STATE BAR OF NEVADA
STANDING COMMITTEE ON
ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion No. 45
Issued on October 27, 2011.

BACKGROUND

The Committee has received a multi-part opinion request from a Nevada attorney who requested ethical guidance concerning the ownership and operation of an ancillary business providing non-legal medical management services and whether the attorney may refer clients to such ancillary business.

QUESTIONS PRESENTED

(1) May a lawyer own and operate an ancillary business that provides nonlegal services?

(2) May a lawyer refer a client to such ancillary business?

ANSWERS

(1) Yes. The Nevada Rules of Professional Rules do not prohibit the operation of an ancillary business that provides nonlegal services so long as the lawyer's conduct in operating the ancillary business conforms to the applicable ethical standards and the ancillary business does not constitute a vehicle for improper solicitation for the lawyer's law practice.

(2) A lawyer may not refer a client to an ancillary business providing nonlegal services unless the lawyer has sufficiently complied with the requirements of NRPC 1.8(a). If such a referral occurs, the lawyer may not continue to represent the client unless the client properly waives the potential conflict of interest arising from the lawyer's personal interest in the ancillary business under NRPC 1.7(b).

AUTHORITIES

a. Nevada Rules of Professional Conduct 1.0(e), 1.0A(b), 1.7, 1.8(a), 7.2(k), 7.3(a), and 8.4(b) and (c) (2010)
b. ABA Model Rules and Accompanying Commentary
c. Cases and Authorities as Cited Herein

DISCUSSION

I. A Lawyer Is Not Ethically Proscribed From Owning and Operating an Ancillary Business Providing Nonlegal Services.

The Nevada Rules of Professional Conduct [NRPC] do not prohibit a lawyer from owning and operating an ancillary business that provides nonlegal services. The Committee has

previously opined in other contexts that a lawyer may operate a collateral business.[1] A lawyer who owns and operates an ancillary business is more than a passive investor in an independently managed business, but actively manages such ancillary business side-by-side with his law practice. Examples of ancillary businesses providing nonlegal services include retail shopping operations, real property management, manufacturing enterprises, brokerage services and such other services of a nature that are, from the clientele's perspective, readily distinguishable from and not easily confused with the practice of law.[2]

While not prohibited by the NRPC, a lawyer's ownership and operation of an ancillary business raises several ethical considerations. Specific considerations include the imputation of the NRPC to the lawyer's conduct in operating the ancillary business and the improper solicitation of the practice of law.

In operating an ancillary business, the lawyer must be cognizant that the ethical obligations imposed by the NRPC apply to a lawyer in all circumstances.[3] While the rules of professional conduct are primarily geared towards the lawyer's professional capacity,[4] acts unrelated to the practice of law may violate the NRPC, as some conduct in a private capacity reflects adversely on professional fitness.[5] Conduct of the lawyer in operating an ancillary business, such as dishonesty, deceitful conduct or the inability to manage financial affairs, may violate general rules such as NRPC Rule 8.4(c), which are applicable to lawyers at all times. Accordingly, a lawyer engaged in an ancillary business unrelated to the lawyer's law practice is nevertheless required to follow the NRPC where applicable.

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1 *See* Formal Opinion No. 6 (09/24/87) ("There is nothing *per se* improper, under the principles just stated, in a lawyer operating a collateral business through which he places temporary secretarial and clerical help in other law offices so long as the lawyer does not place temporary help in offices against which the lawyer has adversary matters pending and adequately instructs the employees in their duty of confidentiality to the clients on whose files they work."); Formal Opinion No. 24 (06/18/87) ("A lawyer is not precluded from acting as a broker, so long as it is clear that the person being provided brokerage service is not a client of the lawyer's firm and cannot be confused as such.").

2 *See, e.g.*, Colorado State Bar Ethics Committee Opinion No. 98 (December 14, 1996) (Dual Practice); ABA Formal Opinion 328 (June 1972); New York State Bar Ass'n Committee on Professional Ethics Opinion No. 206 (November 22, 1971).

3 *See, e.g., Committee on Professional Ethics and Conduct of Iowa State Bar Ass'n v. Millen*, 357 N.W.2d 313, 315 (Iowa 1984) ("Lawyers do not shed their professional responsibility in their personal lives."); *Notopoulos v. Statewide Grievance Committee*, 890 A.2d 509, 518 (Conn. 2006) ("It is well established that the Rules of Professional Conduct bind attorneys to uphold the law and to act in accordance with high standards in both their personal and professional lives."); *Attorney Grievance Com'n of Maryland v. Childress*, 758 A.2d 117, 122 (Md. 2000) ("A lawyer is subject to professional discipline under the Rules of Professional Conduct for conduct the lawyer engages in outside his or her role as a lawyer.").

4 *See* NRPC 1.0A(b). *See also* ABA Formal Opinion 336 (June 1974) ("Many, if not most, disciplinary rules by their nature relate to conduct of a lawyer acting in his professional capacity.").

5 *See* NRPC 8.4(b) and (c). *See also In re Kennedy*, 542 A.2d 1225, 1228 (D.C. 1988).

