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Lawyer's Guide to Financial Planning

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Lawyer's Guide to Financial Planning
October 6, 2021
Index

ICLEF Electronic Publications. 2
MANUAL - Lawyer's Guide to Financial Planning October 6, 2021. 3
Agenda. 6
Presenter contact information. 8
Introduction. 12
Roadmap to Financial Security. 14
The Importance of Budget Discipline at Any Age. 20
Investment Perspectives. 22
Minimize Investment Mistakes. 35
Retirement - Saving & Other considerations. 37
Selling a Niche PracticE. 51
by Cynthia Sharp, Esquire. 51
Rule 1.17 Sale of Law Practice. 69
Rule 29. Mandatory Continuing Legal Education Rule. 80
INDIANA STATE BAR ASSOCIATION LEGAL ETHICS COMMITTEE OPINION NO. 1 FOR 2001. 92
Philadelphia Bar Association - Ethics Op 2003-16. 99
NEW YORK STATE BAR ASSOCIATION - ETHICS OPINION 1200. 103

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October 6, 2021

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Lawyer's Guide to Financial Planning

Agenda

9:00 A.M. The Fundamentals

Attorneys often review a client's portfolio in the context of representation - particularly corporate, estate planning and elder law lawyers as well as matrimonial and real estate practitioners. Sounder advice can be rendered by lawyers who understand the basics outlined in this session.

Investment Perspectives

- Six Step Approach to Financial Security
- Risk Assessment
- Risk Minimization Techniques

Ethical considerations - attorneys who maintain a strong financial structure, both personally and professionally, are highly unlikely to succumb to a temptation to commingle funds. We'll touch on the link between financial distress and mental distress and how the latter can lead to bad decision making in the ethical realm.

9:15 A.M. Factors to Consider when Choosing a Financial Advisor

- Pros and Cons of Managing Own Portfolio
- Role of a Financial Advisor
- What the Credentials Really Mean
- Compensation Structures Demystified

Ethical considerations - Throughout this section, we discuss Indiana State Bar Association Legal Ethics Committee - Opinion No. 1 for 2001 - opining on an attorney's proposed relationship with a financial planning firm. We also touch on opinions in other jurisdictions that specifically discuss whether attorneys are permitted to sell life insurance, securities or other financial product.

9:45 A.M. Asset Conservation Strategies

- Minimizing Investment Mistakes
- How Debt Eats Away at Your Future
- Tips on repayment of student loans – NEW!
- Credit Report/Credit Score
- Bankruptcy and Lawyers
- Preserve Wealth by Reducing Income Tax Liability

Ethical Considerations - We'll include a discussion as to whether an attorney's financial standing, including high student loan debt or bankruptcy, can have an impact with respect to Character and Fitness requirements. We discuss ethics cases involving attorneys who either falsify tax returns or don't file any at all.

October 6, 2021

Lawyer's Guide to Financial Planning

Agenda Cont.

10:30 A.M. **Refreshment Break**

10:45 A.M. Tips for Building and Ethically Selling a Niche Law Practice

This quick paced section is geared to business attorneys advising other practitioners with respect to the sale of a niche practice. We focus on Compliance with Rule 1.17 in the Context of:

- Building a Practice to Sell
- Valuation of Practice
- Negotiating Points to Consider
- Pitfalls to Avoid

Ethical considerations - We focus on Compliance with Rule 1.17

11:00 A.M. Retirement & Rewirement Planning

- Practice Considerations
- Whether or not to go inactive on the roll of attorneys
- Whether the attorney would need to maintain malpractice insurance for the chosen retirement (especially if serving as "of counsel," advisor to a board or not for profit, doing pro bono work, etc.)
- Requirements to stay an active attorney while winding down the business (maintaining CLE requirements, including using section 8 status should the attorney experience age related hardship in maintaining CLE's)

Clients often seek advice from attorneys with respect to the following issues:

- Where to Live (Focus on tax, economic and legal impact)
- Establishing Residency - Two Home Families
- How Much to Save
- How Much to Withdraw After Retirement
- Social Security Benefits (Old Age and Survivors)
- Tax Qualified Plans

11:30 A.M. The Long Term Care Dilemma

- Medicare: What You Need to Know
- Medigap Policies
- Medicaid
- Veterans Benefits
- Long Term Care Insurance - Contractual Terms Explored
- Reverse Mortgages - Analysis of Contracts

Ethical considerations -In addition to offering substantive information, we discuss Model Rule 1.14 Client with Diminished Capacity, focusing on Comments 2 - 6.

12:00 P.M. Review of Concepts / Questions & Answers

12:15 P.M. **Program adjourns**

October 6, 2021

Lawyer's Guide to Financial Planning

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October 6, 2021

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Business Development Strategist

PRESENTS

The Lawyer's Guide to Financial Planning

Featuring:

Cynthia Sharp, Esquire - The Sharper Lawyer

TABLE OF CONTENTS

Principles of Financial Security for the Savvy Lawyer
The Lawyer's Guide to Financial Planning*

Introduction 4

Roadmap to Financial Security 6

The Importance of Budget Discipline at Any Age 12

Investment Perspectives 14

Minimize Investment Mistakes 27

Retirement - Saving & Other considerations 29

Selling a Niche PracticE 43

by Cynthia Sharp, Esquire 43

Rule 1.17 Sale of Law Practice 61

Rule 29. Mandatory Continuing Legal Education Rule 72

INDIANA STATE BAR ASSOCIATION LEGAL ETHICS COMMITTEE OPINION

NO. 1 FOR 2001 84

Philadelphia Bar Association - Ethics Op 2003-16 91

NEW YORK STATE BAR ASSOCIATION - ETHICS OPINION 1200......................95

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INTRODUCTION

"Can anybody remember when the times were not hard, and money not scarce?"

- Ralph Waldo Emerson

We live and practice in challenging economic times. The media keeps us well informed as to the high rate of unemployment as well as the increase in mortgage foreclosures and inundates the airwaves and e-waves with doom and gloom predictions. At the national level, our recourse is limited to our right to vote and voice our concerns to elected officials. While this is a significant right and responsibility, our ultimate ability to influence global and national economic policy is restricted. On the other hand, each of us is able to exert control over our personal financial futures so long as we are armed with the requisite knowledge and wisdom. Remember that YOUR economy is NOT the global economy.

Over a span of almost 30 years in private practice, I discussed personal finances in painstaking detail with thousands of individuals and families in my capacity as an estate planning and elder law attorney. What intrigued me was the financial disparity that existed among people in similar circumstances. This wealth gap likewise exists among attorneys who have had similar opportunities. Class reunions make this quite apparent. Some people in your law school class are well off while others struggle. Obviously, the professional choices that we make dictate our income potential. Yet there are those who have made lots of money while accumulating meager assets and there are those who have earned significantly less but are well on their way to retirement. Many factors influence the amount of wealth that one accumulates. Certainly, luck can play a part. Some acquire wealth through inheritance or marriage; however, they do not represent the majority. Sixty nine percent of respondents to a 2008 poll conducted by PNC Wealth Management accumulated the bulk of their financial holdings through work, business ownership or investments while a meager 6% acquired wealth by inheriting it. An additional 25% have prospered through a combination of inheritance and personal earnings.

By and large, I have observed that people who have “done well” and are “living the dream” share three common characteristics: First, they are financially literate, having committed to an ongoing education with respect to investment and money management principles. Second, emotional maturity and wisdom guides them in their decision making process. Third, they heed advice given to them by their financially astute mentors.

The principles outlined herein are geared toward those who are do not have a sizable inheritance on the horizon or who are not yet financially independent. While many will be familiar with some of the material, most have not applied them with persistence and consistency to their own lives. The information can also be used as a valuable resource for attorneys in dealing with client matters.

ROADMAP TO FINANCIAL SECURITY

Roadmap to Financial Security

Created by: Cynthia Sharp, Esq.

"To Know and Not to Do is Not to Know"

- Dr. Stephen Covey

STAGE ONE - CREATE FINANCIAL PLAN

- [ ] Complete financial assessment and create budget
- [ ] Importance of Budgetary Discipline
- [ ] Identify values and articulate a written financial mission statement.
- [ ] Set initial goals and designate specific timelines
- [ ] Structure a realistic financial plan (See Stage Two)
- [ ] Execute the terms of the plan
- [ ] Monitor Investments/Reassess Positions

STAGE TWO - DECISIONS REGARDING FINANCIAL MANAGEMENT

- [ ] Investing in Stocks, Bonds, Cash Equivalents
- [ ] Do-It-Yourself or Financial Advisor?
- [ ] Financial Advisor
- [ ] Ask 8 questions recommended by SEC's Office of Investor Education and Advocacy
- [ ] Review credentials
- [ ] Choose appropriate level of service based on your needs.
- [ ] Clarify compensation structure.

A. Risk Management
  - Conduct risk assessment
  - Minimize risk (unless you can afford to lose)
  - Asset Allocation

B. Diversification

C. Inflation

D. Real Estate
  - General Considerations
  - Crunch the numbers conservatively. Assume the worst!

- Special attention to mortgage calculations
- How does purchase fit into overall financial plan?

E. Personal Residence

- Analysis regarding purchase vs. rent
- Avoid PMI
- Live below your means

F. Investing in Non-Residential Real Estate

- Vacation home
- Review numbers with a cool head - preferably off season
- Rental, Personal or Hybrid Use?
- Carefully analyze tax rules
- Lease or Purchase Office Space?
- Benefits
- Build equity instead of paying rent
- Asset (can be used as collateral for expansion or other necessary loans)
- Business considerations may override potential financial benefit
- Limits potential growth
- May be disinclined to move because of ownership stake

G. Investment property close to college campus (Alternative to dorm living)

- Do you want to be a landlord?
- What if your child changes schools

H. Other Investment Options/Vehicles

- REITs (Diversification without the hassle)

I. Law Practice as an Asset

- Enhance Income
- Mindset of Building Business to Sell

STAGE THREE - THREE MAJOR LIFE STAGES (FINANCIAL CONSIDERATIONS)

- ☐ Responsibility/Desire Funding Education (Child or Grandchild)
- ☐ CLOSE attention to cost considerations
- ☐ Make a savings plan and stick to it.
- ☐ Consider pros and cons of UTMA/UGMA accounts
- ☐ Investigate all Loans, Scholarships & Grants
- ☐ Tax Benefits for Education
- ☐ Section 529 Plans
- ☐ Coverdell Education Savings Accounts (ESAs)
- ☐ American Opportunity Tax Credit
- ☐ Lifetime Learning Tax Credit
- ☐ Obligation in Divorce Context
- ☐ Updated information: Check out www.savingforcollege.com

J. Retirement Planning

- ☐ Analysis as to where to live
- ☐ Calculate retirement needs. Create a plan early on and stick with it! Many tools available
- ☐ Wait to take social security benefits (unless you need them or have short life expectancy.)
- ☐ Invest in Tax Qualified Plans early. Withdraw at latest possible date taking into account MRD rules.
- ☐ Plan "retirement" far in advance.
- ☐ Consider how you will handle the following common post retirement issues:
    - Redefinition of purpose;
    - Assumption of new roles;
    - Change in identity;
    - New life and lifestyle structure

K. Planning for Long Term Care

- Investigate levels of available care in locale
- Determine cost
- Purchase medigap policy when eligible for medicare
- Take advantage of all benefits available through medicare
- Consider long term care insurance
- Reverse Mortgage
- Eligibility for Veterans Benefits
- Medicaid - Plan for qualification far in advance
- Beware of estate recovery

ASSET CONSERVATION STRATEGIES

L. Insurance

- Professional Liability
- Disability
- Umbrella
- Other Products Customized to Individual/Business Needs

M. Minimize Investment Mistakes

- Beware of Wolves in Sheep's clothing
- Debt Considerations
- Check out credit report/credit score
- Lease or purchase automobile
- Do not carry balances on Credit Cards
- "Neither a Borrower Nor a Lender Be."
- Don't cosign loans.
- Make a plan to eliminate debt (if any) and stick to it!

N. Income Tax Reduction Strategies

- Start planning at beginning of tax year
- Take full advantage of medical expense deductions

DISTRIBUTION STAGE - ESTATE PLANNING

- [ ] Complete planning process
- [ ] Execute documents
- [ ] Appropriate beneficiary designations
- [ ] Online Accounts
- [ ] Avoid Common Estate Planning Mistakes
- [ ] Face the issues with respect to Estate Planning and the Second Marriage
- [ ] Do you need to have the Talk with "Aging Parent"
- [ ] Estate and Inheritance Tax Considerations
- [ ] Consider Role of Life Insurance
- [ ] Special Needs Planning (in estate planning context as well as tort recovery and other legal arenas)

Are you interested in learning about how to build a successful law practice? Set up a FREE initial consultation with Cynthia Sharp today. Call 609 923 1017.

THE IMPORTANCE OF BUDGET DISCIPLINE AT ANY AGE

People squander a lot of money that could be saved or spent on products or services that would add real value to their lives. This phenomenon is often referred to as the "latte factor" -- originally conceived of and trademarked by David Bach of Finish Rich, Inc. While an extra $5 ATM charge or $20 overnight delivery fee (necessitated by procrastination) may seem trivial, it all adds up - over a lifetime.

Example: Laura Lawyer lacks organization skills in many areas - including financial. From time to time, she pays bills late, incurs overdraft costs and is a little sloppy in her record keeping. Having just turned 40, she has become concerned about the lack of retirement savings. While claiming that she can't get ahead in light of the high cost of living, she doesn't have a handle on how her hard earned dollars are spent. After being introduced to the "latte factor" concept, Laura carves out a couple of hours and lists the ways that money leaks out of her budget. Her estimates show the following wasteful and avoidable expenditures made last year:

Overdraft Fees $180

Credit Card Late Fees $150

Overnighting Packages $180 (because of procrastination)

ATM Fees $120

Parking Tickets $175

Speeding Tickets (also increased her insurance) $160

Automatically Charged to Credit Card and Doesn't Use:

Netflix $92

Gym Membership $480

Magazine Subscriptions $50

Clothing with tags still on (sitting in closet) $300

Premium Cable Channels (not watched) $360

Convenience Store Coffee/Soda/Snacks/Bottled Water (bought on the run) $1000

Total - $3247 ($62.44 per week)

The significance of the money leaks become apparent once Laura uses Bach's "latte calculator"[1] If she begins an immediate discipline of saving $62.44 weekly at a modest 4% tax free rate of interest, she will enhance her retirement savings by the amount of $140,628.04 over the next 25 years. Not a bad return for being just a little more careful.

Living a spartan lifestyle is not appealing to most of us. After all, it's fun to sip a vente mocha latte (hold the whipped cream) while sitting through a boring meeting. Indulging in an occasional guilty pleasure gives zest to our day to day life. However, some choose to live austerely and leave a fortune to charity or their heirs. In many cases, the accumulated wealth is a surprise to those who knew the decedent. For example, Rev. Vertrue Sharp (no relation), who made a living raising hay and cattle, saved every penny he ever made - enabling him to leave $2 million to the East Tennessee Children's Hospital, the University of Tennessee Medical Center, and other charities when he died in 1999 at the age of 94.[2]

[1] http://www.finishrich.com/free_resources/lattecalculator.php

[2] Silicon Valley Blogger, March 10, 2008, "When Saving Money Goes Extreme: Serious Savers Who Died Very Wealthy" http://www.thedigeratilife.com/blog/index.php/2008/03/10/serious-savers-who-died-very-wealthy/

INVESTMENT PERSPECTIVES

"I think the market can be beaten, but even a broken clock is right twice a day. Best way to describe it: It's possible but not probable."

- Robert Laura[1]

Investors can choose from a smorgasbord of available investment strategies when designing their financial plan and assembling the portfolio. A detailed evaluation of the innumerable options is well beyond the scope of this chapter; however, many resources are readily available for those inclined to develop expertise in this area. A good place to start is with The Intelligent Investor, touted by Warren E. Buffett as "By far the best book on investing ever written." The Fourth Edition can be found for FREE at http://www.fxf1.com/english-books/The%20Intelligent%20Investor%20-%20BENJAMIN%20GRAHAM.pdf. **I will send you the link electronically if you email me at cindy@thesharperlawyer.com.**

Cardinal principles for those seeking financial security are (1) Risk management is paramount. It must drive portfolio design; and (2) Remain disciplined with respect to investment choices. In other words, don't abandon your position prematurely. In advising individuals to think long-term and remain patient, Warren Buffett stated: "No matter how great the talent or efforts, some things just take time. You can't produce a baby in one month by getting nine women pregnant."

The material that follows focuses on the risk assessment process as it relates to the three primary categories of investments: stocks, bonds and cash. and concludes with a brief discussion of several other common investment choices.

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[1] Lynch, Peter. "Can Regular Investors Beat the Market?", Investopedia, January 5, 2013. http://www.investopedia.com/articles/trading/10/beat-the-market.asp

Risk Assessment

The risk and reward tradeoff in the investment world is an undeniable truth. By and large, individuals do not have direct control over risk factors; however, they can reduce or minimize exposure by participating in the risk assessment process which can be broken down into the following three stages[2]:

- Understanding the risk posed by certain categories of investments
- Determining the kind of risk you are comfortable taking
- Evaluating specific investments

STAGE ONE - UNDERSTANDING THE RISK POSED BY CERTAIN CATEGORIES OF INVESTMENTS

Each major investment class (stocks, bonds and cash equivalents) has one or more risk factors, some apparent and some subtle.

The volatility of the stock market and individual stocks exposes the investor to at least short term risk. The reward for assuming risk is the potential for a greater investment return. Indeed, investors in the stock market have historically enjoyed greater returns than those in the other two major classes. (Naturally, individual stocks vary from a risk point of view.) According to an SEC online publication for investors, "Large company stocks as a group, for example, have lost money on average about one out of every three years. And sometimes the losses have been quite dramatic. But investors that have been willing to ride out the volatile returns of stocks over long periods of time generally have been rewarded with strong positive returns."[3] The key is to stick to the long term plan.

Investors with shorter time horizons will not feel comfortable subjecting a large portion of their portfolio to the vagaries of the stock market and may instead invest in the relatively safe bond market. A variety of bonds are available including municipal bonds, corporate bonds, mortgage and asset-backed securities as well as U.S. Bonds. While the bond market is not

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[2] "Managing Investment Risk", Financial Industry Regulatory Authority, Inc. 2013. http://www.finra.org/Investors/SmartInvesting/AdvancedInvesting/ManagingInvestmentRisk/

[3] "Beginners' Guide to Asset Allocation, Diversifiction, and Rebalancing", U.S. Securities and Exchange Commission, Modified August 28, 2009. http://www.sec.gov/investor/pubs/assetallocation.htm

subject to swings similar to the stock market, an investment in these instruments is not without risk. In fact, some high yield bonds (often referred to as "junk bonds") may prove to be unstable. Investinginbonds.com provides significant information on the topic.

Inflation plays a major part in any risk assessment. A risk averse individual may invest ultra conservatively in low risk/low return cash equivalents, such as money market or savings accounts, certificates of deposit and low yield bonds, not taking into account the resulting loss of purchase power due to inflation. On the other hand, it is highly unlikely that they will suffer huge setbacks risked by those on the other end of the risk spectrum.

To illustrate the eroding effect of inflation, CNN Money[4] created the following scenario: Presume the historical average annual rate of inflation of 3% and the following annual growth rates: Stocks - 9.8%, Bonds - 5.4% and Cash - 3%. It would take the stock 7 years to double in nominal value and 10 years to double taking into account inflation. Bonds would double in 12 years and in 26 if inflation is factored in. Cash would finally double in 23 years; however, the real value would not double even in the lives of the investor's grandchildren.

Any investment portfolio should be designed to hedge against inflation. Classic strategies include investing in real estate, stocks, commodities and gold. Some have opted to purchase Treasury Inflation-Protected Securities (TIPS) from the U.S. Treasury. A comprehensive discussion of this topic is beyond the scope of this book. It should be noted that opinions vary widely with respect to the most effective strategies as illustrated by a recent article authored by Wharton finance professor Jeremy J. Siegel[5]. He points out that while gold does well in an inflationary economy, it performs poorly over the long term. Over the past 200 years, the return on gold has been 0.7 percentage point per year more than inflation.

