

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 2000-4

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Withdrawn by Adv. Op. 2020-08

[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

SYLLABUS: The Ohio Code of Professional Responsibility does not prohibit an attorney from providing financial planning services through the law firm to business and estate planning clients of the law firm when the law-related services are provided in connection with and are related to the provision of legal services. An attorney who provides law-related services in connection with and related to the provision of legal services is subject to the Ohio Code of Professional Responsibility. Attorneys who provide law-related services must heed applicable state and federal laws governing the law-related service.

The Board recommends that an attorney who provides financial services through a law firm in connection with and related to the provision of legal services should not charge a fee based upon the total value of a fund averaged over a definite period, or as of definite dates, or taken as of a definite date. Such compensation may possibly open the attorney and the attorney's records to state regulation and inspection under the Ohio Securities Act. The Board instead suggests the use of a fixed fee, flat or hourly, provided that the fee is not excessive under DR 2-106(A) and (B).

OPINION: This opinion addresses questions regarding an attorney providing both legal services and financial planning services to clients of a law firm.

1. Is it proper for an attorney to provide financial planning services through the attorney's law firm to business and estate planning clients of the attorney's law firm?
2. Is it proper for an attorney to charge a fee to a legal client for financial planning services, basing the fee on a percentage of the assets managed for the client?

Question One

Is it proper for an attorney to provide financial planning services through the attorney's law firm to business and estate planning clients of the attorney's law firm?

An attorney proposes providing financial planning services to business and estate planning clients of the attorney's law firm. The financial planning services would include advising as to risk management; investment management, including asset allocation and selection; retirement planning; estate planning, and personal financial statements. The financial planning services would not include the sale of products or securities.

The Ohio Code of Professional Responsibility does not prohibit attorneys from providing law-related services. In fact, the Ohio Code of Professional Responsibility contains no direct reference to the provision of law-related services, other than to broadly acknowledge in an advertising rule, DR 2-102(E), that an attorney who engages in both the practice of law and another profession or business is subject to certain advertising restrictions. [DR 2-102(E) "A lawyer who is engaged both in the practice of law and another profession or business shall not so indicate on the lawyer's letterhead, office sign, or professional card, nor shall the lawyer identify himself or herself as a lawyer in any publication in connection with his or her other profession or business."]

Unlike the Ohio Code of Professional Responsibility, the ABA Model Rules of Professional Conduct address law-related services.

Rule 5.7 Responsibilities Regarding Law-Related Services

- (a) A lawyer shall be subject to the Rules of Professional conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:
 - (1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or
 - (2) by a separate entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist.
- (b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

Although Model Rule 5.7 does not govern Ohio attorneys, the ABA rule provides guidance. *See e.g., Disciplinary Counsel v. Ball*, 67 Ohio St. 3d 401, 404 (1993) (discussing ABA Model Rules 5.1 and 5.3). ABA Model Rule 5.7(a) acknowledges that lawyers may provide law-related services either in circumstances that are not distinct from the lawyer's provision of legal services to clients or through a separate entity. The rule identifies law-related services as services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services. The rule requires that lawyers who provide law-related services must comply with professional rules of conduct. This Board agrees.

In Opinion 94-7, this Board addressed the provision of law-related services through a separate entity. The Board advised that “[a]n attorney or several attorneys within a law firm may own an ancillary business that provides law-related services, for example, a Workers’ Compensation Service Company that provides claims administration services for employers. Attorneys who operate such law-related businesses must do so in a manner consistent with the Ohio Code of Professional Responsibility. The ancillary business must not engage in activities that would be prohibited as unauthorized practice of law.” Ohio Sup Ct, Bd of Comm’rs on Grievances & Discipline, Op. 94-7 (1994).

Consistent with Opinion 94-7, it is this Board’s view that in the absence of a prohibitive rule, Ohio attorneys may, as they have by tradition and perhaps by unspoken rule, provide law-related services as part of the practice of law to legal clients of the law firm. The provision of law-related services through a law firm must comport with professional rules of conduct and to any applicable laws governing the law-related service.

