ISBA Professional Conduct Advisory Opinion

Opinion No. 14-03
May 2014

Subject: Conflict of Interest; Professional Independence of Lawyer; Unauthorized Practice of Law; Sharing Fees with Non-Lawyers

Digest: Staff attorney employed by non-lawyer business entity is prohibited from providing legal services to the entity's customers.

Ref.: Rules of Professional Conduct 1.7(a) and (b); 5.4(a), and 5.5(c);

ISBA Opinion No. 97-03 (September 1997);

ISBA Opinion No. 90-20 (September 1991);

Maine Ethics Opinion 180 (2002);

New Jersey Ethics Opinion 716 (2009);

Florida Bar Association Ethics Alert (revised 2011);

In re Discipio, 163 Ill. 2d 515, 645 N.E. 2d 906 (1994);

Illinois Corporation Practice of Law Prohibition Act 705 ILCS 220/4.

FACTS

The lawyer is a staff attorney with a financial services company. The company plans to advertise that it can help individuals who were denied social security disability benefits with their appeal. The company then plans to have staff attorneys (who are on salary with the company) handle the individual's social security disability claims.

QUESTIONS

1. Can the staff attorney reasonably undertake representation of both an individual and a financial services company while employed by the financial services company?

2. Would this arrangement be considered fee-sharing with a non-lawyer?

OPINION

I.

The initial issue raised in this inquiry is whether a lawyer employed by a financial services company can undertake the representation of customers of the company who seek social security appeals. Whether such representation poses a conflict of interest requires an analysis of the general conflicts of interest Rule, Rule 1.7(a) and (b) which states:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
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> (1) the representation of one client will be directly adverse to another client; or
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> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by personal interest of the lawyer
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
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> (1) the lawyer reasonable believes that the lawyer will be able to provide competent and diligent representation to each affected client;
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> (2) the representation is not prohibited by law;
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> (3) the representation does not involve the assertion of a claim against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) each affected client gives informed consent.

In the present case, the lawyer would be attempting to represent two clients; the financial services company that employs him; and the customers of the financial services company who seek social security appeals. The financial services company presumably provides financial services and tools to customers that will help them better manage or preserve their finances. The customers who unsuccessfully applied for social security benefits seek to reverse that denial so they can start receiving financial benefits. Presumably, the financial services company is hoping to sell its financial service to the successful claimants. The interest of the customers and the financial services company would appear to be in alignment, but that does not end the inquiry.

There is however, a conflict of interest because there is a risk that the lawyer's employment with the financial services company would materially limit his representation of customers seeking appeals. As a salaried employee, the customer work performed by the lawyer would be subject to supervision, review, and evaluation by the financial service company. The financial services company may direct the lawyer to only aggressively pursue the appeals that will allow for the greater recovery of benefits and delay the handling of claims with smaller recoveries. It is unlikely that the lawyer will be free to exercise his independent judgment as to how the customer work should be handled such that compromises would not be necessary. Such compromises would run contrary to Rule 5.4 (c), which states:

> (c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services to another to direct or regulate the lawyer's professional judgment in rendering such legal services.

Given the high likelihood that compromises will be necessary, it is not reasonable for the lawyer to believe that his representation of the customers who seek social security appeals would not be materially limited or adversely affected by his employment with the financial services company, and vice versa. In a similar inquiry, the Committee found that there would be a conflict of interest for a lawyer to represent his employer, an institution that provides trusts to consumer clients; while also undertaking the document preparation process for the consumer clients. ISBA Advisory Opinion 90-20 (January 1991). In that Opinion, the Committee stated:

> The institution that the attorney represents intends to make money by providing trusts to consumer-clients. The attorney's involvement in trust documents preparation for consumer clients may cause the attorney to owe some duty to the consumer clients, and that duty as well as the interest of the institution-client in the document preparation process, may result in a conflict situation that precludes the attorney from fairly representing the consumer-client and acting in the consumer-client's best interests. The attorney could not reasonably believe that his representation of the consumer-client would not be adversely affected by the pressures exerted by his institutional-client, and vice versa.

Even if there was not a conflict of interest issue, there is another reason that the representation may be problematic for the lawyer. The financial services company is a non-lawyer entity soliciting customers to provide them with legal services. Providing customers with an attorney to represent them on their appeal would require the lawyer to use his legal skills and knowledge which would constitute the practice of law. *See In re Discipio*, 163 Ill, 2d 515, 645 N.E. 2d 906 (1994). With certain exceptions, it is unlawful for a corporation to practice law in Illinois or to render legal services; and the corporation cannot avoid this prohibition by providing the legal services through an employee who is licensed to practice law[1]. (Illinois Corporation

[1] *While the Committee recognizes that 20 CFR 416.1505 of the Social Security Act permits claimants to be represented by lawyers and nonlawyers, the designation of the lawyer by the financial services company to represent customer claimants still obligates the lawyer to abide by the Rules of Professional Conduct. We decline to opine on whether the financial services company would*

Practice of Law Prohibition Act 705 ILCS 220/1 and 220/4). In providing legal services on behalf of the financial services company, the lawyer may be at risk of assisting his employer in the unauthorized practice of law which is contrary to Rule 5.5 (a) which states:

> (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

A similar situation was addressed in ISBA Advisory Opinion No. 97-03 (September 1997), where a lawyer employed by a "management services organization" was asked to provide legal services to the customers of the organization. The Committee was of the opinion that since it would be unlawful for the "management services organization" to provide legal services under the Illinois Corporation Practice of Law Prohibition Act, 705 ILCS 220/1; the lawyer employed by the organization would be in violation of Rule 5.5, if he provided legal services to its customers.

Further, there are ethics opinions from other jurisdictions that have also concluded that such representation as contemplated in this inquiry would be professionally improper. *See e.g*., Maine Ethics Opinion 180 (2002)(*lawyer who is a salaried employee of a private nonprofit credit counseling corporation may not represent corporation's bankruptcy clients*); New Jersey Ethics Opinion 716, 25 Law Man. Prof. Conduct 472 (2009)(*lawyer may not provide legal services to customers of for profit loan modification company)*; and Florida Bar Association Ethics Alert (revised 2011)(*lawyer employed as in-house counsel for nonlawyer company that provides foreclosure-related services to distressed homeowners may not provide legal services to company's customers).*

II.

The second issue raised in this inquiry is whether the arrangement constitutes fee-sharing with a nonlawyer. Sharing fees with a nonlawyer is expressly prohibited by Rule 5.4(a), unless the situation falls within one of the exceptions; none of which apply to the instant case. It would be immaterial that the lawyer was not paid directly from the legal fees paid by the social security claimants. The Committee agrees with the reasoning in the Maine Ethics Opinion 180 cited above which concluded that:

> Applying the Bar Rule to the facts, the Commission believes that there is little, if any substantive difference between a lawyer sharing a fee with a non-lawyer and as here, a lawyer being paid a salary by a non-lawyer in order to provide legal representation to fee paying clients of the non-lawyer.

Accordingly, the arrangement between the lawyer and the financial services company in relation to the lawyer's representation of the social security appeal claimants would constitute fee sharing in violation of Rule 5.4(a).

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be engaged in the unauthorized practice of law in light of the provisions of the Social Security Act. .

CONCLUSION

A lawyer employed by a financial services company may not provide legal services to his employer's customers who are seeking social security appeals because there would be a conflict of interest; the lawyer's independent professional judgment would be compromised; the lawyer may be at risk of assisting the employer, a non-legal entity, in the unauthorized practice of law; and the arrangement constitutes fee sharing with a nonlawyer which is expressly prohibited by the ethics rules.
