INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE

OPINION NO. 1 FOR 2002

An attorney, referred to as "Attorney A" for purposes of this opinion, has submitted an inquiry to the Committee regarding certain activities that the attorney proposes to enter into in the "financial services area."

The Submitted Facts

Attorney A has become a Registered Representative (Series 7) and proposes to market financial planning or advisory services to persons other than the attorney's law practice clients. To market these financial services, Attorney A proposes to use the services of an out-of-state telemarketing company that would solicit "clients" to an "educational program" on taxation and investments.

Attorney A would conduct this program in his role as a "financial planner." At the program, each participant would be given a "certificate" entitling them to a "free" one-hour consultation for a "financial review" with Attorney A. In addition, program participants would be given another "certificate" entitling them to a free one-hour consultation with an attorney pre-selected by Attorney A. The attorneys to be selected would be "estate planning experts" in the area in which the programs are conducted.

Attorney A advises that he will not solicit legal work from the financial services clients obtained through the telemarketing solicitation. Although Attorney A does not plan to solicit legal his financial planning clients, Attorney A is considering selling financial products to his law firm clients.

Submitted Questions

1.) Does the use of a telemarketing firm to attract attendees to a financial planning seminar run afoul of the ethical rules disallowing the use of phone solicitation for attorneys?

2.) Does providing program participants with a certificate for a one-hour free consultation with a pre-selected attorney run afoul of any ethics rules for either Attorney A or the pre-selected attorney?

3.) May Attorney A ethically sell financial products to his current law practice clients?

Analysis

Before responding directly to the questions posed, the Committee would note that it has received a number of inquiries over the past several years from lawyers who want to become or have become involved in or with a financial planning firm. This involvement is either in conjunction with the attorney's law practice or as a part of a multi-disciplinary practice (MDP) in which the lawyer and a financial services company controlled by non-

lawyers have some type of an on-going business relationship. The ethical questions that arise from such relationships generally involve those that relate to a lawyer's business relationships with non-lawyers (e.g., fee splitting).

In Opinion No. 1 for 2001, the Committee comprehensively addressed the various issues related to an attorney's participation in a MDP that involved financial planning services. Although the facts set out in Attorney A's letter suggest a "dual practice" rather than a MDP, the Committee nonetheless believes that Opinion No. 1 is instructional to any attorney who wishes to become involved in either a "dual practice" or an MDP involving financial services or other types of services or products.

As noted above, the Committee believes that Attorney A is intending to engage in a "dual practice." A dual practice is one in which an attorney provides traditional legal services and "law related services."[1] The ethical responsibilities for a lawyer who provides law-related services are set out in Rule 5.7 of the Indiana Rules of Professional Conduct.[2]

In essence, Rule 5.7 provides that attorney conduct in the law-related business activities is subject to the Rules of Professional Conduct unless the attorney can show the non-law activities come within an exception created by the Rule. To come within the exception, the lawyer must show that he/she has been careful to make a "distinction" and to "differentiate" between the law practice and the law-related activities.[3] Further, the lawyer must be able to "assure" clients that the law-related services are not "legal services" and that the "protections of the lawyer-client relationship" will not exist.[4] Another consideration for a dual practice situation is that attorneys must take care to not use the non-legal portion of their dual practice to serve as a "feeder" to their law practice.[5]

The penalty for not complying with the terms of Rule 5.7 in the conduct of a law practice and a law-related service would be to have attorney ethical rules and attending attorney discipline apply to activities undertaken in the non-law business.[6] In this regard, it should be noted that the attorneys bears a "substantial burden" to make this distinction and to otherwise show that the dual practice does not fun afoul of Rule 5.7.[7]

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[1] Rule 5.7(b) defines "law-related" services as those "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 non-lawyer."

[2] Unless indicated otherwise, all references in this letter to a "rule" or the "rules" are to the Indiana Rules of Professional Conduct.

[3] See Rule 5.7(a)(1); also see Maryland State Bar Ethics Committee Opinion 00-34 (9/6/00) ["The lawyer much carefully differentiate between the two practices (accountancy and law)"].

[4] See Rule 5.7(a)(2)

[5] See ABA Informal Opinion C-431 (June 20, 1961); Ohio State Bar Ethics Opinion 86-5 (5/29086); Alabama Ethics Opinion 86-101 (10/30/86); Philadelphia Ethics Opinion 87-22 (10/8/87).

[6] See Rule 5.7(a). Also, see Indiana State Bar Assoc. Legal Ethics Committee Opinion No. 5 of 1991 (concluding that, notwithstanding fact that attorney labeled his business a real-estate management firm, and that certain tasks were a hybrid of lawyer and lay functions, arrangement would constitute practice of law).