Likewise, a lawyer may not operate an ancillary business if it constitutes a vehicle for improper solicitation of the practice of law. NRPC 7.3(a) mandates that "a lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain." The term, a "prior professional relationship," has been limited in other jurisdictions to a prior lawyer-client relationship.[6] The Committee agrees with this construction as it ensures that an ancillary business may not be used as a "cloak for solicitation."[7] Additionally, the lawyer cannot circumvent this prohibition by having employees of the ancillary business refer clientele to the lawyer's law practice.[8] Thus, a lawyer may not operate an ancillary business that solicits professional employment from clients or provide compensation to employees of the ancillary business for such referrals.

II. A Lawyer May Not Refer a Client to an Ancillary Business Unless the Lawyer Has Satisfied the Requirements of NRPC 1.8(a) and May Not Thereafter Remain as Counsel for the Client Unless the Client Has Properly Waived the Potential Conflict of Interest Under NRPC 1.7(b).

Due to the pre-existing attorney client relationship and the client's resultant trust in and dependence upon the lawyer's independent judgment, a lawyer is generally prohibited by the NRPC from referring a client to an ancillary business owned and operated by the lawyer. An ethical referral may occur only where the lawyer has satisfied the requirements for transacting business with a client (NRPC 1.8(a)) and the client has properly waived the potential conflict of interest arising from the lawyer's personal interests (NRPC 1.7(b)). However, even where these ethical considerations are met and the lawyer has obtained the client's informed consent, in some instances it may be impermissible for the lawyer to concurrently represent the client in a professional capacity and provide services through an ancillary business.

The referral of an existing client to an ancillary business owned and operated by the attorney constitutes a business transaction with such client. NRPC 1.8(a) prohibits such transaction unless: (a) such transaction "is fair and reasonable to the client"; (b) the terms of the transaction "are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client"; (c) "the client is advised in writing of the desirability of ... the advice of independent legal counsel on the transaction"; (d) the client "is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction"; (e) the lawyer discloses to the client "the lawyer's role in the transaction" and "whether the lawyer is representing the client in the transaction"; and (f) "the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction."[9]

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6 *See* Utah State Bar Ethics Advisory Opinion Committee Opinion No. 146A (April 28, 1995); Michigan Standing Comm. on Professional and Judicial Ethics Opinion No. RI-135.

7 *See* Alabama Ethics Opinion Number 1987-161.

8 *See* NRPC 7.2(k).

9 NRPC 1.8(a).

In making disclosures and obtaining the informed consent of the client, the lawyer is required to communicate "adequate information and explanation about the material risks and reasonable alternatives to the proposed course of conduct."[10] The disclosure of "adequate information" concerning the transaction includes identifying the lawyer's interest in the ancillary business, and disclosure that the services to be obtained from the ancillary business may be obtained from other providers.[11]

In addition to transacting business with a client, a lawyer's referral of a client to an ancillary business introduces "an extraneous and potentially conflicting motive, which can threaten or interfere with the lawyer's independence of judgment."[12] NRPC 1.7(a)(2) prohibits a lawyer from continuing to represent a client if "there is a significant risk that the representation of one or more clients will be materially limited by ... a personal interest of the lawyer"[13] In such circumstances, representation may only continue where the lawyer reasonably believes he can provide competent representation, the representation is not prohibited by law, and the client "gives informed consent, confirmed in writing."[14] A lawyer's ownership interest in an ancillary business constitutes a "personal interest" sufficient to trigger a potential conflict of interest under NRPC 1.7(a)(2), thus requiring the lawyer to seek a proper waiver under NRPC 1.7(b) prior to continuing representation of the client. This potential conflict of interest and the resulting effect on the lawyer's independent professional judgment requires the lawyer to disclose the nature of the conflict and receive the client's informed, written consent.

Moreover, even if a lawyer receives a client's informed consent concerning a transaction between the client and the ancillary business, certain types of nonlegal services create inherent conflicts of interest that would prohibit concurrent representation and will require the lawyer to cease representation of the client. For example, the Committee has previously opined that a lawyer cannot simultaneously represent a client and act as an investment broker for the client.[15] Likewise, a dispute arising between the client and the ancillary business would create an irreconcilable conflict mandating the termination of representation.[16]

CONCLUSION

A lawyer is permitted to own and operate an ancillary business that provides nonlegal services. However, a lawyer may not refer a client to the ancillary business unless the lawyer has sufficiently complied with the dictates of NRPC 1.8(a) for transacting business with the client and must withdraw as counsel for the client unless the client properly waives the potential

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10 NRPC 1.0(e).

11 NRPC 1.0(e). *See also* Arkansas Bar Association Advisory Opinion 98-01 (06/08/98).

12 Arkansas Bar Association Advisory Opinion 98-01 (06/08/98).

13 NRPC 1.7(a)(2).

14 NRPC 1.7(b).

15 *See* Formal Opinion 24 (06/18/1987) ("A lawyer is not precluded from acting as a broker, so long as it is clear that the person being provided brokerage service is not a client of the lawyer's firm and cannot be confused as such.").

16 *See* NRPC 1.7.

conflict of interest under NRPC 1.7(b). In making the required disclosures and obtaining the client's informed consent, the lawyer must disclose both the lawyer's interest in the ancillary business and the nature and scope of the potential conflicts of interest that may arise.

This opinion is issued by the Standing Committee on Ethics and Professional Responsibility of the State Bar of Nevada, pursuant to S.C.R. 225. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, its Board of Governors, any persons or tribunals charged with regulatory responsibilities, or any member of the State Bar.