A number of other factors potentially in play, such as currency, liquidity and sociopolitical risk are beyond the scope of this book and most likely beyond the control of most investors.

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4 "Understanding How Inflation Works", CNN Money, Updated July 10, 2012. http://money.cnn.com/magazines/moneymag/money101/lesson4/index6.htm

5 Siegel, Jeremy J., "Stocks: The Best Inflation Hedge", Kiplinger, June 9, 2011. http://www.kiplinger.com/article/investing/T052-C019-S001-stocks-the-best-inflation-hedge.html

STAGE TWO - DETERMINING THE KIND OF RISK YOU ARE COMFORTABLE TAKING

Risk tolerance can be measured by answering a series of questions posed in one of the numerous assessments available online. The assessment developed by calcxml (http://www.calcxml.com/do/inv08) categorizes possible risk profiles as "Very Defensive, Defensive, Conservative, Moderate, Moderately Aggressive, Aggressive, Very Aggressive." The major factors in determining risk tolerance include age, goals and timelines for meeting them, financial responsibilities and other financial resources.

Because an investor's level of risk tolerance most likely shifts over time, it should be formally assessed on a periodic basis. An impending retirement is one of the major catalysts in a shift to a more conservative portfolio. On the other hand, an individual receiving a large inheritance may become less risk averse and willing to take enhanced risk with a portion of the total portfolio that he or she could live without. An investor's level of risk tolerance is uniquely subjective and depends on the circumstances at hand.

STAGE THREE - EVALUATING SPECIFIC INVESTMENTS

A number of tools are available to evaluate (and ultimately re-evaluate) the strength of a particular company or bond issuer. Unless an investor is able to devote significant hours to this endeavor, it's probably wise to rely on financial professionals for this information.

Risk Minimization Techniques

Some investors gamble with the hope of achieving an ultra high return. However, those seeking financial security are most likely inclined to invest with a view to minimizing risk. Two classic strategies, asset allocation and diversification are outlined below.

ASSET ALLOCATION

An investor must consider a number of factors before deciding on the appropriate allocation of investment funds among the broad asset classes which include stocks, bonds and cash equivalents and their subcategories. The primary considerations are age, current financial

position, amount to be saved each year, length of time the money will be invested and risk tolerance level. Software is widely available to assist investors with staying on track from an allocation standpoint. Of course, financial advisors can assist in this regard.

Those with longer investment horizons may opt for stocks even though the investment carries varying degrees of risk. Because the stock market generally has the strongest long term return, the gamble may be justified since time remains to recoup unanticipated market losses. Investments that will be tapped in the near future should be more conservatively invested which means an emphasis on bonds and cash equivalents. For example, a person planning to save enough to have a down payment on a home in 2 years would not want to go into a risky investment. On the other hand, a 30 year old putting away money for an anticipated retirement date 35 years hence will probably have a higher risk tolerance.

ASSET ALLOCATION ILLUSTRATIONS[5]

George is 35 years old, has a net worth of $50,000 and plans to save at the rate of $12,000 per year. He self classifies his risk tolerance as 5 (balanced). The suggested asset allocation is: 75% stock, 10% bonds and 15% cash equivalents. At age 70, with a net worth of $2,000,000, he plans to save no more and wishes to withdraw 4% per year. The suggested asset allocation at that point is: 44% stock, 40% bonds and 16% cash equivalents.

Lynn is 60 years old, has a net worth of $1,000,000 and plans to save at the rate of $40,000 per year. She self classifies her risk tolerance as 8 (aggressive). The suggested asset allocation is: 60% stock, 24% bonds and 16% cash equivalents. At age 80, with a net worth is 2,500,000, she plans to save no more and wishes to withdraw 4% per year. The suggested asset allocation at that point is: 35% stock, 48% bonds and 17% cash equivalents.

DIVERSIFICATION

"It is the part of a wise man to keep himself today for tomorrow, and not venture all his eggs in one basket."—Sancho Panza

Don Quixote (Part I, Book III, Chapter 9) by Miguel de Cervantes

A diversified portfolio represents different categories of investments as well as diverse subclasses within a particular category. Investment options other than the three major categories should be evaluated. Real estate investment considerations are discussed in Part One, Section Four. Diversification may reduce risk since classes of assets normally do not simultaneously react to economic conditions in the same manner. A decline in stock values may be occurring while bond values are on the rise. The same holds true within assets classes. For example, an investor may hold both domestic and international stocks or may hold both corporate bonds and municipal bonds.

Most busy lawyers do not have time to conduct sufficient background research and the task is best left to financial professionals. Many choose to participate in "pooled investments" such as mutual funds, exchange traded funds and lifecycle funds since the manager is responsible for all diversification and asset allocation decisions.

FINANCIAL ADVISOR OR DO IT YOURSELF?

Management of Own Investment Portfolio (DIY)

Many decide to go with a discount broker in order to do save fees. The tradeoff for lower fees is that no personalized investment advice is offered since the role of the firm is to execute trades. While risk assessment tools, a myriad of calculators and research findings are offered by most of the rated discount brokers, the individual investor is responsible for weighing options on their own regarding issues such as asset allocation, choice of funds and post retirement draw-down amounts. The investor must also rigorously monitor his or her own progress and make strategic adjustments where appropriate.

Those determined to invest on their own must first conduct a thorough study of the discipline of financial planning in order to gain a complete understanding of relevant concepts. Knowledge of what drives financial markets and the ability to interpret trends and analyze financial statements are among the preliminary prerequisites to beginning a successful DIY investment strategy.

The Role of the Financial Professional

In contrast to "Do-It-Yourselfers", another category of investors (such as busy lawyers) defer responsibility for financial planning to their advisors. The "do-nothing-at-all" crowd (so dubbed by Bill Harris writing for Forbes) may end up with "...expensive products, such as excessively high-priced mutual funds and other more expensive investment vehicles that provide large commissions for advisors but little overall value to the investor himself."[2] Perhaps some people turn over all decision making to their advisors because they are already overwhelmed and too busy with their own business or career or lack adequate financial knowledge to make informed decisions. This section will equip the investor with fundamentals to take into account when

[2] "DIY Investors: Don't Go It Alone" Forbes, September 4, 2012. http://www.forbes.com/sites/billharris/2012/09/04/diy-investors-dont-go-it-alone/

choosing a financial professional and defining his or her role. Keep in mind that a key role played by an advisor is to remain dispassionate as it is often very difficult to be objective with respect to your own money. The expression "He who acts as his own attorney has a fool for a client" may be extended to the realm of financial planning.

Whether to hire a stockbroker, investment adviser, financial planner, accountant, insurance agent, broker or other type of professional to help plan financial affairs can be a confusing proposition. As a group, they offer a wide range of investments and products, hold a variety of designations and have a number of different compensation methods. To further complicate matters, the definitions of the terms are fluid depending upon the services offered by or products sold by the individual or firm. Those interested in delving further into the definitional aspect are directed to the website of the U.S. Securities and Exchange Commission (SEC) and to the website of the U.S. Financial Regulatory Authority (FINRA)24

No matter the label, the professional chosen should be the person who can best serve the investor's needs and the initial step is to specifically define those needs. The personal assessment process will identify whether assistance is needed in development of a detailed strategy or financial plan for meeting all financial goals or whether the engagement will be limited to services such as advising with respect to investments, business, insurance product, income tax reduction, retirement or estate planning. The most important factor is to choose someone with whom there is chemistry and a sense of trust. Reliance on referrals from other attorneys, professionals or friends is a wise move.

Many people adopt the "team approach" under which their professionals work together. (Note that in some jurisdictions, attorneys are permitted to act as financial planners for their clients.) Others retain several different financial firms, choosing not to "put all of their eggs in one basket". Diversification of advisors may have its advantages. Investors whose sole advisor was Bernard Madoff would have felt a lesser financial sting if a portion of assets had been handled by three or even four other advisors.

[4] "Selecting Investment Professionals", Financial Industry Regulatory Authority, Inc., 2013. http://www.finra.org/Investors/SmartInvesting/GettingStarted/SelectingInvestmentProfessional/P117278

The SEC's Office of Investor Education and Advocacy lists the following as questions that a potential client "should always ask when hiring any financial professional"[5]:

- What experience do you have, especially with people in my circumstances?
- Where did you go to school? What is your recent employment history?
- What licenses do you hold? Are you registered with the SEC, a state, or the Financial Industry Regulatory Authority (FINRA)?
- What products and services do you offer?
- Can you only recommend a limited number of products or services to me? If so, why?
- How are you paid for your services? What is your usual hourly rate, flat fee, or commission?
- Have you ever been disciplined by any government regulator for unethical or improper conduct or been sued by a client who was not happy with the work you did?
- For registered investment advisers, will you send me a copy of both parts of your Form ADV?

The Initialisms: A Clarification

The website of the Financial Industry Regulatory Authority (FINRA) website lists close to 100 different designations that may be held by financial advisors and the Wall Street Journal has identified an additional 115[6]. The credentials are not issued by government agencies.[7]. For example, the well regarded CFP designation is issued by The Certified Financial Board of Standards, Inc. which is in turn accredited by the National Commission for Certifying Agencies (NCCA).

A financial advisor's credentials show a commitment to increasing knowledge base, at some level, in a particular financial realm. However, an investor should keep in mind that an advisor without a list of designations may produce excellent results, having learned through self-study

[5] "Investment Advisers: What You Need to Know Before Choosing One", U.S. Securities and Exchange Commission, Modified August 7, 2012. http://www.sec.gov/investor/pubs/invadvisers.htm

[6] "Understanding Professional Designations" Financial Industry Regulatory Authority, Inc., 2013. http://www.finra.org/Investors/ToolsCalculators/ProfessionalDesignations/DesignationsLookup/

and experience. Since certain designations in the financial world are relatively easy to obtain, independent research into the requirements may prove worthwhile. The designations can be easily confused since they are often referred to in common parlance by initialisms.8 FINRA's website offers consumers the ability to "decode the letters that sometimes follow a financial professional's name", determine the continuing education requirements (if any) of the issuing organization, ascertain whether a mechanism is in place for registering complaints against credential holders and "confirm who holds the credential".

Compensation

Professionals deserve to be compensated. When a lawyer is working on or completes a matter (depending on the arrangement), the client (hopefully) receives an invoice specifically outlining the amount that is being paid out of retainer or is owed. Although often convoluted and difficult to interpret, bills listing treatment rendered and the exact amounts due are (or at least should be) sent by medical providers to the patient and/or the insurance company. Many investors do not A 2011 study conducted by Cerulli Associates and Phoenix Marketing International revealed that 33 percent of investors believed their advisor's services were free, while another 31 percent were unclear as to how their advisor was paid9. Of course, people may not understand bank statements, medical and legal bills or even estimates provided by plumbers. All compensation arrangements should be presented to the consumer in a clear manner.

Any prospective client should feel free at the initial interview to ask for a written fee schedule from the advisor. Full disclosure allows the individual to properly analyze whether a particular compensation arrangement is appropriate for his or her individual circumstance. Awareness of advantages and disadvantages allows the investor to choose which type of service is most suitable for his or her individual needs which of course dictates the compensation level.

The first issue to address is the level of service needed. Although cost should be the least important aspect of the decision, it is usually the first question asked. Investors must realize that some firms provide recommendations, investment advice, and research support, while others may not. The method of compensation will depend upon the services to be provided by the firm.

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[9] Johnson, Jennifer ,"What Americans Don't Know About Financial Fees", The Fiscal Times; Life + Money, December 4, 2012. http://www.thefiscaltimes.com/Articles/2012/12/04/What-Americans-Dont-Know-about-Financial-Fees - jX8UL8Ld7EI32m6u.99

Advantages and disadvantages exist with each type of compensation structure. The most significant criticism leveled is that each has an inherent conflict of interest as an advisor may be incentivized to make recommendations profitable to the advisor while not in the client's best interest. However, the same criticism is often aimed at legal fees. Attorneys who operate under a contingency structure may encourage early settlement to avoid spending potentially unprofitable hours in trial. An hourly rate agreement may inspire numerous motions and other questionably necessary legal work in order to drive up the bottom line fee in the matter. However, honest lawyers do not engage in such practices and neither do honest financial advisors. Full and complete trust of any advisor, on ALL levels is crucial. Thorough research at the outset and careful decision making with respect to the choice of any professional is critical. The pros and cons of compensation models for financial advisors are discussed in great detail by Daisy Maxey in her excellent article - "How to Pay Your Financial Adviser"[10].

COMMON FEE STRUCTURES

Fee-only Compensation

The three main "fee - only" structures are percentage of assets under management, flat fee and hourly rate.

Percentage of assets under management: Clients opting for this system, the most common in the industry, pay the advisor a percentage of assets managed by the firm. Standard fees range from 1.00% to 2.0% annually. An account balance minimum is normally required, often in the $500,000 to $1,000,000 range. Because the advisor's compensation is directly tied to the client's success, he or she has an incentive to grow the account and to minimize losses which places the interests of the advisor and the client "in pari passu".

A scant number of firms base the fee on a percentage of the client's entire net worth plus a percentage of the client's gross income. This gives clients with little liquidity access to the services of a financial advisor. For example, a young attorney earning a healthy income but with little to invest currently due to heavy student loans may be attracted to this type of structure.

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[10] Maxey, Daisy, "How to Pay Your Financial Adviser", The Wall Street Journal, December 12, 2011. http://online.wsj.com/article/SB10001424052970204554204577024152103830414.html

A flat fee may be attractive to investors seeking specific advice or services. This type of person may be of the DIY ilk, simply seeking a professional's opinion or expert direction. Both the flat and hourly fee methods leave implementation of the plan to the client. The following example illustrates this type of arrangement:

"Jude Boudreaux, an adviser with Upperline Financial, a fee-only financial-planning firm in New Orleans, offers an introductory financial-planning service for $1,000 a year or $100 a month. Clients get four meetings of an hour to an hour and a half in which they discuss their net worth, budget and changes that are needed. They meet again later to discuss their progress and any new issues that have arisen. The investors aren't charged extra for telephone calls or emails."

While the hourly fee option is not widely available, those seeking one-time or ongoing intermittent advice with respect to their portfolio could choose this alternative. The common fear expressed is that the adviser has an incentive to "keep the meter running". A solid agreement and ongoing involvement in the planning process should obviate this concern

Commission Only

Some advisors receive a percentage of the value of each product sold to or transaction entered into on a client's behalf. The advantage to the client is that no fees are incurred except for specific individual transactions. A concern often expressed is that a commission-only advisor could put his or her own profit opportunities above the client's best interest. Churning, excessive trading or abuse of other sales practices is regulated by SEC Rule 15c1-7. It is fair to ask whether the advisor receives a larger commission upon the sale of the firm's products.

Fee - Based

Some advisors may charge a fee (hourly, flat or retainer) for development of a financial plan and subsequently receive commissions at the time of the sale of the insurance and investment products recommended in the plan. The same criticisms cited with respect to "commission only" advisors may be applicable here. Investors may opt for this structure in light of the "one stop shopping" feature.

Salary plus bonus

Financial advisors working for a discount broker typically offer no investment advice and often receive a salary and a bonus. Discount brokers are generally not valued for the advice. Rather, the so-called "value" is the discount itself.

The SEC's Office of Investor Education and Advocacy suggests that a potential client inquire as to whether the financial advisor's fee is negotiable[11]. This author is not personally inclined to negotiate fees with a professional in any field. That being said, certain situations may warrant a request for a more favorable financial arrangement. A large investor such as Donald Trump may exercise more clout than a neophyte with a modest portfolio with respect to negotiating fees or commissions.

[11] "5 Reasons The Do-It-Yourself Investor Is Gaining Popularity", Investopedia, May 4, 2012. http://www.investopedia.com/financial-edge/0512/5-reasons-the-do-it-yourself-investor-is-gaining-popularity.aspx#ixzz2NH4R7VkB

MINIMIZE INVESTMENT MISTAKES

Having money to invest for the future presents its own set of challenges. The objective is to enjoy reasonable return on the asset (whether through appreciation or income) as opposed to losing your proverbial shirt. Protect yourself by keeping the following in mind.

Make sure that you get your education from an unbiased source. Many financial planners look out for the client's best interest and make recommendations accordingly. However, some present biased information to guide the client into a product from which he or she will receive a high commission.

Along that same lines, beware of doing business with people who suggest that you invest in deals that will generate a huge return on your funds in a relatively short period. Living by this precept can save you some headaches: "If it sounds too good to be true, it probably is."

This author personally witnessed several clients and friends who were persuaded to mortgage their homes to invest in Ponzi operations, highly leveraged real estate deals (now underwater) and risky tax shelters. Many of these "opportunities", if not most, went south and sour. The investors were saddled with the sting and burden of expensive mistakes. If you do not understand how the investment works (including the purported tax benefits), keep your money for another opportunity - which will certainly come along.

Over the past decade, the spotlight has been on two major Ponzi schemes - Bernie Madoff who attracted $65 billion from his investors over a 20 year period and Allen Stanford whose investors entrusted him with $8 billion over a decade. However, most "scammers" do not run operations of that magnitude and NEVER call them Ponzi schemes. Most of the time, they seem that "regular" investments that are doing consistently well. Many people unwittingly invest in Ponzi schemes (which are more prevalent than one might think), trusting others to conduct due diligence and to continue monitoring the investment.

R.P. McCabe and 700 others invested in excess of $100,000,000 in a real estate investment. McCabe, who lost $1 million (most of his life savings), reports that his wealth management company steered him toward the investment which paid off in the 10 to 12% range after about four years. The investors later discovered that the financial statements were phony and that

distributions were not profit based but represented funds collected from new investors as well as the capital of current investors.

After becoming aware of the loss at age 65, McCabe fell into a "deep psychological depression" which destroyed his 34 year marriage. Taking control of his life after months of therapy, he decided to write a novel with a theme of financial fraud. In the course of researching Betrayed, he interviewed 200 of the 700 victims about how the scam changed their lives. He reported that "Suicide is very common after financial fraud has been committed…The psychological impact for a lot of us was a deep shame and self-recrimination that we should have seen it coming. The thing is, we weren't investing in something sketchy. The investors here were not overreaching with some get-rich-quick scheme like a promise of a 25 percent return on something in some banana republic." 1

[1] Michele Lerner, December 4, 2012 6:00AM, "Life After a Ponzi Scheme: Victim Turns Million-Dollar Loss into Literature" http://www.dailyfinance.com/2012/12/04/ponzi-scheme-victim-turns-loss-in-book/

RETIREMENT - SAVING & OTHER CONSIDERATIONS

"The trouble with retirement is that you never get a day off."

- Abe Lemons

While retirement may ultimately lead to bliss (or so we think), the process, transition and adjustment can be a tough road. The Holmes Rahe Stress Scale[1] rates 43 stressful life events by assigning them "life change units". Retirement is tied for ninth (along with marital reconciliation) on the stress scale, having earned 45 units out of 100.

Increased stress is bound to occur if the retiree has not established a financially comfortable retirement. This chapter focuses on the overall personal economic considerations that must be examined in the course of making retirement or "retirement" plans. Even those who believe they will "die with their boots on" should make contingency plans just in case circumstances prevent the attorney from earning a livelihood.

Where to Live

Attorneys who retire or rewire may neither need nor want to continue living in their present location. The desire to move can be heightened when children scatter and friends and family flee to faraway places. Before making the life altering decision to abandon "home", it is wise to ensure that all relevant factors have been considered. Both personal and financial aspects are relevant; however, ensuring that the new environment satisfies lifestyle issues is first and foremost. Voluminous up to date information can be obtained by googling the phrase "best places to retire". Hours of reading material covering pertinent areas such as climate, crime rates, access to quality medical care and public transportation as well as cultural facilities is available.

Once attractive options are identified, the financial and legal implications of making a move must be analyzed. Many are motivated to move to another part of the country to save on housing costs. Lower prices can also be found close by. For example, home sale prices in Washington, D.C. rose 110 percent to an average of $940,992 in 2010 while prices in St. Charles, Md. (a suburb

[1] "Holmes – Rahe Stress Inventory", The American Institute of Stress, 2013. http://www.stress.org/holmes-rahe-stress-inventory/

27 miles outside of D.C.) plummeted 46 percent to an average of $245,191 during the same period2.

