(b) are satisfied. With respect to Rule 1.7(b)(1) – the most important factor in determining whether a conflict is consentable – the inquirer believes he will be “able to provide competent and diligent representation to each affected client,” despite the significant risk. The question is whether the inquirer’s belief is “reasonable” within the meaning of Rule 1.7(b)(1) and Rule 1.0(q) and (r) (defining “reasonable” and “reasonable belief”). If so, the inquirer may represent the clients in estate-planning matters, even with the intention of later recommending the company to manage the trust funds, as long as the inquirer obtains each client’s “informed consent, confirmed in writing.” If not, the representation is “nonconsentable” and the lawyer may not proceed. As explained in Comment [14] to Rule 1.7:

[14] ... [S]ome conflicts are nonconsentable. If a lawyer does not reasonably believe that the conditions set forth in paragraph (b) can be met, the lawyer should neither ask for the client's consent nor provide representation on the basis of the client's consent. A client's consent to a nonconsentable conflict is ineffective. ...

14. We note that lawyers in some other jurisdictions are permitted to provide financial management services to clients whom they represent in estate matters. *See* Arizona Op. 99-09 (“While we recognize that there are significant potential conflicts of interest inherent in the brokerage of securities and insurance products by estate planning lawyers to their clients, in keeping with our previous opinions, the Committee concludes that the Rules of Professional Conduct do not expressly prohibit a lawyer from engaging in such ancillary business activities so long as the requirements of ER 1.7(b) and ER 1.8(a) are met.”); Ron A. Rhoades, *The Attorney as “Complete Advisor” – Fiduciary Ancillary Business Models*, Florida Bar J., Mar. 2005, <https://www.floridabar.org/the-florida-bar-journal/the-attorney-as-complete-advisorfiduciary-ancillary-business-models/>.

15. We conclude that the inquirer’s belief that the representation will not be adversely affected is reasonable. This situation is different from one where the legal and financial advice are given simultaneously and intertwined, such as where the lawyer simultaneously gives legal advice about what financial product to purchase and seeks to sell that same product to the client. *Compare, e.g.*, N.Y. State 1200 (lawyer may not simultaneously serve as clients’ lawyer and wealth manager). Here, because the decision to retain the Company (and the content of the Company’s financial advice) are not intertwined with the inquirer’s legal advice about whether to create a trust, the benefit to the lawyer is substantially more attenuated and less likely to influence the lawyer’s legal judgment. Moreover, the eventual decision whether or not to retain the lawyer’s financial management company will be made by a trustee, who may or may not be or become a client of the law firm. Given these considerations, in our opinion, a lawyer who is mindful of the need to give disinterested advice about whether and how to establish a trust can reasonably avoid being affected by his personal financial interest in serving or having his company serve as financial manager.

16. Accordingly, after the inquirer establishes a separate financial management company with the expectation or hope that the company will manage the assets of client trusts, the inquirer must seek and obtain clients’ informed consent at the outset of any estate-planning representation that might lead to advice about whether the client should form a trust, or should pursue any other avenues that might call for employing the lawyer’s financial management company. The lawyer must explain the risk that the lawyer’s advice will be influenced by the lawyer’s self-interest, and the lawyer must explain the alternatives. *See* Rule 1.0(j) (defining “informed consent”). If the informed client then consents to the representation, the lawyer must confirm the client’s consent in writing. *See* Rule 1.0(e) (defining “confirmed in writing”) and Rule 1.7(b)(4) (requiring a lawyer to obtain “informed consent, confirmed in writing” to a consentable conflict arising under Rule 1.7).

#### Rule 5.7

17. The inquiry also implicates Rule 5.7, which governs lawyers’ provision of nonlegal services through entities separate from their law firms. N.Y. State 1155 sets forth relevant considerations under Rule 5.7 and, in general, we refer the inquirer to the framework set forth in that opinion. However, we underscore one particular question, namely, whether the provision of estate-planning services through the law firm will be “distinct from” the provision of financial management services within the meaning of Rule 5.7(a). A lawyer must always comply with the Rules of Professional Conduct with respect to legal services, but if the legal and nonlegal services are *nondistinct*, then the inquirer must also comply with the Rules even with respect to the nonlegal services.

