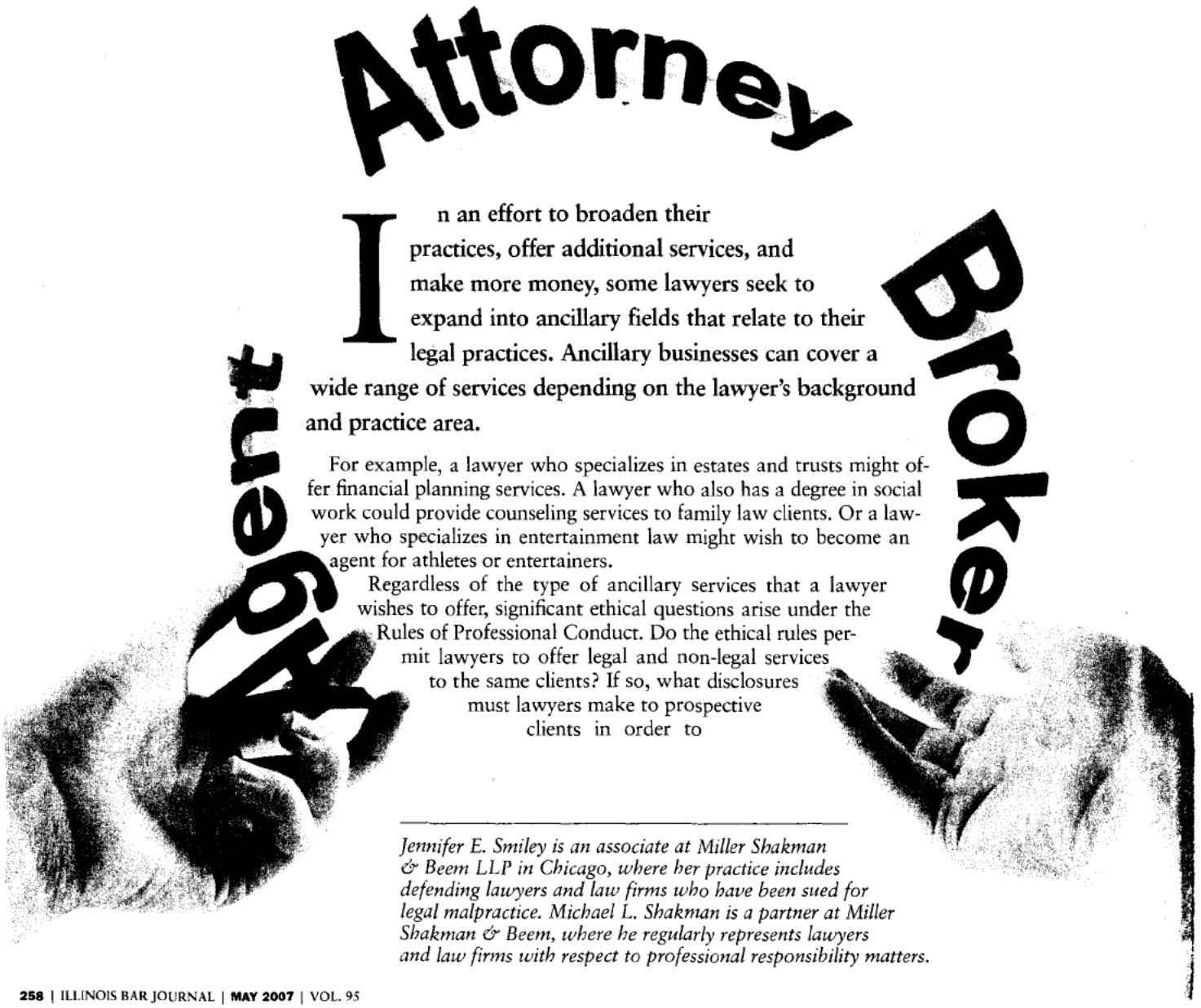
Jennifer E. Smiley and Michael L. Shakman

Ethical Challenges When Lawyers Sell Non-Legal Services

Lawyers who seek to broaden their practices by offering non-legal services to their clients must take care to avoid conflicts of interest, undue influence, and inadequate disclosure. This article summarizes the ethical rules that apply when lawyers offer non-legal services.



In an effort to broaden their practices, offer additional services, and make more money, some lawyers seek to expand into ancillary fields that relate to their legal practices. Ancillary businesses can cover a wide range of services depending on the lawyer's background and practice area.

For example, a lawyer who specializes in estates and trusts might offer financial planning services. A lawyer who also has a degree in social work could provide counseling services to family law clients. Or a lawyer who specializes in entertainment law might wish to become an agent for athletes or entertainers.

Regardless of the type of ancillary services that a lawyer wishes to offer, significant ethical questions arise under the Rules of Professional Conduct. Do the ethical rules permit lawyers to offer legal and non-legal services to the same clients? If so, what disclosures must lawyers make to prospective clients in order to

Jennifer E. Smiley is an associate at Miller Shakman & Beem LLP in Chicago, where her practice includes defending lawyers and law firms who have been sued for legal malpractice. Michael L. Shakman is a partner at Miller Shakman & Beem, where he regularly represents lawyers and law firms with respect to professional responsibility matters.

comply with the ethical rules? And what types of conflicts might arise in such representations? The answers to these questions are complex.