In addition to its potential impact on cost of living, changing domicile can affect income, estate and gift tax liability, the availability of government benefits as well as a myriad of other legal rights. A thorough study of germane information would be a wise investment of time. The website maintained by Retirement Living Information Center ("Center") is an excellent resource geared toward seniors. Notably, a section is devoted to a state by state comparison of Sales, Personal Income, Inheritance and Estate Tax rules and rate structures3. For example, homeowners shouldering crushing property tax burdens in their locale are advised to explore the Tax Foundation's website which publishes specific figures with respect to property tax paid by households on owner-occupied housing in all 793 U.S. counties with populations exceeding 65,000. Follow this link for rankings by amount of property taxes paid: http://taxfoundation.org/article/property-taxes-owner-occupied-housing-county-ranked-property-taxes-paid-2007-2009-3-year-average. Follow this link for rankings by taxes as a percentage of home value: http://taxfoundation.org/article/property-taxes-owner-occupied-housing-county-ranked-taxes-percentage-home-value-2007-2009-three-yearhttp://taxfoundation.org/article/property-taxes-owner-occupied-housing-county-ranked-taxes-percentage-home-value-2007-2009-three-year Military retirees may be drawn to states imposing no income tax on their retirement pay - also listed on the Center's website.

Those who own property in more than one state may wish to re-establish domicile in what has been treated, up until now, as the second (or even third) home. Each state's criteria with respect to establishing domicile can vary and should be thoroughly investigated and carefully followed. The abandoned state will not be so quick to relinquish coveted income and estate tax revenues.

In general, "domicile is a common law term meaning a person's fixed and permanent place of abode in which the person intends to remain indefinitely or to which the person intends to return. See Dep't of Rev. v. Glass, 15 Or. Tax 117 (2000). See also Black's Law Dictionary 558-59 (9th ed. 2009). Materials from a recent ABA Section of Taxation and Section of Real Property

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[2] Brandon, Emily, "10 Bargain Retrirement Spots", US News, Money; Retiremet, Februry 22, 2011. http://money.usnews.com/money/retirement/articles/2011/02/22/10-bargain-retirement-spots

[3] "Retirement Living Information Center, Taxes by State", 2013. http://www.retirementliving.com/taxes-by-state

Probate Law, Trust Estate Division program "Home Is Where Your House Is, Or Is It? Personal Income Tax Issues Related to Residency Domicile" contains a comprehensive legal analysis of the issue of determining domicile[4].

Moderator: Stewart M. Weintraub. Panelists: John H. Gadon, Debra S. Herman and Felicia S. Hoeniger. October 21, 2011 (Quotes on p. 2)

Example: Jonathan and Suzanne sell their law firm in New Jersey and decide to explore their options during the four year "buy out" phase. They agree to spend the first winter in their vacation condo in Florida and ultimately stay for ten months straight, wanting to test out the summer heat. In the meantime, they continued to maintain their brokerage and bank accounts, safe deposit boxes, driver's licenses in the Garden State which is listed as state of residence on their passports. Their many ties to the state shows the lack of intention to leave the New Jersey domicile permanently.

How Much to Save

Numerous online calculators designed to determine the amount an attorney needs to save in order to have sufficient retirement income. Dinkytown's website has a number of calculators that can provide projections and make recommendations with respect to savings goals based upon innumerable assumptions. Among my favorites are: (1) Retirement Income (http://www.dinkytown.net/java/RetirementIncome.html); (2) Retirement Nestegg (http://www.dinkytown.net/java/RetirementNestegg.html) (3) Retirement Planner with Retirement Earnings (http://www.dinkytown.net/java/RetirementPlan4.html); and (4) Retirement Shortfall (http://www.dinkytown.net/java/RetireShort.html).

Before using any of the tools, it is first necessary to assess the present reality and outline concrete intentions about the future so that the Retirement Plan will be based upon realistic assumptions. The objective is to be positioned with a lifetime of post retirement income sufficient to maintain the desired lifestyle. The Dinkytown website outlines the information that

[4] "Home is Where Your House Is, or is it? Persona Income Tax Issues Related to Residency Domicile", American Bar Association Section of Taxation and Section of Real Property Probate Law, Trust Estate Division. October 21, 2011, Denver, Colorado. http://www.americanbar.org/content/dam/aba/events/taxation/taxiq-fall11-weintraub-home-paper.authcheckdam.pdf

must be input in order to determine whether the investor is on track for retirement. By the way, many other online calculators will perform the same functions.

Of course, assumptions such as rate of inflation and rate of return on investment are impossible to predict with certainty and change frequently. The analysis should be repeated annually so that adjustments can be made along the way to take into account changes in the economic picture. Yearly reviews also hold an investor accountable with respect to savings goals.

Investors normally shift investments to a more conservative mode after retiring since the ability to “ride out the market” is no longer intact. However, financial advisors generally agree that including investments with some growth potential will reduce vulnerability to inflation. A financial advisor can advise with respect to the appropriate asset allocation and diversification at various life stages.

Attorneys of all ages will benefit from participating in the Retirement Plan process and it is never too late to get started. This is the time to face reality no matter the state of the lawyer’s current financial position. Indeed, young attorneys who start contributing to a retirement plan TODAY will have a significantly more secure and comfortable retirement than those who wait until age 60 to begin this process. However, even those who have accumulated less than desirable amounts based on age attained can still create a secure retirement although adjustments will need to be made with respect to current spending/saving behavior. Expectations regarding number of years to be worked and lifestyle may also need to be modified. "Delaying retirement is often viewed as the surest route to financial security in old age," according to the Urban Institute, a Washington think tank. "By working longer and earning more, older workers can accumulate additional Social Security, boost savings, and shrink the period their retirement savings must fund”"/>5.

Some attorneys aren’t ready to leave the work force (for financial or emotional reasons) but would like to pursue another career path. Those who have accumulated enough wealth to retire completely may wish to continue working simply because they like to make positive contributions. Others need to work for economic reasons and will rely on income earned after

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"/>5 Moeller, Philip, “Best Retirement Plan: Work Longer”, MSN Money, April 23, 2013. http://money.msn.com/how-to-budget/best-retirement-plan-work-longer

"retirement" to supplement the retirement fund already accumulated. Beginning a savings program at a young age will provide a foundation for a career change if that is within ones vision.

How Much to Withdraw After Retirement

The amount to withdraw from the investment portfolio after retirement can present a thorny problem unless, of course, the retiree has accumulated a handsome investment portfolio that could not possibly be depleted. The objective for the rest of us is to achieve that delicate balance of supporting the desired lifestyle without running out of money.

Under the 4% rule[6], a retiree who withdraws 4% of the portfolio in the first year of retirement and thereafter, withdraws that first-year dollar amount and increases that figure annually to account for inflation will not outlive his or her savings. Although this strategy has worked quite well since it was developed in the nineties (so long as an appropriate balance of equities and bonds is maintained), many in the financial climate of 2013 have rejected this approach in light of the currently low bond interest rates and uncertain economic conditions that have plagued us over the past few years.

Retirees invested in low yield investments and those with longer time horizons will need to adopt a conservative approach in determining withdrawal amounts and are well advised to re-evaluate their strategy on an annual basis. A "one size fits all" approach does not work because each situation differs. A chart known as the "Magic Triangle"[7] is a low-tech method to calculate how much money will last depending on its rate of return and annual withdrawal rate. The tool's drawback is that it does not take into account inflation or taxes.

As discussed in Part Two, Section Two, those with qualified retirement plans must comply with the Required Minimum Distribution rules.

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[6] Greene, Kelly, "Say Goodbye to the 4% Rule", The Wall Street Journal, Updated March 1, 2013. http://online.wsj.com/article/SB10001424127887324162304578304491492559684.html?KEYWORDS="kelly+greene"

[7] "Retirement – The Magic Withdrawal Triangle", Fire Finance, November 17, 2011. http://firefinance.blogspot.com/2007/01/retirement-magic-withdrawal-triangle.html

Social Security Benefits (Old Age and Survivors)

Social Security retirement income8 is available in most circumstances to those who have reached the age of 62 and are fully insured which requires at least 40 earned credits during the earner's years of work. Spouses may be entitled to spousal benefits based upon the earner's work history. Both spouses and children may be entitled to survivor's benefits.

The age at which Social Security is first drawn impacts the amount of the monthly benefit permanently for both the earner and his or her survivors. Currently, 100% of the benefits are available to those who begin drawing at normal or full retirement as determined by year of birth in accordance with the schedule reprinted below. Those opting for "early retirement" at age 62 will receive as much as 30% less per month while people who retire after their normal retirement date receive a "delayed retirement credit" which stops accruing upon attaining age 709. An estimate of benefits (based on different retirement dates) can be obtained by setting up a password protected account at the website My Social Security10. Individual earnings records are available as well and should be checked for accuracy.

The Social Security Administration (SSA) provides an additional online calculator that allows computation of the financial impact of early or delayed retirement (same webpage). The SSA's Detailed Calculator provides a more accurate estimate since it has the ability to factor in the actual earnings record.

Source: ssa.gov.

It may be wise to wait until age 70 to draw benefits because of the significant increase in the monthly benefit. However, if someone needs the money to make ends meet, perhaps is in ill health or has other unique circumstances, it can make sense to begin taking benefits at an earlier age. Social Security recipients earning income (as an employee or through self employment) in addition to their benefits may suffer a reduction in the benefit amount if under normal retirement age. Earnings up to $18,960 in 2021 do not reduce the benefit amount. However, benefits are reduced by $1 for every $2 of income above $18,960 for those who haven't reached

Age To Receive Full Social Security Benefits

(Called "full retirement age" or "normal retirement age.")

Year of Birth*	Full Retirement Age
1937 or earlier	65
1938	65 and 2 months
1939	65 and 4 months
1940	65 and 6 months
1941	65 and 8 months
1942	65 and 10 months
1943--1954	66
1955	66 and 2 months
1956	66 and 4 months
1957	66 and 6 months
1958	66 and 8 months
1959	66 and 10 months
1960 and later	67

**If you were born on January 1st of any year you should refer to the previous year. (If you were born on the 1st of the month, we figure your benefit (and your full retirement age) as if your birthday was in the previous month.)*

full retirement age. After reaching full retirement age, the amount of earnings will not affect the Social Security amount.[13]

[13] "How Work Affects Social Security Retirement Payments", Social Security, July 5, 2013. http://ssa-custhelp.ssa.gov/app/answers/detail/a_id/236/~/how-work-affects-social-security-retirement-payments

Social Security benefits are subject to taxation if the taxpayer has other sources of income including wages, self-employment income, distributions from IRAs or other QRPs, interest, dividends and pension income. The rules are detailed in IRS Publication 915. Worksheets and examples are provided as well. Individuals whose other income is between $25,000 and $34,000 may be subject to taxation on up to 50 percent of the benefits while those with income that exceeds $34,000 may be subject to taxation on up to 85 percent of the benefits. Couples filing a joint return with a combined income* between $32,000 and $44,000 may have tax liability with respect to up to 50 percent of the benefits while up to 85 percent of Social Security benefits may be taxable to the extent other income of a couple exceeds $44,000. Those married and filing a separate tax return will most likely pay taxes on a portion of the benefits.

According to the Commissioner of SSA: "Without changes, in 2033 the Social Security Trust Fund will be able to pay only about 75 cents for each dollar of scheduled benefits." Consequently, it makes sense to reduce the current estimate by 25% when projecting available future income for retirement planning purposes. While it is unlikely that the Social Security program will be scrapped in our lifetimes, the benefits are meager and support only a minimal standard of living - which is what people are relegated to who do not plan ahead to supplement it with other sources of income.

Tax Qualified Plans

BACKGROUND

A number of tax-favored vehicles are available for those who wish to take charge of saving for their own retirement. Individuals can set up plans on their own by establishing one of the types of Individual Retirement Accounts (IRAs) discussed below. Qualified Plans established by employers can be quite attractive for both the law firm employer and employee.

The concept is that "before tax" income is contributed to the plans. In other words, the Participant (or the employer contributing to an employee retirement plan) is entitled to a tax deduction for amounts contributed. Gains on investments in the account grow tax-free. When

funds are distributed from the account, the distribution is included in the taxable income of the Participant or employee. Since tax is ultimately paid, the plans are often referred to as tax deferred plans.

Some investors shy away from qualified plans, choosing to invest their money elsewhere. One commonly cited reason is a loss of flexibility with respect to choice of investments. Accounts are not permitted to invest in (a) antiques and collectibles (with a few exceptions); (b) llfe insurance; (c) most derivative instruments; (d) real estate that offers benefit to the Participant (i.e. home or rental income) Furthermore, trustees of particular plans are permitted to impose stricter restrictions. For example, many do not permit acquisition of any type of real estate by a plan. An investor whose strategy depends solely on the above investments may be wise to steer away from IRAs so long as analysis shows that the loss of the tax benefit will not be outweighed by the growth of the investment on a non-qualified basis. A number of online tools (cited below) are available that will assist with that analysis.

EMPLOYER PROVIDED PLANS

Three major types of employer sponsored plans are named after the provisions in the IRC under which the plans are statutorily established: Sections 401 (k), 403 (b) and 457 (b) Profit sharing plans are also offered by some employers.

A 401(k) plan is the appropriate vehicle in the law firm setting and can be funded by pre-tax employee salary deferrals and/or employer matching contributions. (Note that Roth 401(k)s, discussed below, are funded with post-tax earnings.) Employers are not required to "match" and the level of employer generosity varies. Most importantly, if the employee does not elect to defer, the employer will have nothing to match - resulting in no contribution whatsoever.

The 2021 401(k) contribution limit is $19,500 in elective salary deferrals in addition to "catch-up contributions" of $6,500 for participants' age 50 or older.

While an employee switching jobs is entitled to the entire portion of the 401(k) representing salary deferral, she is vested in the matching contributions only to the extent provided under the plan rules. The employee's choices upon departure are: (a) withdraw the funds and suffer a hefty tax liability, (b) rollover the funds to a plan maintained by a new employer or into an individual IRA, (c) keep the funds with the current employer - if permitted under the plan.

Distributions must begin by April 1 of the calendar year after reaching age 70½ unless the taxpayer is still working. The "still working" exception applies only to the current plan in which he or she is participating and is not available if the account holder is a 5% owner of the business sponsoring the retirement plan. Depending upon the terms of the plan, loans may be permitted against 401(k) funds.

457 (b) retirement plans are similar to 401(k) plans but are offered by state and local governmental entities as well as 501(c)(3) qualified charitable organizations. Also similar are 403 (b) plans (also referred to as Tax Sheltered Annuities) offered to employees of public schools, other specified tax-exempt organizations as well as certain ministers.

ROTH 401(k)

Conceptually the same as a Roth IRA, Roth 401(k)'s are plans established by employers as a vehicle for employees to make "after tax" contributions to an account that enjoys tax free growth and is not subject to income tax upon distribution - in most cases. The same factors used to determine whether to convert to a Roth IRA apply with respect to participation in a Roth 401(k). 14

Employees of all income ranges can contribute a maximum of $19,500 in 2021 with a catch-up contribution in the amount of $6,500 available to those 50 and older. Upon leaving the employer, the employee has the option of rolling the account balance into a Roth IRA or into a Roth 401(k) maintained by the new employer.

Employer Sponsored Plans

Three major types of employer sponsored plans are named after the provisions in the IRC under which the plans are statutorily established: Sections 401 (k), 403 (b) and 457 (b) Profit sharing plans are also offered by some employers.

A 401(k) plan may be an appropriate vehicle in the law firm setting and can be funded by pre-tax employee salary deferrals and/or employer matching contributions. (Note that Roth 401(k)'s,

[14] "A Look At 401 (k) Plan Fees", United States Department of Labor, Revised October 2010. http://www.dol.gov/ebsa/publications/401k_employee.html

discussed below, are funded with post-tax earnings.) Employers are not required to "match" and the level of employer generosity varies. Most importantly, if the employee does not elect to defer, the employer will have nothing to match - resulting in no contribution whatsoever.

The ongoing administrative fees and expenses associated with a 401(k) or profit sharing plan should be examined carefully before establishing the plan with a professional or financial institution. This inquiry should include questions about costs associated with termination of a 401 (k) and/or profit sharing plan. Personal experience revealed that the costs can be quite hefty.

The following example provided by the U.S. Department of Labor illustrates the potential impact of costs on the account balance:15

"Assume that you are an employee with 35 years until retirement and a current 401(k) account balance of $25,000. If returns on investments in your account over the next 35 years average 7 percent and fees and expenses reduce your average returns by 0.5 percent, your account balance will grow to $227,000 at retirement, even if there are no further contributions to your account. If fees and expenses are 1.5 percent; however, your account balance will grow to only $163,000. The 1 percent difference in fees and expenses would reduce your account balance at retirement by 28 percent."

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PLANS DESIGNED FOR SMALL BUSINESS

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[15] "A Look At 401 (k) Plan Fees", United States Department of Labor, Revised October 2010. http://www.dol.gov/ebsa/publications/401k_employee.html

Solo practitioners and partners in small firms wishing to maximize involvement in tax deferred plans are encouraged to explore the features of a SEP IRA and SIMPLE plans. Because they are less burdensome than 401(k)'s and profit sharing plans from an administrative point of view, the maintenance costs are generally quite reasonable. A perceived disadvantage is that employers may be required to make contributions on behalf of employees. Another perspective is that providing an attractive benefit package will not only attract top talent but will serve as a retention feature as well.

Information about IRS rules governing SEP IRAs and SIMPLE plans can be found in IRS Publication 560: Retirement Plans for Small Business (SEP, SIMPLE and Qualified Plans).

INDIVIDUAL RETIREMENT ACCOUNTS

The main reason that Congress permits deferral of taxes, in the context of tax favored retirement plans, is to encourage savings for retirement and not to provide benefits to the beneficiaries after the death of the participant in a plan. The minimum required distribution (MRD) rules found in sec. 401(a)(9) of the Internal Revenue Code are structured to limit the deferral of taxation on retirement plan benefits, by forcing plan withdrawals.)If the MRDs are violated, a 50 percent excise tax is imposed on the amounts that should have been distributed to the participant or the participant's beneficiary.

The following question-answer format is designed to provide an introduction to the basic issues in this area and is by no means intended to be a comprehensive discussion of this extraordinarily complex topic.

NONDEDUCTIBLE IRAs

Nondeductible Traditional IRAs are available for those ineligible to establish a deductible Traditional IRA. While no tax deduction is available for contributions, the funds grow on a tax-deferred basis. The taxpayer's income must be equal to or exceed the amount of the contribution which is limited to $6,000 through age 49 and $7,000 for those turning age 50 by the end of the taxable year. Income is taxed at the time of withdrawal.

ROTH IRAs

Roth IRAs present an attractive planning opportunity for passing plan benefits to heirs and can also be advantageous to those whose post retirement tax bracket remains high.

Features that distinguish Roth IRAs from traditional IRAs are (a) No deduction is allowed for contributions; (b) Contributions can be made at any age; (c) The absence of an MRD requirement during the Participant's lifetime; (d) Qualifying distributions are not subject to income tax; and (e) Ability to participate even if covered under an employer provided plan - without regard to income levels.

The contribution limit for 2019 is $6,000.00 except for taxpayers age 50 and over who are eligible to make an additional catch-up contribution in the amount of $1,000 in 2019 for a total of $7,000.00. Contribution limits, as set forth in the following chart, are income based.

Direct Contribution

The tax code requires a Participant to have earned income (or to file a joint return with a spouse who does) to be eligible to contribute in a given year. Contributions can be made up until the due date of the tax return due date (i.e. April 15, 2022 for 2021 contributions).

The contribution limit for 2021 is $6,000.00 except for taxpayers age 50 and over who are eligible to make an additional catch-up contribution in the amount of $1,000 in 2021 for a total of $7,000.00. Contribution limits, as set forth in the following chart, are income based.

A strategy for those whose income exceeds the threshold is to contribute to a nondeductible traditional IRA and immediately convert the account to a Roth IRA. A tax advisor should analyze the effects of this strategy before its implementation.

No minimum age requirement is imposed for establishing a Roth. Furthermore, parents or grandparents (or anyone else for that matter) can make a contribution on behalf of a child up to the amount of his or her earned income. If the child continues to contribute and does not make withdrawals, the amount that will accumulate is astonishing.

