Enduring Ethics Opinions: Opinion # 79, (Propriety of Business Venture in Which Lawyers and Accountants are Principals) by Rita M. Farry, Esq., Professional Ethics Commission

On May 6, 1987, the Professional Ethics Commission addressed the ethics of a proposed business entity comprised of attorneys and an accountant. The Commission had received a brochure describing a corporation which would “provide total legal and financial services” with a “team of experts” in “legal and financial matters.” The team included two attorneys and an accountant, and while the accountant was not to be an “officer” of the corporation, it was not clear that the accountant would not be a shareholder or otherwise share in the profits of the venture.

The Commission was asked whether the proposed business would violate any of the Maine Bar Rules. It determined that the proposed corporation would violate then applicable Maine Bar Rule 3.2(a)(2)\(^1\), which prohibited any sharing of proprietorship with non-lawyers, regardless of how that shared proprietorship is accomplished. The opinion noted that the Rule did not prohibit lawyers from employing other professionals, such as accountants, or non-professionals, as long as there is neither a delegation nor a representation of authority to practice law. Maine Bar Rule 3.2(a)(2) simply provided that

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[a] \text{ lawyer shall not aid any person, association, or corporation in the unauthorized practice of law.}
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Maine Bar Rule 3.2(h) went on to provide that a lawyer was subject to the Bar Rules with respect to the provisions of “law-related services” if the law-related services were provided

(i) By the lawyer in circumstances that are not distinct from the lawyer’s provision of legal services to clients; or
(ii) 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.

\(^1\) The Maine Supreme Judicial Court adopted the Maine Rules of Professional Conduct with an effective date of August 1, 2009. On the same date Maine Bar Rule 2-A (Aspirational Goals for Lawyer Professionalism), Maine Bar Rule 3 (Code of Professional Responsibility) and Maine Bar Rule 8 (Contingent Fees) were abrogated, as they were replaced by the Maine Rules of Professional Conduct.
The Commission also noted that the Maine Bar Rules prohibited a lawyer from dividing a legal fee with a non-lawyer, citing Rule 3.3(e). The Commission was aware of the growing interest in interdisciplinary service organizations but believed the public interest would not be best served by their encouragement on a proprietary level, in the legal profession.

The results under today’s Maine Rules of Professional Conduct would be the same as the results under abrogated Maine Bar Rules 3.2 and 3.3. M. R. Prof. Conduct 5.5(a) provides that “[a] lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.” Comment [1] to Rule 5.5 states that paragraph (a) “applies to unauthorized practice of law by a lawyer, whether through the lawyer’s direct action or by the lawyer assisting another person.” Comment [3] to Rule 5.5 adds, in pertinent part, that

[a] lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services.

M. R. Prof. Conduct 1.5(e) is nearly identical to abrogated Bar Rule 3.3(d) relative to fee sharing among lawyers, other than partners or associates in the same law firm, which requires the total fee charged be reasonable, full disclosure and consent of the client. Unlike abrogated Maine Bar Rule 3.3(d), M. R. Prof. Conduct 1.5(e) also requires that the consent be in writing.

In an age of baby boomers steadily entering retirement, collaborative law arrangements and succession planning, Opinion 79 remains relevant and worthy of review. The stated goals supported by that opinion include:

(1) minimal public confusion as to the nature and legitimacy of proffered services;
(2) maintenance of clear and unrestricted authority in the Supreme Judicial Court over the practice of law; and
(3) avoidance of the difficult problems that would be posed by the substantive law of partnerships under a contrary rule.
As a result, the sale of a portion of an attorney’s practice, which included preparation of tax returns for clients, to an accountant would likely violate M. R. Prof. Conduct 5.5 and 1.5 for the reasons set forth in Opinion 79. In addition, M. R. Prof. Conduct 1.17 expressly prohibits such a sale, as it requires that a law practice must be sold in its entirety and that the selling attorney or each attorney in the selling firm must have retired, become disabled or died. As was the case in Opinion 79, the controlling premise is that the practice of law is a profession, not merely a business. See Comment [1] to M. R. Prof. C. 1.17.

The Reporter’s Notes to Rule 1.17 disclose that until 2002, lawyers were forbidden to sell all or part of their law practices, other than tangible items such as furnishings, equipment, books and leases although firms could buy-out withdrawing or retiring partners, return their capital and continue to pay distributions and benefits to such departing partners. After discussion by the Maine Supreme Court’s Advisory Committee on the Rules of Professional Conduct, the Committee recommended allowing the sale of an entire law practice to a single purchaser, subject to narrowly specified exemptions. The Advisory Committee also recommended that Bar Counsel be involved in such sales at an early stage in the process, in order to provide lawyers with assistance in avoiding unintended violations of the rule.

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2 The Rule permits a sale of an entire practice attendant upon the lawyer’s retirement from the private practice of law within the jurisdiction, thus accommodating the lawyer who sells the practice on the occasion of moving to another state. M. R. Prof. C. Rule 1.17, Comment 4.