The applicable rules

The Illinois Rules of Professional Conduct do not directly address the issue of lawyers providing services that are ancillary to the practice of law, although several rules are important to any analysis of such services. Rule 1.7, the general rule on conflicts of interest, provides as follows:

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
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> (1) the lawyer reasonably believes the representation will not adversely effect the relationship with the other client; and
>
> (2) each client consents after disclosure.[1]
>
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after disclosure.
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> (c) When representation of multiple clients in a single matter is undertaken, the disclosure shall include explanation of the implications of the common representation and the advantages and risks involved.

Rule 1.7 sets up a framework for avoiding conflicts of interest that requires lawyers to make their own assessment of whether an adversity – including one that is the result of the lawyer's own self-interest – will adversely affect their representation of a client. If a lawyer concludes under Rule 1.7(b) that there is need for client consent, he or she must disclose the conflict to the client and obtain consent before proceeding.

Rule 1.8, which governs business transactions between lawyer and client, can also apply to ancillary services. This rule provides, in part, that:

> Unless the client has consented after disclosure, a lawyer shall not enter into a business transaction with the client if:
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> (1) the lawyer knows or reasonably should know that the lawyer and the client have or may have conflicting interests therein; or
>
> (2) the client expects the lawyer to exercise the lawyer's professional judgment therein for the protection of the client.

Thus, business transactions between lawyer and client – which are by definition ancillary to the legal relationship – are prohibited when *either* the lawyer and client have or may have contrary interests *or* when the client expects the lawyer to exercise legal judgment with respect to the transaction.

These rules suggest several potential obstacles that confront lawyers who seek to provide ancillary services to their clients. The lawyer must identify all conflicts of interest, including conflicts that may arise out of the financial or professional interests of the lawyer's own ancillary businesses. The lawyer must then determine if those conflicts will adversely affect the representation, and, if they will not, obtain consent from the client after disclosure. In addition, a lawyer must ensure that the ancillary services are not business transactions that run afoul of the prohibitions of Rule 1.8.

Lawyers who want to offer ancillary services must rebut the presumption of undue influence and navigate an array of conflicts issues that may or may not be possible to anticipate.

ABA Model Rule 5.7, which has not been adopted in Illinois but is one of the proposed Rule changes currently being considered by the Illinois Supreme Court,[2] suggests a framework for considering ancillary businesses. Entitled "Responsibilities Regarding Law-Related Services," Model Rule 5.7 provides as follows:

> (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:
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> (1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or
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> (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.
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> (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.

On its face, Model Rule 5.7 proposes that the Rules of Professional Conduct not apply when lawyers provide "law-related services" if the lawyer (1) ensures that the law-related services remain distinct from the legal services and (2) takes reasonable measures to inform the client that the attorney-client privilege does not apply to the law-related services.

The comments to Model Rule 5.7 clarify the application of the rule. Comment 1 notes that the ethical problem most likely to arise when a lawyer conducts ancillary business is the client's failure to understand that the normal protections of the attorney-client relationship do not apply to these services. The lawyer is responsible for taking reasonable measures to ensure that the client *knows* that the ancillary services are not legal services and that, therefore, neither the Rules of Professional Conduct nor the attorney-client privilege will apply.[3] The lawyer bears the burden of showing that the measures taken to communicate this information to the client are reasonable given the client's level of sophistication.[4]

Regardless of the sophistication of the recipient, the lawyer *must* keep the law-related services distinct from legal services or risk a finding that the Rules of Professional Conduct apply to all of the services.[5] When the legal and law-related services are so intertwined that they cannot be separated, then both the lawyer

1. The Terminology section of the Rules of Professional Conduct defines "disclosure" as "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question."
2. See http://www.isba.org/eth2000.html. Model Rule 5.7 has previously been cited in Illinois as a source of useful guidance. See, for example, Illinois State Bar Association's Opinion of Professional Conduct 98-03 (January 1999), online at http://www.isba.org/ethicsopinions/98%2D03.asp.
3. See Model Rule 5.7, comments 4 & 6, available at http://www.abanet.org/cpr/mrpc/rule_5_7_comm.html.
4. Id, comment 7.
5. Id, comment 8.

and the law-related business must abide by the Rules of Professional Conduct.[6]

Finally, the lawyer must keep in mind that even if the requirements of Rule 5.7 are met, meaning that the Rules of Professional Conduct do not apply to particular law-related services, other legal principles such as agency law will likely impose certain duties on the lawyer.[7]

The best legal advice to the client might be to decline to sign an unfavorable contract, but that could directly conflict with the financial interests of the lawyer's corporation.