18. Under Rule 5.7(a), a lawyer who provides nonlegal services to a client that are “not distinct” from the legal services provided to that client is subject to the Rules, such as those governing competence, confidentiality, and conflicts of interest, with respect to the provision of nonlegal services as well as legal services. Even if the legal and nonlegal services are “distinct,” the lawyer is subject to the Rules with respect to the nonlegal services if the client “could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship,” *see* Rule 5.7(a)(3), and it “will be presumed that the person receiving the nonlegal services to be the subject of a client-lawyer relationship” unless the lawyer advises the client in writing to the contrary. *See* Rule 5.7(a)(4). If the legal and nonlegal services are nondistinct from each other, however, then, as Opinion 1155 discussed, the nonlegal services are subject to the Rules no matter what disclaimer the lawyer provides.

19. N.Y. State 1155 recognized that whether legal and nonlegal services are distinct depends on the facts, but that the most significant consideration is whether the services are integrated. Here, for example, the legal and nonlegal services may or may not be integrated. If the lawyer, in the role of financial manager, discusses with the client how to invest trust assets at the same time as the lawyer, as legal advisor, advises about whether to establish a trust, or if the lawyer drafts a trust instrument naming the company as financial manager, then the services will be nondistinct. Conversely, the services are most likely to be distinct if the lawyer does not offer and provide financial management advice or services through the company until after the trust is established. As we stated in N.Y. State 1155, ¶ 15:

When a patron of the nonlegal service business uses only that service and not legal services, there is no integrated whole and the nonlegal services are by definition distinct. When, however, the patron of nonlegal financial planning services is also using or has received related legal services of the lawyer, whether the legal and nonlegal services are distinct will depend on the nature of the legal and nonlegal services. *When the legal services involve estate planning and the financial planning services including planning investments that would affect the size and composition of the estate or the educational or retirement plan, even if the nonlegal services are provided from a separate entity and at times are not overlapping, we believe the services would be nondistinct.* Therefore, the provisions of the Rules will apply to the nonlegal services. [Emphasis added.]

#### Rule 1.8(a)

20. Even if, in any given estate-planning representation, the legal and nonlegal services are “distinct,” the inquirer must nonetheless comply with Rule 1.8(a), which governs business dealings with clients. *See* N.Y. State 896 (2011) (a law firm providing nonlegal lien search services and legal services must comply with Rule 1.8(a)). As N.Y. State 896 summarizes: “Rule 1.8(a) requires that: (i) the nonlegal services be provided on terms that are ‘fair and reasonable’ to the client, (ii) the terms on which the nonlegal services will be provided are fully disclosed to the client in writing in understandable form, (iii) the client is advised to seek the advice of independent counsel about the lawyer’s provision of the nonlegal services, and (iv) the client gives informed consent, in a writing signed by the client, to the terms of the transaction in which the nonlegal services are provided and to the lawyer’s inherent conflict of interest.” *Id.*, ¶11.

## **CONCLUSION:**

21. An estate-planning lawyer who has an interest in a nonlegal financial management company that the lawyer hopes to recommend to estate-planning clients as financial manager for the trust assets, has a conflict of interest requiring clients' informed consent, confirmed in writing, at the outset of the representation. Further, if the financial management services and the legal services provided to clients are not distinct from each other, the lawyer is subject to the Rules governing the attorney-client relationship with respect to the nonlegal financial management services. Whether the legal services and nonlegal services are distinct or nondistinct from each other, the lawyer must also comply with the Rules governing business transactions with clients whenever an entity with which the lawyer is affiliated or owns an interest in offers nonlegal services to a client.

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