Distribution Rules

Qualified distributions may be made tax-free from a Roth IRA so long as the following two-prong test is met:

(A) The distribution is (1) made on or after the date when the individual attains age 59 1/2; (2) made to a beneficiary on or after the death of the account holder, (3) attributable to permanent disability; or (4) made for payment of qualifying first-time homeowner expenses; and

(B) The distribution is made after the end of the five-year taxable period that begins with the first taxable year for which an individual first makes any regular or conversion contribution to a Roth IRA.

Practice Considerations - Retirement

SELLING A NICHE PRACTICE

by Cynthia Sharp, Esquire

A Word From the Author

This topic is right up my alley since I have built and "sold" interests in two niche practices during the course of a 28 year career as a practicing attorney. The first focused on the area of consumer bankruptcy while the most recent focused on estate planning and elder law. In both circumstances, I was compensated for the value of my interest in the practices have continued to operate with apparent success after my departure.

Lawyers are steeped in the long tradition of simply "winding down" practices, essentially abandoning a valuable asset. Indeed, as pointed out by Michael Gerber, "..most legal practices are jobs for the attorneys who own them3." This paradigm survives in large part because of continued outdated attitudes, lack of training in business principles and the scarcity of guidance as to the sales process.

Indeed, the concept remains in its nascent stages even though Model Rule of Professional Conduct 1.17 established the ethical requirements for the sale of a practice over 30 years ago. Regulators in other parts of the world are yet more progressive. Even non-lawyers have been permitted to purchase law practices in Australia since 2007 and in the U.K. since 2011.

In writing this chapter, I hope to demonstrate to niche practitioners (if not general practitioners) that with the right mindset, education, effort and commitment, a law practice can be built to sell. In order to provide a broader perspective of the reality of the marketplace, I interviewed

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3 Michael E. Gerber, Robert Armstrong, J.D. And Sanford M. Fisch, J.D.; *The E Myth Attorney: Why Most Legal Practices Don't Work and What to Do About It* (John Wiley & Sons, Inc., Hoboken, New Jersey, 2010)

attorneys and other professionals who have been involved at some level in the sale of a law practice and thank each of them for openly sharing their experiences[4].

Unique Qualities of a Niche Practice

Readers of this chapter are most likely either already practicing in a niche area or thinking about it. Some attorneys prefer a general practice, enjoying the variety available in that arena. Also, the ability to offer a multitude of services is a perceived benefit since one client may hire the firm for more than a single case.

For me, the advantages of a niche practice outweighed any downsides. Adhering to the decision to accept only certain types of cases was sometimes difficult - especially when potentially lucrative matters outside my chosen field presented themselves. However, the commitment to a "specialty" yielded both short term and long term professional, personal and financial satisfaction.

In recognition of the prevalence and potential benefits of niche practices, the ABA Solo, Small Firm and General Practice Division devoted the March/April 2013 issue of GPSolo (Volume 30, Number 2) to the topic. In his article "Building a Niche Practice: Go Small to Go Big", Jeramie Fortenberry recognized that a practice can be focused by legal area, demographics or both. The defining characteristic is that "...in each case, the practice is focused on a distinct market segment."

This brings us to a distinguishing characteristic of a focused practice: the ability to build a clear cut brand for purposes of client attraction. Becoming the "go to" attorney in a niche area increases the number of referrals. Targeted relationships with potential referral sources are easier to develop. For example, a therapist is more likely to send a client to an attorney with a focused matrimonial practice than to a generalist. In addition, attorneys not practicing in your field can become your most valuable source of new business. Competitors will refer conflict cases and less

[4] This chapter reflects perspectives of the following professionals:

- Jan Copley (Practice Building Consultant - Atticus, Inc.)
- Roy Ginsburg, J.D. (Attorney coach)
- Cammie Hauser (Senior Practice Advisor - Atticus, Inc.)
- Ed Poll (Coach and law firm management consultant)

The American Academy of Estate Planning Attorneys (AAEPA) graciously arranged for me to conduct a group interview with the following members of the organization who had either bought or sold a practice:
Larry Deason, Geoff Garrett, Mike O'Brien, Paul Kraft and Colleen Prosser. Co-founders Sanford Fisch and Robert Armstrong were also interviewed. I also acknowledge the attorneys who agreed to be interviewed but did not want their identities revealed.

experienced attorneys in your area of practice will refer the complex cases (if you have proved your abilities). Lawyers and judges alike will have the confidence to retain you for their own needs and to refer their family members besides.

Some who claim to be niche practitioners are really operating a general practice firm. Time and time again, attorneys claim to be "specialists" when they really take any case that comes in the door. For example, consider this all too common example of an ill defined and watered down brand: The lawyers of a 3 attorney firm who claim to be "specialized" list on the home page of their website nine distinct practice areas (including family law litigation, bankruptcy, legacy planning and mergers and acquisitions) and 34 types of cases they handle. Will a potential client or referral source believe this to be a niche firm?

A narrowly defined practice allows an attorney to develop a breadth of knowledge in the chosen arena which leads to greater earning power. Most people are willing to pay higher fees to lawyers with mature levels of expertise. It was rare that a client did not retain my firm for a matter on the basis of fee structure. In addition, niche practitioners have many opportunities for intellectual challenge because of the complexity of issues that are referred to those who commit themselves to go narrow and deep within their field.

These unique features of a focused practice lead to one final advantage that is normally overlooked: they are more attractive than a general practice when the attorney lists them on the market place for sale. After all, they are easier to brand and systematize. While general practices can be sold, I have no information regarding such transactions. Every sale that has been brought to my attention has been the sale of a niche practice. This does not mean that all niche practices can be sold - only those that have been run as a business. Furthermore, almost all practices listed for sale on the internet are focused. Check it out yourself by googling "law practices for sale".

Getting the Practice Ready to Sell

Some business owners wait until the brink of sale to organize the financial and business records for the benefit of the buyer's eyes. This scenario usually occurs when a seller must sell quickly because of a decline in health, upcoming move or outside opportunity such as a judgeship. Needless to say, "desperation sales" do not generate the optimum financial results.

However, structuring and running a law practice as an efficient business from the inception will not only enhance its marketplace value but will also contribute to a significant increase in profits along the way. According to Sanford Fisch, "the owner of a law firm is well advised to begin the process of building the practice to sell from the day the firm opens its doors. Every step you take should be geared with the end in mind."

That being said, it is never too late to get a practice ready to sell. The business coaches interviewed all agreed that a lengthier time frame will allow for the creation of more value particularly if the attorney is entrepreneurial. Historically, attorneys who approached their practices with a business mindset were considered unprofessional. Now, many state bar associations and even law schools offer practice management training. Lawyers seeking a more intense and customized experience in this area may wish to consider hiring a business coach.

The person at the helm needs to pay constant attention to the firm's finances - always working toward a healthy bottom line. Creating a business plan that is periodically reviewed and revised to reflect changing times will certainly be a contributing factor to success. Familiarity with the impact of Key Performance Indicators (KPIs) on the bottom line will guide law firm leaders in the strategic planning process.

Most profitable law firms share the following common characteristics: (1) Functioning marketing plan and commitment to improving rainmaking capability; (2) Highly leveraged from a technological and/or staff point of view. (3) Practice management infrastructure including staff and standard operating procedure manuals, organization charts as well as fee agreements and financial, billing and budgetary processes; (4) Infrastructure for efficient delivery of legal services which includes checklists, form banks and step by step instructions.

Niche practices, in particular, lend themselves to a streamlined knowledge base and systems for delivery of legal services. Non-lawyer staff members can handle a significant amount of the day to day work with proper training and up to date manuals. The lawyer's enhanced leveraging capability results in higher profitability. However, strong attention should be paid by all lawyers to MRPC 5.3 relating to a lawyer's responsibility regarding non-lawyer assistants.

LINING UP A TEAM

Whether you opt to sell to a "home grown" buyer or to list the practice in the marketplace, consider consultation with and possible retention of professionals to assist with the transaction. Some have the skills and expertise to function in multiple roles and can assist with a number of issues including valuation, ethical considerations and locating a buyer. They will also bring an objective perspective to the table. It is unlikely that you will find many seasoned local veterans who can claim to have handled a significant number of these transactions. The industry is simply too new and until now, most lawyers have just walked away instead of capturing value (i.e. getting paid).

The following is a general description of expertise you may consider:

Certified Public Accountant

Any transaction with potential tax implications requires the services of an experienced certified public accountant (CPA). Even those attorneys with strong tax and/or accounting backgrounds will benefit from another set of eyes to ensure that issues are not missed. Hopefully, your firm has used an accountant all along already familiar with the financial status of the business.

The CPA should ensure that the books are in order and prepare financial documentation to share with other professionals you hire and ultimately to present to the potential buyer. At a minimum, the CPA will need to prepare the following:

- Current profit and loss statement
- Schedule of all firm assets with appraisals (where appropriate)
- Asset and liability statement
- Statement regarding actual or potential claims against the firm
- Accounts receivable aging statement
- List of active cases
- List of equipment, furniture and fixtures
- List of real estate owned by firm (if any) along with a current appraisal
- Chart of accounts reflecting annual expenditures and dates due
- Firm's quarterly and monthly budget including expenses, accounts and notes payable

- Copy of all leases
- Bank statements (both business and trust)

Your CPA will explain the tax consequences of the transaction and can help with its structure. Therefore, he or she should be consulted prior to inception of serious negotiations.

Law Firm Management Consultant

A law firm management consultant with experience in the sale of a niche law practice can prove valuable. However, note that consultants don't all work alike and it is to your benefit to interview more than one to ensure comfort level with style of operation. The role that the consultant will play and the method of compensation should be clarified up front - in writing.

Business Valuation Expert

A third professional to assist in the sale of your practice is a business evaluator who will provide an opinion as to your practice's value. Whether valuation of a practice is an art or a science is a subject of great debate. Most of the individuals interviewed for this chapter did not believe that a valuation expert plays a useful role in the sale of a small practice. This topic is discussed in more detail in the Valuation section below.

Business Transaction Attorney - Lawyers frequently save money on professional fees (in the short term at least) by tending to their own legal affairs. Easy access to forms as well as other attorney/ friends who readily offer free guidance (even without fully analyzing the case) has lead more than one down the road of self representation. Before making this move, consider the following: 1. You are not competent because you've probably never negotiated or drafted a contract for the sale of a practice. 2. Accepting this matter would violate the basic tenet of a niche practice which is "to refuse cases outside of the area of focus the firm's focus". 3. Always keep in mind the following famous quote courtesy of Abraham Lincoln: "He who represents himself has a fool for a client". 4. As John Ventura put it: "It is important that this attorney has past experience in the sale of niche law practices and knows the future problems that could come up after the sale takes place."

STRUCTURING THE TRANSACTION

Where's the buyer?

The successor to your firm may be a "stranger" or may be "home grown". While some rely on a consultant to locate a qualified external buyer, most lawyers interviewed for this chapter (whether selling to an internal or external source) found their own buyers in the local legal community, sometimes through an introduction by the firm's accountant.

Possible outside buyers include new lawyers, those leaving big firms or other legal positions, and competitors wishing to increase their practices while eliminating competition. For example, Geoff Garrett was in his mid fifties when he decided to start a private practice after devoting his legal career to the airline industry. He was attracted by the turnkey operation and well oiled machine developed by his predecessor and has successfully "stepped into" a volume practice. Mike O'Brien, having practiced in a large firm, had built a respectable practice but wanted to "supercharge" the growth of his business. Purchasing an established practice in his field and locale instantly added 30% to his volume which has been consistently sustained.

If you aren't ready to rewire/retire immediately but wish to plan for a future sale, an option is to develop your own successor from lawyers who work for you or to cultivate a buyer by bringing him or her into the firm. One advantage to this approach is that the purchasing attorney has been fully trained in those very processes that made your firm a success which increases the likelihood that the culture will continue.

However, Business Coach Roy Ginsburg offers another point of view: "(a) better solution is to find an experienced fellow-solo with some capacity to grow, or another law firm with an experienced practitioner or practice group that would like to expand. One potential problem with the "grow your own successor" approach is that your "heir apparent" may leave prior to culmination of the deal - having already benefited from your training as well as exposure to systems and may steal clients as well.

Thomas D. Begley, Jr. observed that unless the buyer is "home grown", there is no guaranteed recurring income stream. Also, the barriers to entry are low which allows potential buyers to just set up shop in competition with the seller.

Valuation

The classic definition of fair market value, as set forth in IRS Revenue Ruling 59-60, provides the foundation for determining how much you will receive for your practice: "The amount at which the property would change hands between a willing buyer and willing seller, when the former is not under any compulsion to buy, and the latter is not under any compulsion to sell, both parties having reasonable knowledge of relevant facts.[5]"

The starting point for valuing other types of professional service practices (such as accounting and medical practices) can be relatively straight forward since comparables are readily available. The same does not hold true for the sale of law practices since significant hard data has not yet been compiled. In addition, the standards applied to reach the ultimate value of a traditional law practice should differ from other professional service businesses in light of the disparities in the business models. For example, doctors, dentists and accountants rely on repeat "business" from the same client or patient while most attorneys - until now - have neither designed nor implemented client maintenance programs designed to attract additional cases or referrals from their existing clientele.

It appears that the two prevalent valuation methods in this arena are known as "fixed price" and "earn out". Under the fixed price approach, the parties negotiate a set figure generally based on past earnings and further agree to the length of the note and rate of interest. An "earn out" generally involves payment from the buyer to the seller of a fixed percentage of the firm's revenue over a given period.

One seller related that the buyer paid for a professional valuation that satisfied neither party. Completely disregarding the report, they agreed that the purchase price would be 60% of one year's gross revenue. This is certainly within the bounds of the figures quoted by others which was 40% - 150% of one year's gross revenue. Another buyer related that he paid a multiple of the average of the highest two year's revenues and further relates that he regrets entering into a "fixed price" arrangement. Business Coach Roy Ginsburg refers to the "fixed price" method as "seat of the pants" because the formula is truly based upon guessed estimations. No matter the past revenue, it is virtually impossible to predict future revenue especially when you have a new attorney involved. Business coach Jan Copley points out that "The problem with selling to

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[5] Rev. Rul. 59-60, 1959-1 CB 237

attorneys is that they are usually not entrepreneurial by nature." This viewpoint is supported by a recent post in the Beckner-Posner blog: "The professional model attracts a more studious, intellectual, risk-averse type of person." This leads them to negotiate a buyout price based on an "earn out" whereas the seller will naturally be more secure with a "fixed sum" price. Paul Kraft (who bought out his partner's interest) observed that it would be unusual for an inside buyer to insist on an "earn out" since the purchase should be relatively low risk. Perhaps an inside buyer would insist on an "earn out" if he or she lacked confidence in his or her own abilities to continue the business without the expertise and influence of the departing partner. Kraft further added that the multiple applied under the fixed price scenario in the case of an inside buyer will most likely be lower since he or she most likely helped build the practice[6].

Sanford Fisch suggests a hybrid of the two methods which is best explained by illustration:

Presume that the parties agree that the practice is worth $400,000. The obligation is to be paid over a 4 year period at a rate of 25% of the firm's gross revenue. The note is fully satisfied at the earlier of the expiration of 4 years or at the time the $400,000 is paid off. In other words, if the full $400,000 is paid in a 3 year period, no more payments are due and owing. No further obligation exists after the 4 year period even if the entire $400,000 has not been paid.

In the opinion of Law Practice Management Consultant Ed Poll, "It's generally preferable to settle on a fixed sum, rather than a percentage of revenues. This also prevents ethical concerns about selling client files." He strongly dissuades his clients from selling their practices utilizing the "earn out" method.

No matter the valuation method, the seller has the opportunity throughout his or her career to enhance the value by adopting the "enterprise driven model" as opposed to "personality driven practice model". Robert Armstrong and Sanford Fisch discuss this model extensively in the recent book The E Myth Attorney: Why Most Legal Practices Don't Work and What to Do About It cited in the Resources section below. Cammie Hauser pointed out that "the practice must be positioned so that it runs without you. If you are the value and you leave, the value is gone".

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[6]Becker, Gary and Richard Posner, The Professional versus the Business Model in Law and Medicine—Posner, 12/10/12. http://www.becker-posner-blog.com/2012/12/the-professional-versus-the-business-model-in-law-and-medicine.html

OTHER FACTORS

Practicalities and Negotiating Points

1. A seller should require a buyer to make a downpayment so that both parties have financial "skin in the game".
2. The seller should retain a security interest in future receivables on the outstanding balance owed on the sales price.
3. Digital assets need to be included as part of the package. Colleen Prosser discovered this the hard way after purchasing her deceased father's practice. She was denied access to the firm's domain after the site crashed since the domain name had not been transferred to her.
4. The failure to impose interest where the practice is sold at a fixed price will result in imputed interest by the IRS. The seller will be less than pleased when additional income tax is owed as a result and may use this as a basis for renegotiating the deal.
5. Include an indemnification clause to protect the parties from the negligence of the other.
6. It's probably not wise to sell to an inexperienced attorney particularly if your sales price is determined using an "earn out" formula. An untrained buyer could be doomed to failure. As Mr. Ventura pointed out: "Your firm was probably hired because you were known for being a specialist in your field and had most likely earned a reputation for representing your clients well." It will be tough for a rookie to step into those shoes.
7. The length that the senior attorney stays with the firm after consummation of the deal varies. An external buyer may require a shorter period in order to exert sole control over all aspects of the practice early on. Six to eighteen months seems to be the average range. Transitions from a senior partner to a junior attorney within the firm may last a little longer in light of the working relationship that has been developed. My contract built in a 3 year period during which I remained on a part time basis receiving a declining share of the profits as compensation each year. At the end of the third year,

I had the option to continue with the practice or to leave (which I did). Upon my departure, the 4 year "earn out" period began.

8. Ensure that the written agreement clarified the respective responsibilities for satisfaction of law firm liabilities that remain outstanding as of the departure of the senior attorney. However, bear in mind that even a clear contract does not guarantee that execution will take place in accordance with its terms.

True Story: Law firm owed a debt of $50,000 on an outstanding line of credit when senior lawyer left the firm. As the senior and junior lawyer had maintained a 50/50 partnership, they agreed to split the liability evenly. Wanting to clear the slate, senior lawyer paid the debt in full and junior lawyer (claiming to have no liquidity) agreed to pay his share to senior lawyer at the rate of $2500 per month over a ten month period. Senior attorney's buyout was based on an agreed upon "earn out" formula based on net profits. The buyer treated the monthly payments as an expense of the firm (instead of as a personal expense) which resulted in a reduction in the monthly "earn out" amount paid. As you can imagine, Seller was less than pleased upon discovery of this error and unimpressed with Buyer's mathematical capabilities.

Staff Members

By creating an atmosphere of loyalty, fairness and collegiality, an attorney can attract quality employees who stay for the long term. When selling a firm, it is natural to consider the employment security of key staff members. After all, some have worked side by side with the firm's founder through many business cycles.

However, certain buyers may balk at retaining current staff because of the ability to replace them at a lower cost with less experienced individuals - which would presumably result in immediately larger profits. This attitude would most likely be held by a buyer who regards salaries as an expense instead of an investment in the business.

Because support staff in niche practices are usually highly trained in the narrow specialty of the firm, they are valuable as an experienced workforce in place. In most instances, the staff is already operating well within the firm's infrastructure, having created many of the processes. In addition, they have a feel for the client base, the nature of the practice and the culture of the firm. Their familiarity with efficient delivery of legal services and the status of ongoing matters

certainly makes for a smoother transition. The description of the value of each individual staff member should be presented in detail to potential buyers.

Prospective sellers often wonder when to tell the staff of the intention to leave the practice. A lesson learned from one of my mentors is "How you do anything is how you do everything." If your individual style is one of transparency, you will most likely open up to the staff at an early date - even before finding a buyer. If you are the type who plays close to the vest, you may not announce your impending departure until after the deal is signed, sealed and delivered. Some may hold back the announcement, fearing that staff members will protect their own economic security by seeking employment elsewhere. When the human factor is involved, there is neither an easy nor a clearcut answer.