[7] See Utah State Bar Op. 146(A) (1995) ("The lawyer will assume a substantial burden of showing that his legal advice (or omission of advice) was free from any bias or conflict of interest created by the dual capacities in which the lawyer acted.")

Does the use of a telemarketing firm to attract attendees to a financial planning seminar run afoul of the ethical rules disallowing the use of phone solicitation for attorneys?

Rule 7.3 specifically prohibits telephone contact with prospective clients with whom the lawyer has no family or prior business relationship.[8] However, based upon the assumption that Attorney A is conducting his law practice and his law-related business so as to comply with Rule 5.7, the Committee is of the opinion that Rule 7.3 would not apply to the proposed solicitations. This would be so long as these solicitations were solely for clients for Attorney A's financial services business and not for his legal practice.

Does providing program participants with a certificate for a one-hour free consultation with a pre-selected attorney run afoul of any ethics rules for either Attorney A or the pre-selected attorney?

The Committee is of the opinion that admonitions of Rule 7.3 would apply to bar referral of Attorney A's financial services clients to the attorneys that Attorney A has selected to participate in the proposed program. This is due to the fact that although the telephone solicitations are mainly intended to obtain clients for Attorney A's financial planning business, these solicitations also have the direct effect of producing clients for the attorneys that have been designated by Attorney A to participate in the program.

The fact that the pre-selected attorneys receive no fee from the program participants for the one-hour consultation would not matter as the clients that Attorney A refer to the selected attorneys would qualify as "prospective clients" as that term is used in Rule 7.3. In any event, even if the selected attorneys are participating in this program for "free," it is likely that they are doing so with the hope of some future paying legal work from the financial planning clients that Attorney A would send them as a result of the proposed program.

By virtue of Rule 8.4(a), Rule 7.3 would apply to any attorney knowingly assists an attorney to violate the Rule. Thus, Attorney A would have an ethical obligation to not direct clients who had been obtained through the proposed telemarketing program to the selected attorneys.

May Attorney A ethically sell financial products to his current law practice clients?

Prior responding directly to this question, the Committee would note that the professional rules and legal commentaries tend to discourage other than "standard commercial transactions" between attorneys and their clients.[9] Particularly troublesome for attorneys are those business transactions involving investments.

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[8] See Rule 7.3(b).

[9] See Comment to Rule 1.8, "Initiating Discussions about Potential Business Transactions with Clients," *ABA Annotated Model Rules of Professional Conduct* (3rd ed. 1996) at p. 123.

Despite concerns the concerns expressed above, the Committee is of the opinion that what Attorney A is proposing to do is not unethical.[10] However, it does raise the distinct possibility for a conflict of interest if the transactions contemplated do not provide proper safeguards for the client as set out in Rule 1.8(a). Briefly stated, the safeguards mandated by the Rule include that the transactions be objectively fair to the client, that the client be given a written explanation of the terms, have an opportunity to consult independent counsel, and that the client consent to the arrangement in writing. In Attorney A's particular situation, the Committee believes that it would be advisable when giving the client a written explanation of the terms that he also include an explanation of his interest in the financial products being proposed for purchase by the client.[11]

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[10] See Utah State Bar Op. 146(A), *supra*, at p. 2 ("Nothing in the rules prohibits a lawyer from soliciting insurance business from client who respond to his marketing efforts for his law practice, so long as he complies with Rule 1.8.").

[11] See American Law Institute, Restatement of the Law Governing Lawyers, *Proposed Final Draft No. 2* (April 6, 1998), §11(g) at p. 121.

Opinion No. 2 of 2002

Facts

Attorney A and Attorney B each are part-time public defenders in the appellate division of the same public defender office. Attorney A and Attorney B each operate a part-time private practice as well. The private practices of A and B are entirely separate.

Question

May attorneys A and B act as opposing counsel in a civil matter where neither litigant in the civil matter has been represented by the public defender's office in question?

Opinion

Rule 1.10 of the Indiana Rules of Professional Conduct states in part:

> While lawyers are associated in a firm, none of them shall represent a client if he knows or should know in the exercise of reasonable care and diligence that any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.8(k), 1.9 or 2.2.

Rule 1.7 of the Indiana Rules of Professional Conduct prevents a lawyer from representing a client if such representation is directly adverse to another client unless the lawyer reasonably believes the representation will not adversely affect the relationship with the other client and each client consents after consultation.