Before providing financial planning services, Ohio attorneys should be fully aware of state and federal laws regulating investment advisory services. The Ohio Department of Commerce, Division of Securities administers the law regulating investment advisers in Ohio and is available as a resource on investment adviser issues. For a discussion of Ohio law (Chapter 1707 of the Ohio Revised Code) and for references to applicable federal law see Thomas E. Geyer, *An Overview of Amended Substitute House Bill 695’S Amendments to the Ohio Securities Act and a Guide to Ohio’s New Investment Adviser Provisions*, 28 Cap. U. L. Rev. 359 (2000).

This Board has no advisory authority as to state and federal law. Nevertheless, the Board notes that attorneys who provide investment advisory services for compensation are subject to the licensing and other regulations of Ohio law, *unless* the investment advisory services are provided by the attorney “solely incidental” to the practice of the attorney’s profession. Under R.C. 1707.01(X)(2), when investment advisory services are provided by an attorney “solely incidental” to the practice of the attorney’s profession, the attorney is not considered an “investment adviser” under R.C. 1707.01(X)(1).

R.C. 1707.01(X)(1) “Investment adviser” means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as a part of regular business, issues or promulgates analyses or reports concerning securities.

R.C. 1707.01(X)(2) “Investment adviser” does not mean any of the following:

- (a) Any attorney . . . whose performance of investment advisory services described in division (X)(1) of this section is solely incidental to the practice of the attorney’s . . . profession.

Thus, if an attorney's financial advice to clients is beyond "solely incidental," the attorney may meet the definition of investment adviser in R.C. 1707.01(X)(1) and be subject to regulation under the Ohio Securities Act set forth Chapter 1707 of the Ohio Revised Code.

What is considered "solely incidental" is not within this Board's authority to determine. The Securities and Exchange Commission has stated:

The performance by a lawyer of investment advisory services would be solely incidental to his [her] law practice where the following three conditions are met: (i) the lawyer does not hold himself [herself] out to the public as providing investment advisory services; (ii) the lawyer renders such services only in connection with the fulfillment of his (her) contract for legal services; (iii) the charge for such services is based on the same factors as determine the lawyer's usual charges. *See* Thrailkill & Goodman, P.C. (pub. avail. July 16, 1982), and LaManna & Hohman (pub. avail. March 18, 1983) (accountant exception).

Milton O. Brown, P.C. No-Action Letter, [1983-1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶77,545 (Aug. 29, 1983).

For discussion of the Ohio Securities Act see Thomas E. Geyer, *An Overview of Amended Substitute House Bill 695'S Amendments to the Ohio Securities Act and a Guide to Ohio's New Investment Adviser Provisions*, 28 Cap. U. L. Rev. 359, 367 (2000). The "solely incidental" exclusion is mentioned at page 376 of the Geyer article.

As to applicable disciplinary rules in the Ohio Code of Professional Responsibility, the Board offers the following guidelines. Preservation of client confidences and secrets must be maintained under DR 4-101. An attorney should consider whether provision of a law-related service subjects the attorney's records to inspection by regulatory agencies outside the legal profession. For example, if an attorney falls within the definition of investment adviser, but does not meet the "solely incidental" exclusion provided by law, the attorney will be subject to the law and to its regulatory powers that includes state inspection of records. It is the Board's view that an attorney should not jeopardize the confidences and secrets of clients of his law practice in this manner. Thus, an attorney who wants to provide financial services through a law firm should do so only when the services are provided "solely incidental" to the practice of law.

An attorney should abide by DR 5-101 regarding conflicts of interest. In particular, DR 5-101(A)(1) requires that "[e]xcept with the consent of the client after full disclosure, a lawyer shall not accept employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's financial, business, property, or personal interests. Thus, to avoid a conflict of interest under DR 5-101(A)(1) a lawyer should inform a legal client who needs related financial services that the client may obtain financial services elsewhere. The lawyer should inform a client of the fee, if any, for providing the law-related services.

An attorney should abide by the publicity and other related rules under DR-2-101 to 2-105. As an example, to avoid a violation of DR 2-102(E), the lawyer should not

advertise the financial planning services on the letterhead, office sign, or letterhead of the law practice.

An attorney should not charge an illegal or excessive fee under DR 2-106. The fee should be reasonable. A lawyer's fee for providing financial planning services in conjunction with legal services is addressed further in Question Two.