Ethical Considerations

Model Rule of Professional Conduct (MPRC) 1.17 (adopted by the ABA House of Delegates in February 1990) formally recognizes that attorneys (or their estates) may ethically receive compensation for the sale of a law practice, including good will. Reproduced in Appendix 7-1, the rule sets forth the requirements governing such sales. Since a few states have not adopted the rule, reference should be made to the ethics rules of the relevant jurisdiction to ascertain whether the contemplated transaction is even permitted.

Any sale should be structured in accordance with the version of Rule 1.17 pertaining to the transaction at hand. A chart outlining jurisdictional variations to MRPC 1.17 as adopted by the ABA is reproduced in Appendix 7-2. (appendix http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/1_17.authcheckdam.pdf) The following summarizes high points of the Model Rule and discusses several areas in which states have differed in the rule's adoption.

MRPC 1.17 (a), suggests options that states may choose with respect to limitations on the selling attorney's future ability to practice law. For example, some states require the seller to cease private practice in the state altogether while others allow the seller and buyer to agree on reasonable restrictions regarding the seller's future practice. Since the local rule may greatly restrict future professional opportunities, the selling lawyer should pay close heed to this area.

In specifying that either an entire practice or entire area of practice must be sold, MPRC 1.17 (b) is designed for the protection of clients with less lucrative matters. Otherwise, a purchaser may

restrict the acquisition to matters with the potential to generate high fees. Some jurisdictions require the sale of the entire practice.

MRPC 1.17 (c) outlines seller's obligation to provide written notice to his or her clients of the proposed sale and the client's right to retrieve the file or hire new counsel.

Comment 7 of MRPC 1.17 clarifies that while the confidentiality rules require client consent prior to disclosure of specific information, negotiations between a seller and purchaser do not in and of themselves violate MRPC 1.6.

Oriented toward client protection, MRPC 1.17 (d) prohibits passing the costs of a law firm acquisition to the clients, mandating that "… the fees charged to the client cannot increase solely as a result of the sale…". However, Georgia and Missouri are among the states protecting the purchasing attorney whose fee structure was higher than the selling attorney's. The Model Rule has been expanded in those jurisdictions to provide: "The purchaser may, however, refuse to undertake the representation unless the client consents to pay the purchaser fees at a rate not exceeding the fees charged by the purchaser for rendering substantially similar services prior to the initiation of the purchase negotiations." Minnesota requires the buying lawyer to honor existing fee agreements for a year.

Notably, Comment 14 of MRPC 1.17 provides that "Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this Rule." Therefore, a partner leaving the practice and selling his or her interest to another lawyer in the firm may not be bound by MPRC 1.17 so long as the retainer agreement provided for representation by the law firm as opposed to the individual attorney. As an example, Mr. Ventura did not send a letter to his firm's clients when he left the practice on the following basis: "Although normally you would notify your clients that you sold your business and give them a chance to hire someone else or stay, in my case, since I was selling my name and remaining of counsel to the firm, and since the lawyer buying my practice knew most of the clients already, we did not send a letter to the clients saying I sold the practice. They were told I was retired, which was the truth."

Gratuitous Advice: Many attorneys who claim to be specialists or to specialize in a given area are in direct violation of MRPC 7.4 (d). The rule prohibits a lawyer from stating or implying that he

or she "is certified as a specialist in a particular field of law" unless certified as a specialist by an ABA accredited or state approved organization, the name of which is clearly identified. While applicable to all attorneys, MRPC 7.4 (d) is uniquely applicable in the niche firm setting - whether or not the practice is for sale. Readers are advised to review all marketing materials (including the website) to ensure that the verbiage is ethically compliant. All too often, lawyers fail to scrutinize the copy written by a marketer untrained in the nuances of attorney ethics. It is well established that the responsibility to be ethically compliant cannot be delegated.

Extended Reporting Coverage

Most modern professional liability insurance policies are "claims made" which means that coverage extends only to incidents reported during the policy period. Because attorney errors may not be discovered until years and years after their commission, protection in the form of "tail coverage" should be purchased upon a lawyer's leaving practice. Formally known as "extended reporting coverage" (ERC), the rider is normally procured from the carrier insuring the law firm at the time the attorney departs. The tail coverage can be purchased for periods of one, two, three, five or an unlimited number of years. While the one time premium can be quite expensive (usually a multiple of the last year's premium), the peace of mind will be worth it for most.

In negotiating the terms of the "buy out", the departing attorney should propose that the firm pay the cost of the premium. At the very least, all issues regarding malpractice insurance must be addressed in a written contract.

True Story: Senior attorney left the firm in December (in accordance with the terms of the contract) while the firm's malpractice policy was still in effect. Under the terms of the buy out agreement, the continuing law firm had no obligation to provide continuing liability coverage for the senior attorney. Prior to the time of the expiration of the policy's term the following April, the junior lawyer (who had practiced 10 years) informed senior attorney that he wished to purchase a tail policy with senior attorney. His new liability insurance company would only cover him and the new firm structure on a prospective basis. The application was completed on behalf of both lawyers and the law firm entity under which they had practiced. Junior lawyer related to senior lawyer that he was short of money and would reimburse senior lawyer for half of the

premium if she would advance the funds. Because of their long standing relationship, she trusted him and did so. Most readers have probably guessed the end of the story - the junior lawyer is covered under the ERC policy and has refused to reimburse senior attorney to this date.

Tax Considerations

Tax implications of the terms of the "buyout" contract should be fully analyzed by experienced tax counsel prior to inception of the negotiation process. The economic ramifications of tax clauses can be quite significant. For example, if the "buyout" is structured as an ongoing consulting agreement, the seller will report the payments as ordinary income and the buyer will be permitted a deduction in the year of the payment. Amounts paid for a "covenant not to compete" are likewise treated as ordinary income by the seller but the buyer must amortize the payments over a 15 year period. However, the portion of a sale allocated to "goodwill" is taxed at favorable capital gains rates to the seller and amortized over a 15 year period by the purchaser.

The following true scenario was recently related to me: Senior partner sold his interest in the firm (characterized in the contract as a sale of "goodwill") to junior partner. The contract contained neither a covenant not to compete nor terms relating to future consulting services. The valuation was based on a future "earnout" to be determined pursuant to an agreed upon formula and payments were scheduled to be made on a monthly basis over a 5 year period. At the end of the first year of the payment period, junior's unsophisticated accountant erroneously issued a 1099 to senior. The 1099 was ultimately retracted but only after senior attorney, his accountant and attorney constructed a memo to the accountant and junior attorney educating them as to the IRS position on this issue.

"Begin with the end in mind."

- Stephen R. Covey

The Next Phase

Leaving the full time practice of law involves adjustment on many levels because of the multitude of roles you play in a given day. You serve your clients, often render life changing advice, mentor junior attorneys and staff, exercise your intellectual muscle when faced with challenging issues and make important strategic and impactful decisions.

Lawyers interviewed who have left their firms entirely report relief that the daily stress and pressures that can accompany the practice have been lifted. At a routine physical that took place two years after I "rewired", my doctor looked me straight in the face and said "You look younger. What are you doing?" That said it all for me.

The same lawyers who felt relief also reported on the necessary tradeoffs. An attorney who leaves the practice entirely may experience unexpected emotions including a sense of loss. Many go through a period of "mourning" for the roles that they no longer play and for their old identity. Some miss staff members with whom they forged close bonds as a natural result of time spent together and shared mission. Others simply miss the "thrill of victory" and "agony of defeat" as well as hanging out with other attorneys.

Many lawyers selling their practice would like to continue practicing law on a part time basis for the foreseeable future but want to cut back to pursue other interests or goals. It can be to the advantage of both the buyer and seller for the senior attorney to assume an ongoing "of counsel" relationship - at least for a specified period of time. During that period, the seller can pass the baton to the junior lawyer and condition clients, referral sources and staff members to work with the successor. However, it is absolutely critical to define (preferably in writing) the specific roles of both attorneys during the period of transition.

Another advantage of a transition period is that it affords an opportunity for the seller to plan life's next phase and to set new goals - to the extent that he or she hasn't done so already. Under

most circumstances, the proceeds received from the sale of a small practice will not fully fund a retirement with the lifestyle to which an attorney has become accustomed. Therefore, those who implemented a financial retirement plan early on will usually have more flexibility with respect to their options. Keep in mind, however, that planning the future personal, business and professional life is as critical as the financial aspect.

If your game plan is to have a continuing relationship with the firm, consider the consequences of any contractual dispute which may arise. You may be precluded, as a practical matter, from working with the firm in that eventuality. Both your contract and the version of MPRC 1.17 adopted by your state may entirely prohibit you from practicing in that jurisdiction should you have a future change of heart.

Even those attorneys who are financially able and mentally ready to leave the practice entirely need to have a game plan. Creating a vision and making a plan well ahead of time will help lay a strong foundation for making the shift with ease and with a positive and realistic attitude. If a decline in health or disability is the catalyst for semi or full retirement, the focus obviously needs to be on self care. Otherwise, the opportunities are boundless and you are limited only by your own imagination and courage. Most of the time, you can even go back to practice — if you so choose. For example, Stan Byrd (a seller who was not interviewed) is now working three days a week for the buyer - Geoff Garrett. Jan Copley, who admitted to "flunking retirement" opened a new practice three years after selling the first one.

Whether a lawyer captures value from his or her practice when retiring, rewiring or scaling back is largely dependent on mindset, persistence and consistency. After moving on to the next phase of life, never forget that the wisdom earned from years of experience will serve you well whether you decide to approach a new venture or simply take it easy and enjoy life. Most of all, don't second guess yourself or spend time regretting any mistakes that may have been made along the way. As the sage investor Warren Buffet observes: "In the business world, the rearview mirror is always clearer than the windshield."

Recommended Resources

- Michael E. Gerber, Robert Armstrong, J.D. And Sanford M. Fisch, J.D.; The E Myth Attorney: Why Most Legal Practices Don't Work and What to Do About It (John Wiley & Sons, Inc., Hoboken, New Jersey, 2010)

- Cammie Hauser, Atticus Senior Practice Advisor, "Planning Your Exit", Atticus Online/Exit Planning Articles, http://www.atticusonline.com/category/archived/exit-and-succession-planning/
- Fortenberry, Jeramie, Building a Niche Practice: Go Small to Go Big (GPSOLO March/April 2013) 12.
- Roy Ginsburg. http://sellyourlawpractice.com
- Ed Poll. www.lawbiz.com and www.lawbizblog.com

RULE 1.17 SALE OF LAW PRACTICE

A lawyer or a law firm may sell or purchase a law practice, or an area of law practice, including goodwill, if the following conditions are satisfied:

a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, in the geographic area in which the practice has been conducted.
b) The entire practice, or the entire area of practice, is sold to one or more lawyers or law firms.
c) The seller gives written notice to each of the seller's clients regarding:
    1) the proposed sale;
    2) the client's right to retain other counsel or to take possession of the file; and
    3) the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.

If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.

d) The fees charged clients shall not be increased by reason of the sale.

Comment

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice, or ceases to practice in an area of law, and other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6.

Termination of Practice by the Seller

[2] The requirement that all of the private practice, or all of an area of practice, be sold is satisfied if the seller in good faith makes the entire practice, or the area of practice, available for sale to the purchasers. The fact that a number of the seller's clients decide not to be represented

by the purchasers but take their matters elsewhere, therefore, does not result in a violation. Return to private practice as a result of an unanticipated change in circumstances does not necessarily result in a violation. For example, a lawyer who has sold the practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice upon being defeated in a contested or a retention election for the office or resigns from a judiciary position.

[3] The requirement that the seller cease to engage in the private practice of law does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity that provides legal services to the poor, or as in-house counsel to a business.

[4] This Rule also permits a lawyer or law firm to sell an area of practice. If an area of practice is sold and the lawyer remains in the active practice of law, the lawyer must cease accepting any matters in the area of practice that has been sold, either as counsel or co-counsel or by assuming joint responsibility for a matter in connection with the division of a fee with another lawyer as would otherwise be permitted by Rule 1.5(e). For example, a lawyer with a substantial number of estate planning matters and a substantial number of probate administration cases may sell the estate planning portion of the practice but remain in the practice of law by concentrating on probate administration; however, that practitioner may not thereafter accept any estate planning matters. Although a lawyer who leaves a jurisdiction or geographical area typically would sell the entire practice, this Rule permits the lawyer to limit the sale to one or more areas of the practice, thereby preserving the lawyer's right to continue practice in the areas of the practice that were not sold.

Sale of Entire Practice or Entire Area of Practice

[5] The Rule requires that the seller's entire practice, or an entire area of practice, be sold. The prohibition against sale of less than an entire practice area protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchasers are required to undertake all client matters in the practice or practice area, subject to client consent. This requirement is satisfied, however, even if a purchaser is unable to undertake a particular client matter because of a conflict of interest.

Client Confidences, Consent and Notice

[6] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Rule 1. 6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific information relating to the representation and to the file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the identity of the purchaser, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the sale is presumed.

[7] A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the Rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The Court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered in camera.

[8] All elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice or area of practice.

Fee Arrangements Between Client and Purchaser

[9] The sale may not be financed by increases in fees charged the clients of the practice. Existing arrangements between the seller and the client as to fees and the scope of the work must be honored by the purchaser.

Other Applicable Ethical Standards

[10] Lawyers participating in the sale of a law practice or a practice area are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation

competently (see Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure the client's informed consent for those conflicts that can be agreed to (see Rule 1.7 regarding conflicts and Rule 1.0(e) for the definition of informed consent); and the obligation to protect information relating to the representation (see Rules 1.6 and 1.9).

[11] If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale (see Rule 1.16).

Applicability of the Rule

[12] This Rule applies to the sale of a law practice of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a non-lawyer representative not subject to these Rules. Since, however, no lawyer may participate in a sale of a law practice which does not conform to the requirements of this Rule, the representatives of the seller as well as the purchasing lawyer can be expected to see to it that they are met.

[13] Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this Rule.

[14] This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice or an area of practice.

Professional Liability Insurance

Oregon is the only state that mandates practicing attorneys to carry professional liability insurance. The approach of many jurisdictions is to require uninsured lawyers to disclose in writing to clients the lack of protection. Mandatory disclosure of policy limits below a certain threshold may also apply. Other states require neither insurance nor notification.

Many attorneys practicing in the solo or small firm setting do not carry malpractice insurance, unnecessarily exposing assets and possibly future income. Faced with a claim and high defense costs, lawyers often represent themselves casting aside President Lincoln's pearls of wisdom: "He who represents himself has a fool for a client." Carrying malpractice insurance not only protects from financial hardship but also provides the lawyer with access to immediate

objective advice when malpractice is alleged and protects the client's interest in the event of a credible claim.

Attorneys participating in a recent survey conducted by the New Mexico State Bar Lawyers Professional Liability and Insurance Committee[7] cited the following reasons for remaining uninsured: (1) Cost; (2) Limited law practice; (3) "Very careful" in law practice; (4) Don't trust insurance companies; (5) Don't believe they have risk of exposure. Those who believe they are exempt from being sued for malpractice are apparently unaware that 5 - 6 % of private practice attorneys face legal malpractice claims per year.[8] According to Mike Mooney (Vice President of Bar Association Programs at USI Affinity), "16% of claims come from Personal Injury/Property Damage Plaintiff work, 13% from Civil Litigation, and 8% from Business Transactions. All other areas of practice account for the other 63%. Furthermore, the frequency and severity of claims continue to increase."

The website[9] of the ABA Standing Committee on Lawyers' Professional Liability provides valuable information about malpractice insurance. Topics covered include How to Better Understand Insurance, What to Do If You are Declined Coverage".

A Checklist for Purchasers is available as well.

The following are just a few of the practicalities to consider in the malpractice insurance arena:

1. When completing the application, NEVER withhold specifically requested information even if it seems damaging and embarrassing. Failure to disclose all information may result in the carrier voiding the policy.
2. Attorneys should be familiar with their policy's notice provisions regarding potential claims. Many require the insured to give notice of all circumstances that would reasonably be expected to give rise to a claim. Failure to comply could result in a denial of coverage.

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[7] "Lawyer Liability Insurance", New Mexico Lawyer, May 2012, Volume 7, No. 2. http://www.nmbar.org/Attorneys/lawpubs/NMLawyer/NMLLawyersProfLiability.pdf

[8] "Malpractice Insurance", American Bar Association, 2013. http://www.americanbar.org/portals/solo_lawyers/going_solo/malpractice_insurance.html

[9] "Materials for Purchasers of Professional Liability Insurance", American Bar Association, Updated September 9, 2011. http://www.americanbar.org/groups/lawyers_professional_liability/resources/materials_for_purchasers_of_professional_liability_insurance.html

3. If an assistant takes care of the renewal process, insist on proof that the policy has been renewed and that the check for the premium was cashed.

Example: Jessica has relied on Deirdre, her trusted assistant for the past 20 years, to run the business and administrative aspects of her small law office. Everything ran quite smoothly until Deirdre recently overlooked the outstanding invoice for the malpractice premium and the policy was cancelled. When she received the cancellation notice by certified mail on March 1, 2012, she placed it on Jessica's desk. Jessica was in the middle of a backbreaking trial and never saw the notice. On April 15, 2012, Jessica received a letter from an attorney retained by a disgruntled client threatening a malpractice suit. At this juncture Jessica discovers that she is uninsured. Suit was indeed filed and Jessica unsuccessful defended her own action. Judgment was entered against her in the amount of $150,000 - all of which she satisfied out of her own pocket.

4. Since most lawyers have "claims made" policies, a retired attorney is not covered if a claim is reported after the expiration of the policy maintained while in practice (even if the action or non action leading to the claim occurred during the period of the policy). Attorneys contemplating retirement are wise to investigate an Extended Reporting Endorsement also referred to as a "tail policy" which extends the term of an existing policy.

ADDITIONAL RESOURCES

- "Mandatory Legal Malpractice Insurance: The Time Has Come" Bennett J. Wasserman and Krishna J. Shah New Jersey Law Journal, January 14, 2010
- Legal Malpractice: The Law Office Guide to Purchasing Legal Malpractice Insurance, (2010 ed.) by Ronald E. Mallen

Rules for Admission to the Bar and the Discipline of Attorneys

Rule 2. Registration and Fees

(a) Name and Address. All attorneys in active or inactive good standing, duly admitted to the practice of law in the State of Indiana shall file with the Clerk of the Supreme Court, 216 State House, Indianapolis, Indiana 46204, their correct name, office and residence address, office telephone number, electronic mail address, and county of residence. Said attorneys shall notify the Clerk of the Supreme Court of any change of address (including electronic mail address), change of telephone number, or change of name within thirty (30) days of such change. A notice of a change of name shall be accompanied by a copy of the court record or an affidavit that states the name change. The names and addresses so filed shall be effective for all notices involving licenses as attorneys and/or disciplinary matters, and a failure to file same shall be a waiver of notice involving licenses as attorneys and/or disciplinary matters. The Clerk shall annually send a certified list of attorneys, together with their addresses on file to the Indiana State Bar Association.

(b) Annual Registration Fee--Active Attorneys. Except as provided in sections (c) or (d), each attorney who is a member of the bar of this Court on August 1 of each year shall, so long as the attorney is a member of the Bar of this Court, pay a registration fee of one hundred eighty dollars ($180.00) on or before October 1 of such year. A delinquent fee in the amount of one hundred thirty dollars ($130.00) shall be added to the registration fee for fees paid after October 1 and on or before October 15 of each year; a delinquent fee in the amount of one hundred eighty dollars ($180.00) shall be added to the registration fee for fees paid after October 15 and on or before December 31 of each year; and a delinquent fee in the amount of three hundred thirty dollars ($330.00) shall be added to the registration fee for fees paid after December 31 of each year. An attorney who has paid the registration fee under this subsection and any applicable delinquent fees and who is otherwise eligible to practice law in this state shall be considered to be in active good standing.

Any attorney admitted to practice law in this State on a date subsequent to August 1 of each year shall, within ten (10) days of the date of his or her admission to the Bar of the Court, or by October 1 of said year, whichever date is later, pay a registration fee of one hundred forty-five dollars ($180.00).

