

Informal 89-10.

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Lawyers As Investment Advisors

In the wake of several cases in which clients have incurred losses because lawyers have made "investments" of clients' funds, either authorized or unauthorized, the Committee on Professional Ethics has been requested to make recommendations on certain questions involving the role of lawyers as investment advisors to their own clients.

Rules of Professional Conduct, Rule 2.1, provides that a lawyer shall render candid advice to clients. The rule expressly provides that, in rendering the advice, "a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." Some degree of investment advice may be necessary to the adequate representation of the client in many situations. As explained in the Comment to Rule 2.1, purely legal advice may sometimes be inadequate to the client. Thus an absolute bar to the rendering of investment advice to clients is not recommended.

However, there are a number of problems associated with investment advice. If the lawyer has any interest in the investments recommended to the client, or if the lawyer is compensated, other than for the representation of the client, as a result of the investment advice, there is a conflict of interest. Rule 1.8(a) states:

(a) A lawyer shall not enter into a business transaction, including investment services, with a client or former client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client or former client unless:

(1) The transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client or former client and are fully disclosed and transmitted in writing to the client or former client in a manner which can be reasonably understood by the client or former client;

(2) The client or former client is advised in writing that the client or former client should consider seeking the advice of independent counsel in the transaction and is given a reasonable opportunity to do so;

(3) The client or former client consents in writing thereto.

See also, Connecticut Bar Association Informal Opinion 87-6 (June 18, 1987) (Conflicts of Interest and Multiple Representation)

Another problem raised by the inquiry is that of unauthorized "investments." Unauthorized investment of clients' money is prohibited by Rules 1.2 and 1.15. Rule 1.2 requires the lawyer to abide by the client's decisions concerning the objectives of representation and to consult with the client as to the means by which they are to be pursued. Thus, when the lawyer is properly advising the client on investment matters, the client must ultimately decide the investment objectives, and must authorize the lawyer to make the investments.

Rule 1.15(a) requires the lawyer to hold funds of a client in an account maintained in the state where the lawyer's office is situated, or elsewhere with consent. Other property must be identified as client's property and appropriately safeguarded. Subsection (b) of the rule requires the lawyer to promptly notify the client of the receipt of funds or property of the client and to promptly deliver the same except as permitted in the rule, by law, or by agreement with the client. Thus, unauthorized investment would violate the lawyer's duty to safeguard the client's property.

Investment advice by a lawyer may also involve a question of competence. Rule 1.1 requires a lawyer to provide competent representation to a client. As the Comment to Rule 2.1 "Advisor" observes:

[m]atters that go beyond strictly legal questions may also be in the domain of another profession.... [B]usiness matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best, often consists of recommending a course of action in the face of conflicting recommendations of experts.

It is possible that the lawyer is competent and qualified as both a lawyer and as an investment advisor. If so, and if the lawyer desires to establish a dual practice, the same considerations as apply to other types of dual practice would apply. See Connecticut Bar Association, Informal Opinion 88-24 (Simultaneous Operation of Accounting Firm and Law Firm from the Same Location). Since investment advice is closely related to the practice of law, the attorney engaging in the dual practice would be required to observe the Rules of Professional Conduct in the investment practice.

Thus our recommendations in response to your specific questions are as follows:

1. Should lawyers be permitted to act as investment advisors to their own clients?

Yes, provided the Rules of Professional Conduct are strictly followed, particularly Rule 1.8(a) pertaining to conflicts in business transactions with clients, Rules 1.2 and 1.15 pertaining to objectives of clients and safekeeping of client property, and Rule 1.1 pertaining to competence.

2. Does that create some kind of conflict?

A conflict is created if the lawyer has an interest in the investment or the sale of the investment. In either event, the transaction is prohibited, unless the provisions of Rule 1.8(a) are satisfied.

3. Should a lawyer be required to at least advise the client to obtain independent investment advice?

Independent investment advice is required in two circumstances: If the lawyer has an interest in the transaction, Rule 1.8(a) requires that the client be given a reasonable opportunity to seek the advice of independent counsel; and, if the lawyer is not competent to render adequate advice, a qualified investment advisor should be recommended.

4. If a lawyer wants to be an investment advisor, should he or she be allowed to act as a lawyer for the same party on the same matter?

Yes, provided the lawyer complies with the Rules of Professional Conduct, particularly Rule 1.8(a) pertaining to conflicts in business transactions with clients, Rules 1.2 and 1.15 pertaining to objectives of clients and safekeeping of client property, and Rule 1.1 pertaining to competence.

Thus, it is the recommendation of the CBA Committee on Professional Ethics that the investment advising activities of lawyers are adequately governed by the Rules of Professional Conduct, and that no changes are necessary.

It is worth noting that, although the Rules of Professional Conduct permit business transactions between client and lawyer, these transactions are not the favorite of the law. "There are no transactions respecting with which courts of equity are more jealous and particular, than dealings between attorneys and their clients, especially where there is great intellectual inequality, and comparative experience on the part of the latter." *Miller v. Miller*, 26 Conn 213, 219 (1857).