In conclusion, the Board advises that the Ohio Code of Professional Responsibility does not prohibit an attorney from providing financial planning services through the law firm to business and estate planning clients of the law firm when the law-related services are provided in connection with and are related to the provision of legal services. An attorney who provides law-related services in connection with and related to the provision of legal services is subject to the Ohio Code of Professional Responsibility. Attorneys who provide law-related services must heed applicable state and federal laws governing the law-related service.

Question Two

Is it proper for an attorney to charge a legal client a fee for financial planning services, basing the fee on a percentage of the assets managed for the client?

The Board first considers several methods of compensation. Under the Ohio Administrative Code, an investment adviser, who is licensed or who should be licensed, is prohibited from charging a fee based upon performance. The Ohio Administrative Code prohibits a person who is an investment adviser licensed or required to be licensed from entering a contract that "[p]rovides for compensation to the investment adviser on the basis of a share of capital gains upon or capital appreciation of the funds or any portion of the funds of the client." Ohio Admin. Code § 1301:6-3-151(I)(1)(a)(i) (2000)

The Securities and Exchange Commission has also stated that a contingent fee based on performance of assets for providing financial services to legal clients is deemed an illegal fee. *See* Milton O. Brown, P.C. No-Action Letter, [1983-1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶77,545 (Aug. 29, 1983). *See also*, Thomas E. Geyer, *An Overview of Amended Substitute House Bill 695'S Amendments to the Ohio Securities Act and a Guide to Ohio's New Investment Adviser Provisions*, 28 Cap. U. L. Rev. 359, 396-98 (2000).

An investment adviser is permitted to charge a fee based upon the total value of a fund averaged over a definite period, or as of definite dates, or taken as of a definite date. The Ohio Administrative Code states that "[p]aragraph (I)(1)(a)(i) of this rule shall not: Be construed to prohibit an investment advisory contract which provides compensation based upon the total value of a fund averaged over a definite period, or as of definite dates, or taken as of a definite date." Ohio Admin. Code § 1301:6-3-151(I)(1)(b)(i) (2000).

However, even though it is legally proper for investment advisers to be compensated in this manner, this Board's view is that an attorney who provides financial services through a law firm should not charge a fee in which the compensation is based upon the total

value of a fund averaged over a definite period, or as of definite dates, or taken as of a definite date. Such compensation may possibly open the attorney and the attorney's records to state regulation and inspection under the Ohio Securities Act.

One of the factors used by regulatory agencies to determine whether an attorney meets the "solely incidental" exception under R.C. 1707.01(X)(2) and falls outside the regulatory requirements of the law is whether the fee charged for advisory services is based on the same factors as those used to determine the fee for professional services. *See e.g.,* Milton O. Brown, P.C. No-Action Letter, [1983-1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶77,545 (Aug. 29, 1983). *See also,* Thomas E. Geyer, *An Overview of Amended Substitute House Bill 695'S Amendments to the Ohio Securities Act and a Guide to Ohio's New Investment Adviser Provisions*, 28 Cap. U. L. Rev. 359, 367 (2000). Whether a fee based upon the total value of a fund averaged over a definite period, or as of definite dates, or taken as of a definite date, would be viewed as based on the same factors as those used to determine a fee for the attorney's professional services is not a question this Board has authority to answer.

Until there is legal authority that clarifies this issue, the Board does not recommend this method of compensation for attorneys who provide law-related services through the law firm. The Board instead suggests the use of a fixed fee, flat or hourly. Fixed fees are expressly referred to in DR 2-106(B)(8) of the Ohio Code of Professional Responsibility. A fixed fee, flat or hourly, is a typical type of fee for legal services. A fixed fee must not be excessive under DR 2-106(A) and (B).

In conclusion, the Board recommends that an attorney who provides financial services through a law firm in connection with and related to the provision of legal services should not charge a fee based upon the total value of a fund averaged over a definite period, or as of definite dates, or taken as of a definite date. Such compensation may possibly open the attorney and the attorney's records to state regulation and inspection under the Ohio Securities Act. The Board instead suggests the use of a fixed fee, flat or hourly, provided that the fee is not excessive under DR 2-106(A) and (B).

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.