The comments to the Model Rules of Professional Conduct recognize attorneys operating in the same government office and division as a "firm" for purposes of the Rules. Therefore, in their capacity as public defenders, Attorneys A and B are part of the same firm, and Rule 1.10 would be applicable to their situation. However, while the Rules recognize Attorneys A and B as members of the same "firm" in their positions as part-time public defenders, such a conclusion does not require that they be considered to be part of the same "firm" in their positions as private practitioners.

Presuming Attorneys A and B keep their private practice files and client information completely separate and outside of the public defender's office, the Committee finds that there is no ethical violation in each attorney representing opposing clients in a civil matter. This analysis would not apply to a situation where there is or may be any overlap between the civil and public defender matters such that information germane to the civil suit might be available in the public defender's office.

Opinion No. 3 of 2002

This opinion address a question presented to the Indiana State Bar Association's Legal Ethics Committee. Specifically, the question presented is this: When contacting unrepresented debtors on behalf of a creditor, is an attorney ethically bound to advise the debtor that the person is an attorney, acting on behalf of the creditor, for the purpose of trying to facilitate the debt collection? In short, yes.

The starting point in this analysis is the easily-made observation that the attorney cannot affirmatively make false statements of fact about the purpose of the contact or the identity or role of the caller. Engaging in conduct involving misrepresentation (or dishonesty, fraud or deceit) is prohibited by Rule of Professional Conduct 8.4(c). Knowingly making a false statement of material fact or law to a third person in connection with one's representation of a client is also prohibited by Rule of Professional Conduct 4.I(a).

The less obvious question is whether the attorney may contact the debtor and be truthful but silent about the attorney's representation of a creditor and the purpose for initiating the contact.

One reason for contacting a debtor would be to collect information to facilitate the debt collection process. A presumed motive for not identifying oneself as an attorney acting on behalf of a creditor would be to obtain information that the debtor might be unwilling to impart if the debtor knew the complete purpose of the contact. Another reason for initiating contact with a debtor might be to impart information, perhaps even information of a legal nature, to facilitate the debt collection process.

The first sentence of Rule of Professional Conduct 4.3 states: "In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested." Contacting a debtor to obtain or impart information or to otherwise facilitate the debt collection process without identifying oneself as an attorney acting on behalf of a creditor would seem to imply a disinterest that does not exist. As such, the Committee believes that failing to identify oneself to a debtor as an attorney acting on behalf of a creditor in connection with collecting a debt would be a violation of Rule 4.3.

Further support for this position is found in the second sentence of Rule 4.3, which states: "When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding." The attorney's "role in the matter" is presumed to be to obtain or impart information to facilitate collection of a debt. This part of the Rule underscores that merely identifying oneself as a lawyer without further noting the essential purpose for initiating the contact is not enough. If the debtor misunderstands the lawyer's role in the matter, even though the attorney has identified herself as such and has stated the purpose for

the contact, the lawyer has an affirmative obligation to make reasonable efforts to correct the misunderstanding.

The comment to Rule 4.3 is also instructive:

> An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel.

Even if the purpose of the call is only to impart, rather than to gain, information, the comment illustrates why disclosure of the full nature of the reason for the contact by the attorney is required.

Indiana has no published opinions addressing the scope of Rule 4.3 in any context similar to this. Although there is generally not a wealth of interpretive law in this area, the view expressed in this opinion is consistent with cases from other jurisdictions that have examined disclosure requirements when dealing with unrepresented persons. *See, e.g., Louisiana State Bar Assn. v. Harrington,* 585 So.2d 514, 516-17 (La. 1990) (lawyer's failure to identify himself as a lawyer violated Rule 4.3); *In re Air Crash Disaster,* 909 F. Supp. 1116, 1123-24 (N.D. Ill. 1995) (violation of Rule 4.3 to send questionnaire to adversary's employees without disclosing it was prepared on behalf of plaintiffs in a lawsuit); Kansas Ethics Op. 15 (1995) (lawyer is required to identify himself as interested party when contacting an unrepresented person).

Finally, it is worth noting that some debt collection practices are regulated by federal and state laws. *See, e.g.,* Fair Debt Collection Practices Act, 15 U.S.C. §1692 *et seq.*; Uniform Consumer Credit Code, Ind. Code §24-4.5-1-101 *et seq.* These laws may impose other disclosure obligations. An examination of any duties of disclosure found in these laws is beyond the scope of this opinion. It is sufficient to simply note that Rule of Professional Conduct 4.1 (b) prohibits a lawyer from knowingly failing to disclose that which is required by law to be revealed. Thus, in the course of contacting debtors on behalf of a creditor, failing to comply with any additional disclosure requirements imposed by regulations or statutes could also constitute an ethical violation by the attorney.