(c) Annual Registration Fee--Inactive Attorneys. One-half (1/2) of the registration fee referred to in section (b) shall be required of an attorney who files with the Clerk, on or before October 1 of each year, an affidavit of inactivity, stating that he or she is currently in active good standing or wishes to retain inactive standing, and that he or she neither holds judicial office nor is engaged in the practice of law in this state. A delinquent fee in the amount of fifty dollars ($50.00) shall be added to the registration fee for fees paid after October 1 and on or before October 15 of each year; and a delinquent fee in the amount of one hundred dollars ($100.00) shall be added to the registration fee for fees paid after October 15 of each year. An attorney who has paid the registration fee under this section and any applicable delinquent fees shall be considered to be in inactive good standing. An inactive attorney shall promptly notify the Clerk of a desire to return to active status, and pay the applicable registration fee for the current year, prior to any act of practicing law.

(d) Annual Registration Fee--Retired Attorneys. No registration fee shall be required of an attorney who is sixty-five (65) years old or older and files with the Clerk, by October 1 of any year, an affidavit of retirement, stating that he or she is currently in active or inactive good standing, neither holds judicial office nor is engaged in the practice of law in this state, and does not plan to return to the practice of law. An affidavit of retirement, once filed, shall be effective for each succeeding year or until the attorney is reinstated pursuant to section (e).

(e) Reinstatement of Retired Attorneys. In the event there is no basis for the suspension of the attorney's license to practice law, a retired attorney's privilege to practice law shall be reinstated upon submitting to the Clerk a written application for reinstatement and payment of:

(1) the unpaid registration fee for the year of reinstatement;

(2) registration fees, including delinquent fees, in the amount referred to in section (b) for each year of retirement; and

(3) an administrative reinstatement fee of two hundred dollars ($200.00).

The Clerk shall deposit the administrative reinstatement fee referred to in subsection (e)(3) into the "Clerk of the Courts-Annual Fees" account, described in section (m).

(f) IOLTA Certification. On or before October 1 of each year, every attorney admitted to practice law in this state shall certify to the Clerk of this Court that all client funds that are nominal in amount or to be held for a short period of time by the attorney so that they could not

earn income for the client in excess of the costs incurred to secure such income are held in an IOLTA account (as that term is defined in Indiana Rules of Professional Conduct, Rule 1.15(f)) of the attorney or law firm or that the attorney is exempt under the provisions of Prof. Cond. R. 1.15(g)(2). Any attorney who fails to make an IOLTA certification on or before October 1 of each year shall be assessed a delinquent fee according to the schedule set forth in section (b) if the attorney is active or section (c) if the attorney is inactive.

(g) Annual Registration Notice. On or before August 1 of each year, the Clerk of this Court shall mail a notice to or notify via electronic mail each attorney then admitted to the bar of this Court who is in active or inactive good standing that: (i) a registration fee must be paid on or before October 1; and (ii) the certification required by section (f) of this rule and by Ind.Prof. Cond. R. 1.15(g) must be filed with the Clerk on or before October 1. The Clerk shall also send such notice to the Clerk for each circuit and superior court in this State for posting in a prominent place in the courthouse, the Indiana State Bar Association, and such print and other media publishers of legal information as the Clerk reasonably determines appropriate. Provided, however, that the failure of the Clerk to send such notice will not mitigate the duty to pay the required fee and file the required certification.

(h) Failure to Pay Registration Fee; Reinstatement. Any attorney who fails to pay a registration fee required under section (b) or (c) or fails to file the certification required by section (f) of this rule and by Ind.Prof. Cond. R. 1.15(g) shall be subject to suspension from the practice of law and sanctions for contempt of this Court in the event he or she thereafter engages in the practice of law in this State. In the event there is no basis for the continued suspension of the attorney's license to practice law, such an attorney's privilege to practice law shall be reinstated upon submitting to the Clerk a written application for reinstatement and payment of:

(1) the applicable unpaid registration fee for the year of suspension;

(2) any delinquent fees for the year of suspension due pursuant to section (b) or (c);

(3) the applicable unpaid registration fee for the year of reinstatement, if different from the year of suspension;

(4) a registration fee, including delinquent fees, in the amount referred to in section (c) for all intervening years of suspension;

(5) an administrative reinstatement fee of two hundred dollars ($200.00); and

(6) the certification required by section (f) of this rule.

The Clerk shall deposit the administrative reinstatement fee referred to in subsection (h)(5) in to the "Clerk of the Courts-Annual Fees" account, described in section (m).

(i) Certification of Good Standing. The Clerk of this Court shall issue a certificate of active good standing or inactive good standing approved by this Court to any attorney upon the receipt of the annual registration fee and any applicable delinquent fees referred to in sections (b) and (c), respectively. The certificate of active good standing shall include a statement to the effect that the lawyer has filed the certification required by section (f) of this rule.

(j) Annual Continuing Education Fee -- Non-attorney Judges.

(1) On or before August 1, of each year, the Clerk shall mail to each non-attorney judge a notice that an education fee of forty-five dollars ($45.00) must be paid on or before the first day of October. Failure to pay the education fee on or before October 1, will result in the imposition of a delinquency fee of forty-five dollars ($45.00).

(2) Any non-attorney judge who fails to pay the education fee shall be automatically suspended from judicial office. A non-attorney judge may resume office upon written application, payment of unpaid education fees and payment of the delinquency fee set out in subsection (1).

(k) Effective Dates.

(1) The requirement in section (c) that inactive attorneys pay an annual registration fee shall apply to all inactive attorneys and shall be effective for the annual fee due on or before October 1, 2002. Notwithstanding any other provision in this rule, any inactive attorney who filed an affidavit of inactivity on or before October 1, 2001 and who, after suspension for nonpayment of the annual registration fee referred to in section (c), thereafter seeks reinstatement to active or inactive attorney status pursuant to section (h), shall not be required to pay unpaid registration or delinquent fees pursuant to (h)(4) for any year prior to October 1, 2002.

(2) Notwithstanding any other provision in this rule, any attorney who, after suspension for nonpayment of the annual registration fee referred to in section (b), thereafter seeks reinstatement to active or inactive attorney status pursuant to section (h), shall not be required

to pay unpaid registration or delinquent fees pursuant to section (h)(4) for any year prior to October 1, 2002.

(3) Notwithstanding any other provision in this rule, any retired attorney who seeks reinstatement to active attorney status pursuant to section (e) shall not be required to pay unpaid registration or delinquent fees pursuant to (e)(2) for any year prior to October 1, 2002.

(l) Affidavit of Permanent Withdrawal. An attorney in good standing, who is current in payment of all applicable registration fees and other financial obligations imposed by these rules, and who is not the subject of an investigation into, or a pending proceeding involving, allegations of misconduct, who desires to relinquish permanently his or her license to practice law in the State of Indiana may do so by tendering an Affidavit of Permanent Withdrawal from the practice of law in this State to the Executive Secretary of the Indiana Supreme Court Disciplinary Commission. The Executive Secretary shall promptly verify the eligibility of the attorney to resign under this section, and if eligible, forward a certification of eligibility, together with the Affidavit of Permanent Withdrawal to the Clerk of the Indiana Supreme Court, and the Clerk shall show on the roll of attorneys that the attorney's Indiana law license has been relinquished permanently and that the lawyer is no longer considered an attorney licensed to practice law in the State of Indiana. An attorney who permanently withdraws under this section shall not be eligible for reinstatement under section (e) or (h), but may apply for admission under Admission and Discipline Rules 3 through 21. In the event the attorney is not eligible to permanently withdraw under this section, the Executive Secretary shall promptly notify the attorney of all reasons for ineligibility.

(m) Deposit and Use of Funds.

(1) Deposit of Funds. All funds collected by the Clerk under this rule shall be deposited in an account to be maintained by the Clerk and designated "Clerk of the Courts-Annual Fees." The Clerk shall thereafter issue those funds as directed by the Indiana Supreme Court.

(2) Use of Funds. The Indiana Supreme Court shall periodically apportion the registration fees collected pursuant to this rule for the operation of the Indiana Supreme Court Disciplinary Commission, the Indiana Commission for Continuing Legal Education, and the Judges and Lawyers Assistance Committee.

RULE 29. MANDATORY CONTINUING LEGAL EDUCATION RULE

SECTION 1. PURPOSE.

The purpose of this Rule is to establish minimum continuing legal education requirements for each Attorney admitted to the Bar of the State of Indiana. The minimum continuing education requirements for an Attorney who serves as a Judge in the State of Indiana shall be governed by the provisions of Admission and Discipline Rule 28.

SECTION 2. DEFINITIONS.

As used in this Rule:

(a) Approved Courses shall mean those Substantive Legal Courses and those Non Legal Subject Matter Courses (as defined below) which are approved under the Commission's Accreditation Policies in the Guidelines to this Rule.

(b) Attorney shall mean a person who has been admitted to practice law in the State of Indiana and whose name appears in the files of the Board of Law Examiners as provided under Admission and Discipline Rule 4. The term Attorney includes a state or federal administrative law judge.

(c) Bar shall mean the Indiana Bar and includes those persons who are Attorneys under subsection (b) above.

(d) Business Day shall mean Monday, Tuesday, Wednesday, Thursday, and Friday of each week but shall not include Federal or Indiana state holidays.

(e) Clerk shall mean Clerk of the Indiana Supreme Court, Court of Appeals and Tax Court.

(f) Commission shall mean the Indiana Commission For Continuing Legal Education created by Section 4 of this Rule.

(g) Commissioner shall mean a person who is a member of the Commission.

(h) Educational Period shall mean a three-year period during which an Attorney must complete thirty-six (36) hours of Approved Courses. Educational Periods shall be sequential, in that once an Attorney's particular three-year period terminates, a new three-year period and thirty-six hour minimum shall commence.

(i) [Deleted, eff. January 1, 2011]

(j) Non Legal Subject Matter (NLS) Courses shall mean courses that the Commission approves for Non Legal Subject Matter credit pursuant to Section 3(a) of this Rule because, even though they lack substantive legal content, they nonetheless enhance an attendee's proficiency in the attorney's practice of law.

(k) Supreme Court shall mean the Supreme Court of the State of Indiana.

(l) Year shall mean calendar year unless otherwise specified in this Rule.

(m) Professional Responsibility Credits shall mean credits for topics that specifically address legal ethics or professional responsibility.

(n) Distance Education shall mean instructional delivery that does not constrain the student to be physically present in the same location as the instructor and does not require an attendant at the learning site to monitor attendance.

SECTION 3. EDUCATION REQUIREMENTS.

(a) Every Attorney, except as provided below, shall complete no less than six (6) hours of Approved Courses each year and shall complete no less than thirty-six (36) hours of Approved Courses each Educational Period. At least three (3) hours of Approved Courses in professional responsibility shall be included within the hours of continuing legal education required during each three year Educational Period. Such hours may be integrated as part of a substantive program or as a free standing program. No more than twelve (12) hours of the Educational Period requirement shall be filled by Non Legal Subject Matter Courses. No more than six (6) hours of the Educational Period requirement shall be filled through interactive Distance Education. No more than three (3) hours of the Educational Period requirement shall be filled through in-house education programs in accordance with the Guidelines. All credits for a single educational activity will be applied in one (1) calendar year.

(b) Attorneys admitted to the Indiana Bar before December 31, 1998, on the basis of successfully passing the Indiana Bar examination, shall have a grace period of three (3) years commencing on January 1 of the year of admission and then shall commence meeting the minimum yearly and Educational Period requirements thereafter. Attorneys admitted after December 31, 1998, shall commence meeting the yearly and Educational Period requirements starting on January 1 after the year of their admission by completing programs designated by the Commission as appropriate for new lawyers.

For Attorneys admitted after December 31, 1998, at least six (6) of the thirty-six (36) Educational Period requirements shall be satisfied by attending an Applied Professionalism Program for Newly Admitted Attorneys which has been accredited by the Commission.

(c) Attorneys admitted on foreign license or Attorneys who terminate their inactive status shall have no grace period. Their first three-year Educational Period shall commence on January 1 of the year of admission or termination of inactive status.

(d) In recognition of the nature of the work, commitment of time, and the benefit of Attorney participation in the Indiana General Assembly, during an Attorney's Educational Period, for each calendar year in which the Attorney serves as a member of the Indiana General Assembly for more than six (6) months, the Attorney's minimum number of continuing legal education hours for that Educational Period shall be reduced by six (6) hours.

SECTION 4. COMMISSION FOR CONTINUING LEGAL EDUCATION.

(a) Creation of the Commission. A commission to be known as the Indiana Commission For Continuing Legal Education is hereby created and shall have the powers and duties hereinafter set forth. The Commission shall consist of eleven (11) Commissioners.

(b) Appointment of Commissioners and Executive Director. All Commissioners and the Executive Director shall be appointed by the Supreme Court.

(c) Diversity of Commissioners. It is generally desirable that the Commissioners be selected from various geographic areas and types of practice in order to reflect the diversity of the Bar and consideration should be given to the appointment of one (1) non-lawyer public member. The three (3) geographic divisions used for selecting Judges for the Indiana Court of

Appeals in the First, Second and Third Districts may be used as a model for achieving geographic diversity.

(d) Terms of Commissioners. Commissioners shall be appointed for five (5) year terms. All terms shall commence on January 1 and end on December 31. Any Commissioner who has served for all or part of two (2) consecutive terms shall not be reappointed to the Commission for at least three (3) consecutive years.

SECTION 5. ORGANIZATION OF THE COMMISSION.

(a) Election of Officers. At the first meeting of the Commission after each December 1, the Commissioners shall elect from the membership of the Commission a Chair who shall preside at all meetings, a Vice Chair who shall preside in the absence of the Chair, a Secretary who shall be responsible for giving notices and keeping the minutes of the meetings of the Commission and a Treasurer who shall be responsible for keeping the records of account of the Commission.

(b) Meetings. The Commission shall meet at least twice each year at times and places designated by the Chair. The Chair, the Executive Committee or any six (6) Commissioners may call special meetings of the Commission.

(c) Notices. The Secretary shall send notice of each meeting of the Commission, stating the purposes of the meeting, to all Commissioners at least five (5) business days before the meeting. Commissioners may waive notice of a meeting by attending the meeting or by delivering a written waiver to the Secretary either before or after the meeting.

(d) Quorum. Six (6) Commissioners shall constitute a quorum for the transaction of business. The Commission shall act by a majority of the Commissioners constituting the quorum. Commissioners may participate in meetings of the Commission and committees thereof by telephone or other similar device.

(e) Vacancies. Any vacancy on the Commission shall be filled as soon as practical and the new Commissioner so appointed shall serve out the unexpired term of the Commissioner being replaced.

(f) Executive Committee. The officers of the Commission described in subsection (a) of this Section shall comprise the Executive Committee which shall have the power to conduct all

necessary business of the Commission that may arise between meetings of the full Commission. Three (3) officers of the Commission shall constitute a quorum of the Executive Committee, and the Executive Committee shall act by a vote of a majority of the officers constituting the quorum. All action taken by the Executive Committee shall be reported to the full Commission at its next meeting.

(g) Other Committees. The Commission may appoint such other committees having such powers and duties as the Commission may determine from time to time.

SECTION 6. POWERS AND DUTIES OF THE COMMISSION AND EXECUTIVE DIRECTOR.

(a) In addition to the powers and duties set forth in this Rule or Rule 28, the Commission shall have the power and duty to:

(1) Approve all or portions of individual educational activities which satisfy the legal education requirements of this Rule.

(2) Approve Sponsors who meet the Requirements of Section 4 of the Commission's Guidelines and whose educational activities satisfy the legal education requirements of this Rule. The Judicial Conference and all seminars conducted by the Judicial Center shall be approved for credit.

(3) Determine the number of credit hours allowed for each educational activity.

(4) Establish an office to provide administrative and financial record-keeping support of the Commission and to employ such persons, sponsors, or providers as the Commission may in its discretion determine to be necessary to assist in administering matters solely of a ministerial nature under this Rule.

(5) Review this Rule and Commission Guidelines from time to time and make recommendations to the Supreme Court for changes.

(6) Upon approval of the Supreme Court publish proposed guidelines and procedures through West Publishing Company and Res Gestae and file the proposed guidelines and procedures with the Clerk.

(7) Provide quarterly financial reports and an annual report of the Commission activity to the Chief Justice of the Supreme Court. A proposed budget for the coming fiscal year (July 1-June 30) shall be submitted to the Chief Justice no later than May 1 of each year.

(8) Do all other things necessary and proper to carry out its powers and duties under this Rule.

(9) Perform all other duties as set forth in Indiana Admission and Discipline Rule 30 and the Indiana Alternative Dispute Resolution Rules.

(b) In addition to the powers and duties set forth in this Rule, the Executive Director shall have the power and the duty to:

(1) Administer the Commission's work.

(2) Appoint, with the approval of the Commission, such staff as may be necessary to assist the Commission to carry out its powers and duties under this Rule.

(3) Supervise and direct the work of the Commission's staff.

(4) Supervise the maintenance of the Commission's records.

(5) Enforce the collection of fees that attorneys, sponsors, mediators and independent certifying organizations must pay pursuant to this Rule, Admission and Discipline Rule 28, Admission and Discipline Rule 30 and the Indiana Alternative Dispute Resolution Rules.

(6) Enforce the continuing legal education requirements of Judges and Attorneys under this Rule.

(7) Assist the Commission in developing guidelines.

(8) Perform such other duties as may be assigned by the Commission in the furtherance of its responsibilities hereunder.

SECTION 7. SOURCES AND USES OF FUNDS.

(a) The Indiana Supreme Court shall periodically designate a portion of the registration fee charged to attorneys pursuant to Admission and Discipline Rule 2 to be used for the operations of the Commission on Continuing Legal Education. The Executive Director of the Commission

shall deposit such funds into an account designated "Supreme Court Continuing Legal Education Fund."

(b) Disbursements from the fund shall be made solely upon vouchers signed by or pursuant to the direction of the Chief Justice of this Court.

(c) The Supreme Court shall specifically approve all salaries to be paid out of Continuing Legal Education Fund.

(d) Not later than May 1 of each year, the Commission shall submit for approval by the Supreme Court an operating budget for July 1 to June 30 of the following fiscal year.

(e) Commissioners shall be paid one hundred dollars ($100) for each meeting of the Commission they attend and be reimbursed for expenses in accordance with guidelines established by the State of Indiana.

SECTION 8. EXEMPTIONS AND OTHER RELIEF FROM THE RULE.

(a) An Attorney shall be exempted from the educational requirements of the Rule for such period of time as shall be deemed reasonable by the Commission upon the filing of a verified petition with the Commission and a finding by the Commission that special circumstances unique to the petitioning Attorney have created undue hardship. Subsequent exemptions may be granted.

(b) An Attorney who is physically impaired shall be entitled to establish an alternative method of completing the educational requirements of this Rule upon the filing of a verified petition with the Commission and a finding by the Commission that the alternative method proposed is necessary and consistent with the educational intent of this Rule. Any petition filed under this subsection shall contain a description of the physical impairment, a statement from a physician as to the nature and duration of the impairment, a waiver of any privileged information as to the impairment, and a detailed proposal for an alternative educational method.

(c) An Attorney shall be exempt from the educational and reporting requirements of this Rule if the Attorney has filed an affidavit of inactivity or a retirement affidavit under Section (c) or (d) of Rule 2. An Attorney who has been inactive for less than a year, and desires to resume

active status, shall complete any balance of his or her yearly Educational Period requirements as of the date of inactive status.

(d) An Attorney who believes that he or she will be unable to make timely compliance with the educational requirements imposed by this Rule may seek relief from a specific compliance date by filing a verified petition with the Commission. The petition shall set forth reasons from which the Commission can determine whether to extend such compliance date. A petition seeking such an extension of time must be filed as much in advance of the applicable compliance date as the reasons which form the basis of the request afford. The Commission, upon receipt and consideration of such petition, shall decide if sufficient reasons exist, and may grant an extension for such period of time as shall be deemed reasonable by the Commission. In no event shall such an extension be granted beyond the time when the next compliance date, as required by the Rule, occurs.

SECTION 9. ANNUAL REPORTING TO ATTORNEYS.