Ethics opinions

Although Model Rule 5.7 is not part of the Illinois Rules of Professional Conduct, its provisions are not inconsistent with the rules. Several Advisory Opinions issued by the Illinois State Bar Association (ISBA) have considered topics related to ancillary businesses.

For example, ISBA Advisory Opinion 97-04 addressed whether the Rules permit lawyers to receive referral fees for the non-legal service of referring clients to investment advisors.[8] After reviewing Rule 1.8 and relevant case law, the opinion concludes that such a fee would amount to a business transaction between the lawyer and client. There is, therefore, a presumption of undue influence by the lawyer in the transaction.[9]

To rebut that presumption, the lawyer must show that (1) the transaction was fair and reasonable; (2) the client had an opportunity to consult with independent counsel before entering into the transaction; and (3) the client consented after full disclosure of all relevant information. If the lawyer does so, then the proposed referral fees could comply with the ethical rules.

Other ISBA Advisory Opinions have addressed questions related to the propriety of lawyers providing ancillary services to their legal clients. ISBA Advisory Opinion 97-07 considers whether lawyers may form a separate company that provides clients with services related to legal notice publications.[10] The opinion concludes that such a business would not inherently violate Rules 1.7 and 1.8 as long as the lawyers rebut the presumption of undue influence as discussed in advisory opinion 97-04.[11]

The ISBA reached a similar conclusion in its advisory opinion 98-03, which considered whether a patent law firm could charge royalty fees for a "matching" service provided to client-inventors and client-promoters.[12] Again, the opinion concluded that the firm could do so if it rebutted the presumption of undue influence.

The opinion also notes, however, that the inquiring law firm contemplated providing this ancillary service simultaneously to multiple legal clients who would be "matched" for inventing and promoting purposes, while at the same time the firm itself would also have a monetary interest in maximizing the fee generated, an interest that may conflict with one or both of the clients' interests. In such a situation, as a practical matter, it may not be possible to craft sufficient disclosures and consents to satisfy the Rules.

More recently, an opinion by the Chicago Bar Association's Committee on Professional Responsibility, Opinions Subcommittee, has addressed issues arising out of ancillary businesses.[13] The opinion considered a lawyer who both practiced law with a law firm and offered law-related services – acting as an agent for entertainers, authors and other creative artists – through a separate corporation solely owned by the lawyer.

The lawyer wished to offer both legal services and law-related entertainment agency services to the same clients, and proposed to (1) disclose in writing that the law-related services would not be protected by the attorney-client privilege and require the client to accept that disclosure in writing before proceeding, (2) negotiate at arms length a written agency agreement with the client, and (3) adopt reasonable measures to keep the legal and the law-related services distinct.

The CBA opinion does not express a view on whether the arrangement would comply with the lawyer's ethical duties. But it does discuss several areas in which serious ethical problems may arise.

First, the CBA Opinion advises that any transactions between the client and the corporation providing law-related services must be treated as a business relationship between lawyer and client, with Rules 1.7 and 1.8 applying. Therefore, conflict disclosures and waivers would be required, as would disclosures regarding the distinctions between the legal and non-legal services being offered. For example, the CBA Opinion notes that the client "will have to be told that conflict of interest rules that would preclude the lawyer from representing a competing entertainer seeking the same engagement as the client would not apply to the agent-corporation."

Conflicts could also arise if the two roles that the lawyer is attempting to fill for the same client develop competing interests. For example, the lawyer could be faced with a situation in which the best legal advice to the client would be to decline to sign an unfavorable contract. But that action could directly conflict with the financial interests of the lawyer's entertainment agency corporation. Some of these conflicts may be impossible to anticipate or waive in advance and may result in the lawyer being required to withdraw from the representation.

Conclusion

It is possible, at least in theory, for lawyers to offer ancillary "law-related" services to their legal clients without running afoul of ethical rules. ABA Model Rule 5.7 is built on that view.

To do so, however, lawyers must rebut the presumption of undue influence and navigate an array of conflicts issues that may or may not be possible to anticipate. Compliance with the Rules while running an ancillary business is a challenging task, but one not foreclosed to an ethical lawyer prepared to address and disclose the issues. ■

6. Id, comment 10.
7. Id, comment 11.
8. Issued January 23, 1998, online at http://www.isba.org/ethicsopinions/97%2D04.asp.
9. See, for example, *In re Marriage of Pagano*, 154 Ill 2d 174, 185, 607 NE2d 1242, 1247 (1992); *Lossman v Lossman*, 274 Ill App 3d 1, 7, 653 NE2d 1280, 1286 (2d D 1995).
10. Issued January 23, 1998, online at http://www.isba.org/EthicsOpinions/97-07.asp.
11. See also ISBA Advisory Opinion 93-1 (January 21, 1994) (lawyers may provide title insurance services for legal clients as long as they comply with Rules 1.7 and 1.8), online at http://www.isba.org/ethicsopinions/93%2D01.asp.
12. Issued January 1999, online at http://www.isba.org/ethicsopinions/98%2D03.asp.
13. See Informal Ethics Opinion 05-12-30 (the "CBA Opinion").