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Minding Your Own Business

Attorneys with ancillary commercial interests

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While most people still admire attorneys for our professional status, our earning potential and our social stature, many of us are dissatisfied, disenchanted or bored with the practice of law.

We hear constant chatter among colleagues about leaving the profession. Our friends and former office mates are branching out or shifting gears. But, for those attorneys who try their hands at business, special rules apply. Violating those rules may result in ethical violations and worse. This column looks at what lawyers need to know when they go into a business other than lawyering.

There are many reasons why attorneys look outside of their practices for opportunities. Some want to get away from office politics, the adversary system or income ceilings. Some, having successfully delegated their time-consuming work to effective underlings, have free time. Some attorneys just wish to reduce their stress. Still others seek to conquer new frontiers.

Lawyers who acquire business interests while engaged in the practice of law usually choose law-related opportunities, often in their practice fields, so they might capitalize on their knowledge and contacts. While these lawyers fit every description, it seems that solo and small firm attorneys are the ones most often involved in extracurricular businesses. They are the entrepreneurial flank of our profession. Attorneys at larger law firms are often prohibited contractually from engaging in other gainful employment or, by their nature, are disinclined to cast a second net. Moreover, large firms tend to be more sensitive to conflict issues and shy away from endeavors that attract them.

Of course, the ancillary business could not engage in the practice of law in any way. In New Jersey, if a business is set up for the practice of law, it must involve *only* the practice of law. Otherwise, the lawyer must be prepared to operate that business from a location that is separate and apart from the law office, and to avoid any association of the new company with the attorney's practice. We look at this requirement, again, below.

All law firms may engage non-attorneys as employees, of course, but these employees may not directly provide legal services. If a non-attorney does so, usually by offering legal advice, the RPCs do not apply—the appropriate violation is the criminal offense of practicing law without a license. "Legal advice" as defined by the Advisory Committee is "applying legal principles to the client's specific problem." Importantly, where such advice is provided without benefit or profit, the criminal charge cannot be sustained.

A recent phenomenon on the national legal landscape is what is called a "multidisciplinary practice." This refers to a firm or other organization that provides both legal and non-legal services. There may be non-attorneys running the non-legal end of things. Think of the busy real estate firm that engages a surveyor, or the criminal lawyer who hooks up with a bail bondsman, or the employment law firm that provides lecturers to business and industry for compliance training. The potential combinations are limitless. These are all businesses that are incidental to the practice, and they can generate tremendous synergy with that practice.

They are also *not allowed in New Jersey*. While Model RPC 5.7 permits attorneys to engage in law-related ancillary activities, New Jersey refuses to adopt any version of it, our Advisory Committee nodding to the concern that there might be "the confusion of clients as to the ethical obligations owed to them by the ancillary services' businesses."

A law-related enterprise may be run from a law office only if the service provided may be considered "part and parcel" of the practice of law. Such businesses usually involve the sale of services that attorneys might otherwise provide in connection with the law practice. In the leading opinion, an alternate dispute resolution service run by the attorney was permissible at the attorney's office, because the committee viewed ADR as "part and parcel" of the practice of law. Only where a lawyer was providing or could provide the service anyway, as part and parcel of the law practice, may such an enterprise be operated alongside, and at the same location as, the law office. There are very few other examples of this result.

Most lawyers who run ancillary businesses seek to sell their services or products to clients, former clients or potential clients of the law firm. This is unquestionably doing business with a client, and the ethical proscriptions against so doing apply. While some attorneys prefer never to mix the business and the practice, others choose to overcome the mandate. We see this increasingly. Estate and elder lawyers are getting licensed to sell insurance and annuities, corporate lawyers offer compliance training to clients through separate organs, and real estate lawyers are creating settlement services to close real estate transactions.

The conflicts of interest are usually obvious. Like most conflicts, these can often be cured by informed consent, commonly referred to as "waiver." New Jersey's informed consent requirement is among the most stringent in the country. The rigor was imposed by the Advisory Committee as evidence that doing business with clients remains disfavored. While the guidelines are rarely acknowledged to the fullest, in practice, attorneys should not be quick to pay mere lip service to informed consent, but should review the requirements carefully to remain beyond reproach in their business dealings with clients. Here are two direct quotes from the Advisory Committee:

"Lawyers should not be able to freely refer a client in need of a service related to a legal representation or its subject matter to any business enterprise in which they retain ownership or controlling interest, or from which they derived income or profit."

A lawyer may only refer a legal client to a business s/he owns, operates, controls, or will profit from, if the lawyer has (1) disclosed to the client in writing, acknowledged by the client, the precise interest of the lawyer in the business, and that the same services may be obtained from other providers and (2) advised the client orally and in writing, of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent counsel of the client's choice as to whether utilization of the business in question is in the client's interest.

Significantly, the recommendation that the client must obtain independent legal advice must be more than a "passing suggestion." Interestingly, where there has been a long-term relationship between attorney and client, or another reason to believe the client might take the recommendation lightly, the lawyer must emphatically recommend that the client obtain other counsel. The Committee sees the history of trust between a client and her long-time attorney as a reason to reinforce, rather than relax, the requirement.

In this vein, Professor Michels notes: "When an attorney engages in a business transaction with a client, any recommendation regarding independent legal advice must be given to the client at a time early enough to be meaningful. This generally means at the outset of the business relationship." (Michels, New Jersey Attorney Ethics, 2016). Two cases from the 1990s hold that a lawyer should not engage in business with a client until the client has *actually received* independent advice.

A more heated controversy is quietly brewing over the requirement that the law office and the business enterprise remain distinct and apart. The Internet and social media will soon bring this issue to the fore. The Advisory Committee has opined (and confirmed when revisited), "that lawyers must keep their law practices entirely separate from their business enterprises. Consequently, lawyers must operate their practices and businesses in physically distinct locations, refrain from joint advertising or marketing of the two, and avoid any other demonstration of a relationship between them."

Avoiding joint marketing and advertising has traditionally meant that the attorney must not associate the business with the practice, and not identify the proprietors as lawyers. There must be no suggestion of an attorney's input, or even presence, in the enterprise, since the information might create the impression that the specialized knowledge, experience or contacts of the attorney would redound to the customer's advantage. Merely indicating that the attorney has a J.D. has been acceptable in given circumstances, provided there is no association made between the business and a lawyer's practice.

The coming dilemma is this: A modern customer seeking information about the business could quickly find out that the owner is a lawyer, affiliated with a particular firm. There is online information about everyone. We post Facebook and LinkedIn profiles. We chronicle our personal, business and professional information and broadcast it into cyberspace. We are in countless records that are public information or available in a database. Google even connects the dots for us. It is increasingly difficult to compartmentalize our lives.

In this age where we can morph, reinvent ourselves or merely spread our wings, we should not overlook that our Rules of Professional Conduct apply to us around the clock and regardless of whether we are wearing our lawyer hats. You are far better advised to run your business with the ethics of an attorney than to run your practice with the ethics of a businessperson. •

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