(a) On or before September 1 of each year, the Commission shall mail or electronically transmit to each Attorney, a statement showing the Approved Courses which the Attorney e is credited on the records of the Commission with having attended during the current year and the current Educational Period. This statement will be sent to the mail or e-mail address for the Attorney listed on the Roll of Attorneys maintained by the Clerk. An Attorney shall at all times keep his or her mailing or e-mail address current with the Roll of Attorneys. If the Attorney has completed the minimum hours for the year or Educational Period, the statement will so reflect and inform the Attorney that he or she is currently in compliance with the education requirements of the Rule. It shall not be a defense to noncompliance that an Attorney has not received an annual statement. Additional statements will be provided to an Attorney upon written request and a five dollar ($5.00) fee made payable to the Continuing Legal Education Fund.

If the statement shows the Attorney is deficient in educational hours, but the Attorney believes he or she is in compliance for the year or Educational Period the Attorney shall file a letter of explanation, a Sponsor certification of course attendance, a personal affidavit of attendance, and an application for course accreditation. All fees must be included with the submission. The

documents required by this subsection shall be filed by December 31 of the year or Educational Period in question unless an extension of time to file the same has been granted by the Commission. When an Attorney has resolved the above discrepancies, the Commission shall issue a statement showing that the Attorney is in compliance with the Rule for the year or Educational Period. In the event credit is not granted, the Attorney shall have thirty (30) days after written notification of that fact to comply with the educational requirements or appeal the determination pursuant to Section 11. Failure to do so will result in referral to the Supreme Court for suspension.

(b) If the statement incorrectly reflects that the Attorney has completed the minimum hours for the year or the Educational Period, then it shall be the duty of the Attorney to notify the Commission and to complete the educational requirements mandated by this Rule.

(c) All fees must be paid in order for an Attorney to be considered in compliance with this Rule.

SECTION 10. SANCTIONS AND REINSTATEMENTS.

(a) Sanctions. On January 1, a one hundred fifty dollar ($150.00) late fee accrues against each Attorney who has not met his/her yearly or Educational Period requirements for the period ending December 31st of the previous year. On February 1 of each year the Commission shall mail or electronically transmit a notice assessing a one hundred fifty dollar ($150.00) late fee to those Attorneys who are shown as not having completed the yearly or Educational Period requirements. The Commission will consider the Attorney delinquent for CLE until both certification of attendance at a CLE program and payment of the late fee are received. Late fees and surcharges are to be deposited by the Commission immediately upon receipt. If the delinquent Attorney has not fulfilled the yearly or Educational Period requirements at the time the Court issues an order suspending that Attorney, the delinquency fee is forfeited. If the Attorney is reinstated to the practice of law pursuant to the provisions of Admission and Discipline Rule 29(10) within one (1) year of suspension, any forfeited late fee shall be credited toward the reinstatement fee. A one hundred dollar ($100.00) surcharge will be added to the late fee for each consecutive year for which an Attorney fails to timely comply with CLE requirements.

On May 1 of each year, a list of those Attorneys still failing to complete the yearly or Educational Period requirements will be submitted to the Supreme Court for immediate suspension from the practice of law. These Attorneys will suffer the suspension of their license to practice law and all related penalties until they are reinstated.

(b) Reinstatement Procedures. An Attorney suspended shall be automatically reinstated upon petition to the Commission and payment of a two hundred dollar ($200.00) reinstatement fee in addition to any applicable surcharge. The petition must demonstrate the petitioner's compliance according to the following reinstatement schedule:

(1) for a suspension of one (1) year or less the petitioner must, between the date of suspension and the date of the petition for reinstatement:

(i) complete the hours required to satisfy the deficiency which resulted in the suspension; and

(ii) complete six (6) additional hours of Approved Courses in a separate course or courses;

(2) for a suspension of more than one (1) year a petitioner must, between the date of suspension and the date of the petition for reinstatement:

(i) complete the hours required to satisfy the deficiency which resulted in the suspension;

(ii) complete thirty-six (36) hours of Approved Courses, twelve (12) hours of which must have been completed within the last twelve (12) month period prior to the date of the petition; and

(iii) begin a new Educational Period as of January 1st of the year of reinstatement pursuant to Section 3(a) of this Rule.

The Commission shall issue a statement reflecting reinstatement which shall also be sent to the Clerk to show on the Roll of Attorneys that the Attorney is in good standing. An Attorney suspended by the Supreme Court who continues to practice law shall be subject to the sanctions for the unauthorized practice of law.

Extensions to provide course attendance certifications for courses which were timely taken may be granted for good cause shown; extensions of time to complete educational requirements are not permitted except under Section 8 of this Rule. Providing or procuring of false certifications

of attendance at educational courses shall be subject to appropriate discipline under the Admission and Discipline Rules.

SECTION 11. APPEALS REGARDING COMMISSION RECORDS.

Any Attorney who disagrees with the records of the Commission in regard to the credits recorded for the Attorney during the current year or Educational Period and is unable to resolve the disagreement pursuant to Section 9 of this Rule, may petition the Commission for a determination as to the credits to which the Attorney is entitled. Petitions pursuant to this Section must be received by the Commission within thirty (30) days of the Commission's written notification that credit has not been granted and shall be considered by the Commission at its next regular or special meeting, provided that the petition is received by the Commission at least ten (10) business days before such meeting. The Attorney filing the petition shall have the right to attend the Commission meeting at which the petition is considered and to present relevant evidence and arguments to the Commission. The rules of pleading and practice in civil cases shall not apply, and the proceedings shall be informal. The determination of the Commission shall be final as to the number of credits for the Attorney and shall be appealable directly to the Supreme Court. In the event of a good faith dispute pursuant to this Section, the educational and reporting deadlines of this Rule shall be extended until thirty (30) days after the full Commission has ruled on the disputed issue, or if an appeal is taken, until thirty (30) days after the Supreme Court has ruled on the disputed issue.

SECTION 12. PETITIONS.

Any petition filed with the Commission pursuant to this Rule shall be in writing and shall be signed and verified by the Attorney seeking relief. The petition shall be sent by registered or certified mail to the attention of the Executive Director at the Commission's offices at the address shown on the most recent statements or Commission's web page pursuant to Section 9 of this Rule.

SECTION 13. CONFIDENTIALITY.

Unless otherwise directed by the Supreme Court or by another court having jurisdiction, the files, records, and proceedings of the Commission, as they may relate to or arise out of an Attorney, Mediator, or Sponsor attempting to satisfy the continuing legal educational requirements of this Rule, or the requirements of the Indiana Alternative Dispute Resolution Rules shall be confidential and shall not be disclosed except in furtherance of the duties of the Commission or upon the request of the Attorney, Mediator, or Sponsor affected.

SECTION 14. CONFLICT OF INTEREST.

A member, agent or administrator of the Commission shall abstain from participating in any decision involving a sponsor or provider of educational services of which he or she is an officer. A member, agent or administrator of the Commission shall not be an employee of an entity principally engaged in sponsoring or providing continuing legal education services.

INDIANA STATE BAR ASSOCIATION LEGAL ETHICS COMMITTEE OPINION NO. 1 FOR 2001

An attorney, referred to as "Attorney A" for purposes of this opinion, has submitted an inquiry to the Committee regarding his relationship with a financial planning firm (the "FP firm"). The description of the business arrangement presented in Attorney A's letter is referred to herein as the "Submitted Facts."

In the Committee's opinion, the proposed business arrangement, as described in the Submitted Facts, violates Rule 7.3 of the Indiana Rules of Professional Conduct, may violate Rules 5.4 and 5.5(b), and possibly conflicts with several other rules.

The Submitted Facts

Attorney A is licensed and in goo d standing to practice law in the State of Indiana. His continuing education activities are focused largely on tax and estate planning issues. Attorney A is also stated to be "... licensed and in good standing as a Certified Financial Planner" (although Indiana law contains no explicit provisions for the licensing or certification of financial planners).

Attorney A is one of the owners of the FP firm, whose other owners and employees are non-lawyers. In delivering financial planning services, non-attorney personnel of the FP firm may decide that a customer also needs estate planning services. In such cases the representative of the FP firm may recommend that the customer retain Attorney A to perform these legal services.

The next step calls for Attorney A to prepare an "engagement letter," which would include statements that "none of the legal fees will be shared with non=lawyers," and that the FP firm's financial planning fees "do not change if the legal documents are prepared by client's long-standing attorney elsewhere?' Upon engagement, Attorney A prepares the legal estate-planning documents and charges the client for those services separately from the financial planning services performed by the FP firm's other personnel.

Attorney A also accepts referrals from an outside financial planning firm, for "stand-alone estate-planning services," and charges the same document-drafting fees to such "outside" clients as to FP firm clients.

The FP firm does not advertise legal document drafting services and does not solicit document drafting engagements by its non-attorney representatives.

Submitted Questions

The primary question submitted is, "Does [Attorney A's] conduct in this scenario comply with the Indiana Rules of Professional Conduct?"

The inquiring party has also submitted three subsidiary questions, each of which follows from the primary question. Because the response to these subsidiary questions depends on the same analysis as the primary question, they are addressed individually below in the "Conclusions" section of this Opinion.

Analysis

The scenario outlined under the Submitted Facts raises issues concerning "multi-disciplinary practice" ("MDP") -- that is, whether and to what extent attorneys may ethically practice law as part of a business venture that is partially owned by non-lawyers, !ncluding members of other disciplines such as accountancy or financial planning.

The Committee recognizes that MDP is the subject of intense interest and discussion within the legal profession and has been addressed recently by, among other things, proposed amendments to the Model Rules recommended by the American Bar Association's Commission on MultidisciplinarybPractice,which were rejected by the ABA House of Delegates on July11, 2000. See._, William J. Harvey,The gathering storm: MDP versus the legal profession, legal ethics and the Indiana lawyer, Res Gestae, Sept. 2000, at 24; Caryn Langbaum, Will attorneys vote themselves out of the competition?, Res Gestae, Oct. 2000, at 12; The Future of the Profession: A Symposium on Multidisciplinary Practice, 84 Minn. L. Rev. 1269 (2000); Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services from Lawyers in a Multidisciplinary Partnership, 13 Geo. J. Legal Ethics 217 (2000). In Indiana these issues

have also been studied by the ISBA's Indiana MDP Task Force.

Nevertheless, the Committee also recognizes that its role is to respond to specific

inquiries raised by attorneys and to interpret the Rules as they exist today. Therefore, the present opinion is limited to addressing the particular circumstances set forth in the Submitted Facts; it is intended to express no broader opinion about the future or ethics of MDP.

The Committee's opinion is that the proposed arrangement outlined by Attorney A

violates Rule 7.3(a), and may conflict with Rules 5.4 and 5.5(b), for the reasons discussed below.

A. Rule 7.3 -- Rule 7.3(a) provides, "A Lawyer shall not seek or recommend by in-

person contact (either in the physical presence of, or by telephone) the employment, as a private practitioner, of himself... . to a nonlawyer who has not sought his advice regarding employment of a lawyer, or assist another person in so doing."

Under the Submitted Facts, staff o fthe FP firm may, and for reasons discussed below are

likely to be, recommending Attorney A's services to their non-lawyers clients. This practice may violate Rule 7.3(a) in two ways. First, because Attorney A is a part owner of the FP, at least some of the recommending personnel would be his employees, who could be deemed to be acting on Attorney A's own behalf in making an in-person recommendation of his services. Second,

even if such personnel were not acting as his agents_ Attorney A would be participating in this arrangement by "assisting another person in" recommending Attomey A's employment to a non-lawyer, in violation of the last clause of the Rule. See e.g., State Bar of Mich., Comm. on Professional and Judicial Ethics, Informal Op. CI-1058 (1985) (advising that lawyer may not enter into arrangement with debt consolidation corporation that interviews clients, evaluates their

needs for legal services, and refers those requesting legal services to lawyer); N.Y. State Bar Ass'n, Comm. on Professional Ethics, Op.565 (1988) (advising that lawyer may not hire public relations and marketing firm to solicit potential clients in person, and may not compensate firm on basis Of legal business so generated).

Although the Submitted Facts do not suggest that employees of the FP firm will be
know that Attorney A is a part owner of the FP firm. [Thus, they may feel impelled by economic pressure, or induced by hope of financial reward, to recommend that a client retain Attorney A, regardless of whether retaining Attorney A -- or hiring any lawyer -- is in that client's best interests,

Furthermore, the prospect that employees or the other, non-attorney owners of the FP will be rewarded -- even indirectly -- for referring clients to Attomey A creates the potential for violation of Rule 7.3(f). Under that Rule, a lawyer may not "compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client..."

Such rules reflect the principle that the selection of an attorney must "'result from a flee directly compensated based on their referrals to Attomey A, these employees can be expected to
and informed choice by the client"and the concern that"when a nonlawyer has a monetary interes in referring cases toa n attorney,then it is the referrer's and not the client's best interests that are being considered."Trotter v. Nelson, 684 N.E.2d 1150 (Ind. 1997) (holding that alleged contract between attorney and non-attorney for referral of clients was unenforceable as against public policy embodied by Rule 7.3(o) (citations omitted).

It should also be noted that under some circumstances, the "engagement letters" sent by Attorney A to prospective clients he has never met should be treated as solicitation letters governed by Rule 7.3(c). ffone of Attorney A's co-owners or employees at the FP firm (or someone at the "outside" FP firm) simply gives a customer's name to Attorney A, without making a prior recommendation to the customer, or a recommendation is made without the customer having a "family or prior professional relationship with Attorney A and does not indicate a willingness to be contacted," then an ensuing written communication from Attorney A would appear to be within the reach of Rule 7.3(c). That Rule provides in relevant part, "Every written communication from a lawyer soliciting professional employment from a prospective client potentially in need of legal services in a particular matter, and with whom the lawyer has

no family or prior professional relationship, shall include the words 'Advertising Material...'"
In an analogous case, Matter of Anonymous, 630 N.E.2d 212 (Ind. 1994), unsolicited letters soliciting employment with respect to a need to avoid mortgage foreclosures were held to be subject to Rule 7.3(c)'s "Advertising Material" requirements.

B. Rules 5.4 and 5.S -- This Committee has considered in the past the ethical issues raised by attorneys who offer legal services as part of non-legal businesses, and we have noted that such arrangements may violate a range of Rules in addition to 7.3. See, e.g., Opinion No. 4 of 1992 (concluding that attorney's relationship with financial services organization that referred prospective investors to attorney did not appear to violate Rule 5.4 or 5.5 so long as attorney prepared all forms and made independent assessment of client's legal needs, but that such arrangements created great potential for violation of Rules, and might implicate prohibitions on fee-splitting and referral services); 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, but attorney could advertise himself as offering property management services so long as he complied with Rules 7.1, 7.3, and 7.4). 1

In the instant case, the Submitted Facts do not contain sufficient detail for the Committee to determine with certainty whether the proposed scenario would violate these other Rules.

Moreover, there is often no clear line between the limits of financial-planning tasks that are merely "law-related services" and thus properly provided by non-attorneys, and other tasks so closely related to estate planning law that they constitute "the practice of law" and are foreclosed to non-attorneys. As the Indiana Supreme Court noted in State ex rel. Indiana State Bar Ass'n v. Indiana Real Estate Assoc., 244 Ind, 214, 191 N.E.2d 711,714-15 (1963):

Although the practice of law is one of the oldest and most honored professions, the law itsetfis by no means an exact science, the practice of which can be accurately and unequivocally defined... There is a twilight zone between the area of law which is clearly permitted to the layman, and that which is denied him. Thus, the

1Other states' bars have grappled with these issues as well; see Utah State Bar Ethics Opinion Committee, Opinion No. 97-09 (considering whether lawyer's plan to provide

Advisory

legal services in conjunction with non-lawyer estate-planning professionals violated Rules 1.1,

1.2(b), 1.6(a), l:7(b), 5.3, and 5.5(b)); Report of the Illinois Bar Ass'n's Corporate Law Section to the Illinois State Bar Ass'n (www.illinoisbar.org/mdppro.html); report of the Boston Bar Ass'n' s Ethics Committee (at www.bostonbar.org/pw/ethics/1999b.html).

question which this court must determine is where, within this 'twilight zone,' it is proper to draw the line between those acts which are and are not permissible to people who are not lawyers.

Notwithstanding this zone of uncertainty, the Submitted Facts present a danger that the activities

of the FP firm and its non-attorney representatives, by providing services in conjunction with

Attorney A, could cross over the line into the practice of law. If so, Attorney A's actions could

be considered as assisting those persons in violation of Rule 5.5(b), which provides that lawyer

shall not "assist a person who is not a member of the bar in the performance of activity that

constitutes the unauthorized practice of law."

For example, after non-attorney financial planners gave advice to the customer, only the

final drafting of the recommended documents might be left to Attorney A. (In an extreme case:

"Here are some standard forms that you can use, but you will have to get an attorney to look them over and re-type them before you sign them.")

Rule 5.4(c), which prohibits an attorney from allowing a person who "recommends the

attorney's employment from influencing the attorney's professional judgment," might also be

violated by these arrangements. For example, in Matter of Thrasher, 661 N.E.2d 546 (Ind. 1996),

where an attorney regularly accepted referral of bankruptcy matters from a business management

company specializing in financial and tax planning. The attorney signed and filed papers

prepared by non-attorneys without having actually met or consulted with the client in question. The Court found that such a practice violated Rule 5.4(c) as well as Rules 1.1, 1.4(b), 1.8(o, 3.3(a)(1), 5.5(b), and 8.4(c).

Even if Attorney A took care to consult with the client and prepare documents personally, and thus avoid the specific practice disapproved of in Thrasher, the danger of compromising Attorney A's professional judgment could arise When non-attorney personnel of the firm advised their customers that they need particular types of estate planning documents, and then referred them to Attorney A for the drafting of such documents. If Attorney A finds that the suggested documents are in fact not the best answers to the clients' needs, he might nevertheless feel constrained against making alternative suggestions. Such suggestions would tend to discredit the expertise of his employees and thereby reduce the FP firm's reputation and the value of his ownership interest.

In addition to constraining the exercise of independent legal judgment as prohibited by Rule 5A(c), these circumstances could also present Attorney A with a material conflict between his own interests and those of his client, in violation of Rule 1.7(b). That Rule provides, "A lawyer should not represent a client if the representation of that client may be materially limited by... the lawyer's own interests." If the non-attorneys in the FP firm sell the client on the idea of buying certain items (e.g. annuities, stocks) there may be commission income involved which would at least indirectly benefit Attorney A. This would conflict with Attorney A's duty to independently evaluate the client's estate plan.

There is also a danger, depending on the details of the FP firm's structure and operations, that the scenario outlined by Attorney A would violate Rules 5.4(a) (prohibiting fee-sharing with non-attorneys) and 5.4(b) (prohibiting partnerships with non-attorneys "if any of the activities... consist of the practice of law")

Philadelphia Bar Association - Ethics Op 2003-16

The inquirer asks whether it is permissible for an attorney practicing in Pennsylvania to sell life insurance or securities and financial products to his or her clients and/or non-clients, and if so, under what circumstances. Inquirer asks whether it is necessary for the entity selling the life insurance and/or securities and financial products to be separately incorporated.

Pennsylvania Rule of Professional Conduct 5.7, "Responsibilities Regarding Nonlegal Services," governs the provision of nonlegal services by lawyers, and provides as follows:

(a) A lawyer who provides nonlegal services to a recipient that are not distinct from legal services provided to that recipient is subject to the Rules of Professional Conduct with respect to the provision of both legal and nonlegal services.
(b) A lawyer who provides nonlegal services to a recipient that are distinct from any legal services provided to the recipient is subject to the Rules of Professional Conduct with respect to the nonlegal services if the lawyer knows or reasonably should know that the recipient might believe that the recipient is receiving the protection of a client-lawyer relationship.
(c) A lawyer who is an owner, controlling party, employee, agent, or is otherwise affiliated with an entity providing nonlegal services to a recipient is subject to the Rules of Professional Conduct with respect to the nonlegal services if the lawyer knows or reasonably should know that the recipient might believe that the recipient is receiving the protection of a client-lawyer relationship.
(d) Paragraph (b) or (c) does not apply if the lawyer makes reasonable efforts to avoid any misunderstanding by the recipient receiving nonlegal services. Those efforts must include advising the recipient that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the provision of nonlegal services to the recipient.

Rule 5.7 thus does provide that it is permissible for a lawyer to provide nonlegal services to his clients or non-clients. As the Comment to Rule 5.7 states, lawyers have for many years been providing their clients with nonlegal services such as title insurance, financial planning, accounting, trust services, real

estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax return preparation, and patent, medical and environmental consulting.

When a lawyer is providing nonlegal services, whether to a client or a non-client, there is the potential for the recipient of the nonlegal services to mistakenly believe, because the provider of the services is a lawyer, that the services are protected by the safeguards that apply in an attorney-client relationship (such as protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence). Rule 5.7 therefore provides that when the legal and nonlegal services are relatively indistinguishable from each other, or there is a reasonable likelihood that the recipient of the nonlegal services might mistakenly believe that he is receiving the protection of a client-lawyer relationship, then Rule 5.7(a) requires that the lawyer providing the nonlegal services adhere to all of the requirements of the Rules of Professional Conduct, including those addressing conflicts of interest (Rules 1.7 through 1.11), confidentiality of information (Rule 1.6), and advertising and solicitation (Rules 7.1 through 7.3).

In order to avoid having to try to ascertain whether or not the recipient of nonlegal services understands that the nonlegal services are distinct from legal services, and therefore not subject to the protections of the Rules, Rule 5.7(d) provides that neither Rules 5.7(b) or (c), nor the rest of the Rules of Professional Conduct will apply if the lawyer takes reasonable efforts to avoid any misunderstanding by the recipient. To accomplish this, the lawyer must communicate, preferably in writing, to the person receiving the nonlegal services that the services will not be provided under the protections of the client-lawyer relationship.

The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to clearly communicate to the recipient of the nonlegal services that there exists no attorney-client relationship with respect to those services. For example, as stated in the comment to Rule 5.7, "a sophisticated user of nonlegal services, such as a publicly-held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and nonlegal services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit."

Thus, if a lawyer makes it clear in writing to the recipient of the nonlegal services that those services are not legal in nature and therefore are not covered by the protections afforded an attorney-client relationship, the lawyer will not have to comply with the Rules of Professional Conduct in providing those ancillary nonlegal services. Note, however, that under Rule 5.7(a), where the legal and nonlegal services are truly indistinguishable, the Rules of Professional Conduct will apply to the provision of the nonlegal services, regardless of disclosures made by the attorney to the recipient of the services.

The inquirer has also asked whether the entity providing the nonlegal services must be separately incorporated. The Comment to Rule 5.7 states that although nonlegal services may be provided through "an entity with which a lawyer is somehow affiliated, for example, as owner, employee, controlling party or agent . . .there is still a risk that the recipient of the nonlegal services might believe that [he] is receiving the protection of a client-lawyer relationship." Where there is such a risk, the lawyer affiliated with the entity must comply with the Rules of Professional Conduct, unless exempted by Rule 5.7(d). So again, the prudent course to take, even where the provider of nonlegal services is a separate entity, is to make it clear in writing to the recipient that the services are nonlegal and not subject to the protections applicable to a lawyer-client relationship.

The inquirer is strongly cautioned that the analysis of whether or not a particular service is legal or nonlegal is highly fact intensive. While this opinion provides a thorough analysis of Rule 5.7, the inquirer must be very careful to properly apply Rule 5.7 and this opinion to his particular facts.

It should be noted that there is a significant minority Committee dissent which is that Rule 1.8 also applies to a scenario when distinct non-legal services are being provided by an attorney to an existing client.

The dissent does not agree with the majority conclusion that without the Rules expressly so providing, compliance with Rule 5.7 eliminates the protections of 1.8 when there is an already existing attorney-client relationship. It is agreed that provided there is compliance with Rule 5.7 that Rule itself does not require any other disclosures as to the distinct non-legal services being provided to the client. However, since Rule 5.7 allows those services to be treated as a separate outside business relationship, without the safeguards of the Rules as

they apply to the attorney-client relationship, Rule 1.8 thus must apply on the other side of that relationship, i.e. the existing attorney-client relationship. Doing business with a client causes a conflict that needs to be disclosed and waived as in any circumstance where an attorney is doing business with a client. The dissent notes that this position is consistent with the Comment to Pennsylvania Rule of Professional Conduct 5.7 which provides in part

The Relationship Between Rule 5.7 and Other Rules of Professional Conduct

Even before Rule 5.7 was adopted, a lawyer involved in the provision of nonlegal services was subject to those Rules of Professional Conduct that apply generally. For example, Rule 8.4(c) makes a lawyer responsible for fraud committed with respect to the provision of nonlegal services. Such a lawyer must also comply with Rule 1.8(a). Nothing in this rule is intended to suspend the effect of any otherwise applicable Rule of Professional Conduct such as Rule 1.7(b), Rule 1.8(a) and Rule 8.4(c).

In addition, that ABA Model Rule of Professional Conduct 5.7 in comment number five agrees. That comment provides,
"When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8(a)."
Providing there is compliance with Rule 1.8(a) the minority dissent agrees with the final conclusion of the majority.

The Philadelphia Bar Association's Professional Guidance Committee provides, upon request, advice for lawyers facing or anticipating facing ethical dilemmas. Advice is based on the consideration of the facts of the particular inquirer's situation and the Rules of Professional Conduct as promulgated by the Supreme Court of Pennsylvania. The Committee's opinions are advisory only and are based upon the facts set forth. The opinions are not binding upon the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. They carry only such weight as an appropriate reviewing authority may choose to give it.

NEW YORK STATE BAR ASSOCIATION - ETHICS OPINION 1200

Topic: Dual practice as a lawyer and wealth management provider; conflicts of interest
Digest: A lawyer may not simultaneously provide legal services and wealth management services to a client for separate fees. A lawyer may provide wealth management services to non-law clients, subject to Rule 5.7. A lawyer may not refer a law client to a financial planner for a fee, even if the services are unrelated, as the referral fee may compromise the loyalty and independent judgment owed to the client.
Rules: 1.7(a) & (b); 1.8(f); 5.7

FACTS

1. The inquirer, a non-practicing attorney admitted in New York, has maintained a twenty- year career as a wealth manager, providing fee-based planning, life insurance sales, and asset The inquirer would like to resume practicing law in a firm or solo practice and also to continue to provide investment advisory services and/or design and broker financial products for a commission. The wealth management services would be provided through an entirely separate entity from the legal services entity. The inquirer asks several questions about the permissibility of providing these services to legal and non-legal clients, including, for example, charging separate fees for creating a life insurance trust for a law client and selling the client a new life insurance policy.

QUESTIONS

2. The inquirer asks three questions:

- May a lawyer simultaneously provide wealth management services to law clients for separate fees?
- May a lawyer provide wealth management services to non-law clients?

- May a lawyer, during a representation, refer a law client to a third-party financial planner and receive a referral fee?

OPINION

Simultaneous Provision of Legal and Non-Legal Services to the Same Client for Separate Fees

3. In the circumstances at issue, the answer to the first question – the rendition of dual services to the same client for separate fees – is no. Traditionally, lawyers have provided both legal and non-legal services to the same client. See N.Y. State 206 (1971) (lawyer-accountant services). The N.Y. Rules of Professional Conduct ("Rules") expressly allow a lawyer to do so. *See* Rule 5.7.
4. This does not end the Rule 1.7(a) prohibits a lawyer from representing a client if a reasonable lawyer would conclude that a significant risk exists that the lawyer's professional judgment on the client's behalf will be adversely affected by the lawyer's own financial or business interests. Providing legal and non-legal services to a client for separate fees presents a conflict of interest. This conflict of interest may be cured only if client consent is permissible under Rule 1.7(b), after full disclosure, confirmed in writing. In some circumstances, such consent may be sufficient to remedy the conflict. *See* N.Y. State 1155 ¶ 5 (2018) (informed consent permissible in some cases); *e.g.,* N.Y. State 784 (2005) (if an entertainment management company in which a lawyer has an interest that provides non-legal services to a client of the lawyer's firm, the law firm may continue to represent the client only if a disinterested lawyer would believe that the representation of the client will not be thereby adversely affected and the client consents to the representation after full disclosure of the implications of the lawyer's interest in the management company).
5. This Committee has previously opined, however, that some dual practice conflicts are so serious as to preclude the possibility of

informed consent. In a series of opinions, we have found that, in certain cases, the conflict between the legal and non-legal services is so severe that informed consent cannot cure Most of these opinions involve acting as a lawyer and a real estate broker in the same transaction. See N.Y. State 1015 ¶ 7 (2014); N.Y. State 1013 ¶ 5 (2014); N.Y. State 933 ¶ 7 (2012); N.Y. State 919 ¶ 3 (2012); N.Y. State 752 (2002) (after adoption of the predecessor to Rule 5.7, the conflict provisions of the Code of Professional Responsibility still prohibited a lawyer from acting as a lawyer and a real estate broker in the same transaction, even with the consent of the client); N.Y. State 208 (1971).

6. The problem with consent identified in these opinions is that the broker's personal financial interest in losing the brokerage transaction interferes with the lawyer's ability to render independent advice with respect to the *See also* N.Y. State 738 (2001) (dual role of lawyer for real estate client and abstract title examiner impermissible because of possible need to negotiate exceptions to title); N.Y. State 621 (1991); N.Y. State 595 (1988). For instance, a lawyer may not provide both legal and financial planning advice to clients and receive brokerage commissions with respect to financial products purchased by clients receiving the lawyer's legal advice. *See* N.Y. State 1155 ¶ 6 (2018). By contrast, we concluded that, as long as the financial planning corporation did not offer any products (*e.g.* securities, real estate or insurance) for which it would receive a commission or other form of compensation or act as legal counsel and broker in the same transaction, then the Rules would permit the conduct. *See id.; see also* N.Y. State 619 (1991); N.Y. State 536 (1981).
7. Here, the inquirer seeks to offer legal services for a fee and wealth management services to the same clients from a separate entity for a separate fee – the creation of the life insurance trust coupled with the sale of an insurance policy being only an This dual practice creates a conflict that, in our

opinion, is not amenable to consent for the same reasons set forth in the foregoing opinions, namely, that the legal fees for creating a life insurance trust are likely modest to the commissions for selling a life insurance policy. As a result, based on our prior opinions, we believe the dual practice is not subject to informed consent and hence impermissible.

Provision of Non-Legal Services to Non-Clients

8. The answer to the second question is yes – a lawyer may provide non-legal wealth management services to non-law clients if the lawyer complies with Rule 7. Rule 5.7(c) defines a non-legal service to mean "services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law" when provided by a non-lawyer. Although legal issues are beyond our jurisdictional reach, we assume without deciding that a lawyer may legally engage in wealth management services and that such services do not constitute the unauthorized practice of law. Rules 5.7(a)(1) & (2) concern situations in which the lawyer intends to offer such non-legal services to law clients – persons to whom the lawyer is providing legal services. Here, however, the inquirer is interested in providing the non-legal wealth management services to persons who are not law clients and to do so through an entity separate from the inquirer's law practice. In these circumstances, the applicable standard is found in Rule 5.7(a)(3).
9. Rule 7(a)(3) says that when, as here, a lawyer or law firm "is an owner, controlling party or agent of, or is otherwise affiliated with, an entity that the lawyer or law firm knows to be providing" non-legal services to someone, then the lawyer or law firm "is subject to these Rules with respect" to the non-legal services "if the person receiving the services could reasonably believe" that the non-legal services are the subject of a client-lawyer relationship. Rule 5.7(a)(4) creates a presumption that the person receiving the non-legal services will believe the non-

legal services "to be subject to a client-lawyer relationship unless the lawyer or law firm has advised the person receiving the services in writing that the services are not legal services and that the protection of a client-lawyer relationship does not exist" with respect to the non-legal services.

10. Thus, a lawyer may provide non-legal wealth management services to non-law clients if the lawyer or law firm rebuts the presumption that Rule 7(a)(4) creates if, in offering the non-legal services, the lawyer disclaims the existence of a lawyer-client relationship. This disclaimer tells the consumer that such accessories to a lawyer-client relationship as the protection of client confidential information, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence do not apply to the provision of non-legal services.

<u>*Receipt of Referral Fees from Third Parties*</u>

11. The answer to the inquirer's third question – receipt of a referral fee from a wealth management firm unconnected to the inquirer – was addressed in Y. State 1086 (2016). There, we said that the question whether a lawyer may accept a referral fee from a third-party service provider implicates Rules 1.7(a)(2) and 1.8(f). *Id.* ¶ 6. Rule 1.7(a)(2), as we note above, prohibits a representation when a reasonable lawyer would conclude that the lawyer's professional judgment on behalf of the client will be adversely affected by the lawyer's own financial, business, property or other personal interests unless the conflict can be and is waived under Rule 1.7(b).
12. We noted in Y. State 1086 that a number of our prior opinions have permitted a lawyer to accept a referral fee or commission from a third-party service provider in a few restricted instances, but that other prior opinions have prohibited a lawyer from accepting such a referral fee or commission, often because the lawyer's personal conflict of interest is so great that disclosure to and consent from the client will not cure the conflict.

13. Our opinions permit such a payment in very limited *See, e.g.*, N.Y. State 981 (2013) (referral fee not prohibited by Rule 1.7 when the service is not related to the lawyer's legal services and the lawyer makes no recommendation to use the service); N.Y. State 667 (1994) (lawyer may accept referral fee from mortgage broker notwithstanding predecessors to Rules 1.7(a) and 1.8(f) as long as client consents and all proceeds are credited to client if client so requests); N.Y. State 626 (1992) (lawyer for lender may retain fees from a title insurance company as long as client consents and amount of the fee is disclosed to the borrower who will pay the cost of the insurance and the total amount of the lawyer's fee is not excessive); N.Y. State 576 (1986) (lawyer may act as agent for title insurance company and also represent the buyer, seller or mortgagee in a real estate transaction consistent with the predecessors to Rules 1.7(a) and 1.8(f) as long as lawyer credits client with amount received from title insurer or the client expressly consents to the lawyer retaining the fee paid by the insurer); N.Y. State 461 (1977) (lawyer may accept part of a fire adjuster's commission consistent with predecessor to Rule 1.7(a) if the client consents and all proceeds are credited to client); and N.Y. State 107 (1969) and N.Y. State 107(a) (1970) (both permitting lawyer to accept a referral fee from a financial company when the lawyer invests the client's funds in certificates of deposit, if client consents after disclosure and lawyer remits the fee to client if client so requests).
14. When these narrow circumstances do not exist, we have opined that receipt of a commission creates a conflict that informed consent cannot *See, e.g.*, N.Y. State 682 (1996) (lawyer may not accept a fee from an investment adviser for referring a client under predecessor to Rule 1.7 because disclosure and consent would not cure the lawyer's direct and substantial conflict); N.Y. State 671 (1994) (lawyer engaged in estate planning may not accept referral fee from insurance company for referring client

under predecessor to Rule 1.7 because disclosure and consent could not cure the direct and substantial conflict between the client's and the lawyer's interests); N.Y. State 619 (1991) (when estate planning lawyer's remuneration from the third party would vary with the quantity of the product or services recommended, receipt of the referral fee was impermissible under predecessors to Rules 1.7 and 1.8(a) [business transaction with client] because the lawyer's substantial financial interest conflict could not be cured by disclosure and consent).

15. N.Y. State 682 identifies two factors that determine whether the lawyer's financial interest in a referral fee is so great that disclosure and client consent will be ineffective. A client may give informed consent for a referral fee when (a) the transaction at issue involves a product or service that is fairly uniform among providers and is required in an objectively determinable amount, or (b) when the product or service is fairly uniform among providers and is unconnected to any particular legal services.
16. In this case, we understand that a variety of financial products could meet the financial planning objectives of the clients (*e*. the products are not fairly uniform) and that the products are not required in an objectively determinable monetary figure. *See* N.Y. State 1086 ("an attorney may not accept a fee from an investment advisor for referring a client to the advisor, because the services of advisors vary substantially among differing providers and the amount of funds that should ideally be entrusted to any particular adviser is not objectively determinable.") Moreover, when the recipient also is a legal services client, the products are likely connected to the inquirer's legal services. For these reasons, we believe the receipt of referral fees or commissions would be ethically prohibited.
17. Comment [1] of Rule 7 highlights the essential aspects of a lawyer's relationship with a client: loyalty and independent

judgment. "The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties. Concurrent conflicts of interest, which can impair a lawyer's professional judgment, can arise from the lawyer's responsibilities to another client, a former client or a third person, or from the lawyer's own interests. A lawyer should not permit these competing responsibilities or interests to impair the lawyer's ability to exercise professional judgment on behalf of each client."

18. Here, there is a possibility that recommending a third-party non-legal services provider for a fee may indeed compromise the attorney's loyalty and independent judgment owed to one's Therefore, an attorney may not accept a referral fee from a third-party non-legal services provider from law clients who were referred to and received services from a third-party financial planner.

CONCLUSION

19. A lawyer may not simultaneously provide legal services and wealth management services to a client for separate fees because it is a conflict of interest that consent may not A lawyer may provide wealth management services to non-law clients subject to Rule 5.7. A lawyer may not refer a law client, even if the services are unrelated, to a financial planner for a referral fee.

Cynthia Sharp, Esquire
Business Development Leader

Veteran attorney Cynthia Sharp (CEO of The Sharper Lawyer) works with motivated lawyers seeking to generate additional revenue for their law firms. She practiced law from 1982 - 2009 and then embarked on a professional speaking and writing career. Ever since, she has served solo and small firm attorneys throughout North America. In the spring of 2020, she co-founded legalburnout.com, dedicated to helping those in the legal industry succeed by applying principles of mindfulness to all areas of their lives.

Cindy, author of The Lawyer's Guide to Financial Planning published by ABA Solo, Small Firm and General Practice Division, is also a Contributor to the Division's books How to Capture and Keep Clients: Marketing Strategies for Lawyers as well as Effectively Staffing Your Law Firm. As Director of Client Services for The Legal Burnout Solution, Cynthia has helped lead over 500 attorneys in live meditations.

She has delivered close to 200 live presentations over the past 25 years on behalf of the American Bar Association, 10 state bar associations, the Million Dollar Round Table, Professional Services Marketing Association and numerous other legal, financial and professional groups, as well as private seminars for her clients.

Cindy served as Business Development columnist on behalf of the ABA GP Solo eReport, Social Media Strategist for GP Solo and has served as a regular guest contributor to ALM's publication Marketing the Law Firm. In addition, she has written well over 120 articles over the past 30 years that have been published in various journals throughout the country.

During 2017/18, Cindy held positions on the GP Solo and eReport Boards of the ABA Solo, Small Firm & General Practice Division, having previously served as Chair of the Publications Board of the Division and on the Division's Council. She completed her term as President of the Philadelphia Chapter of the National Speakers Association in June of 2015 and served as Dean of the Speaker Academy the subsequent year. Sharp has also been an active member in the Association of Continuing Legal Education (ACLEA). She continues her service to her colleagues through a podcast featured on Solo Practice University.

Cindy's most recent accolade is that she has been named Trainer of the Year by the American Bar Association Solo, Small Firm and General Practice Division, a national award presented in New York City on May 3, 2019.

Cindy lives in Philadelphia with her husband, Mark H. Gallant and their dog Rocky and cat Jackson. She practices yoga, enjoys the arts and loves to bake.

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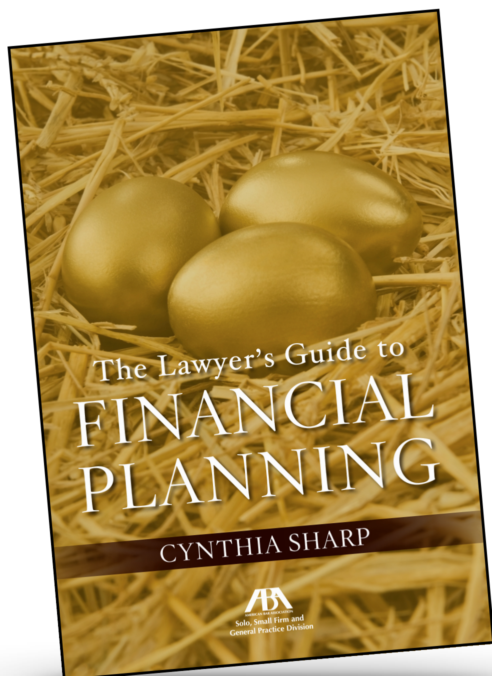

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