

**LOS ANGELES COUNTY BAR ASSOCIATION
PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE**

**FORMAL OPINION NO. 510
December 15, 2003**

**FEE SHARING BETWEEN FINANCIAL PLANNING COMPANY AND LAWYER
EMPLOYEE RENDERING LEGAL SERVICES TO CUSTOMERS**

SUMMARY

An attorney may not ethically accept employment on a salaried basis with a financial planning company where: (1) the attorney forms an attorney-client relationship with any customer of the company; (2) the company bills each customer a set percentage of the customer's estate as a fee representing both the attorney's legal services and the non-legal financial planning services provided to the customer by the company; and (3) the company does not account for the amount of legal fees generated by the attorney's legal services and direct those fees only to the attorney. Such an arrangement would be an improper division of fees with non-lawyers, prohibited by California Rule of Professional Conduct ("Rule") 1-320. It also might constitute forming a partnership with non-lawyers, prohibited under Rule 1-310, and may violate other ethical rules.

AUTHORITIES CITED

Statutes and Rules

California Business and Professions Code section 6068(e)

Cal. Rules Prof. Conduct, rule 1-310

Cal. Rules Prof. Conduct, rule 1-320

Cal. Rules Prof. Conduct, rule 1-400

Cal. Rules Prof. Conduct, rule 1-600

Cal. Rules Prof. Conduct, rule 3-310 (F)

Cal. Rules. Prof. Conduct, rule 4-200

ABA Model Rules Prof. Conduct, rule 5.4

D.C. Rules Prof. Conduct, rule 1.7

D.C. Rules Prof. Conduct, rule 5.4

Cases

Gassman v. State Bar, (1976) 18 Cal. 3d 125

Cain v. Burns, (1955) 131 Cal. App. 2d 439

Gafcon, Inc. v. Ponsor & Associates, (2002) 98 Cal. App. 4th 1388

People v. Volk, (1999) 805 P. 2d 1116 (Colo.)

Ethics Opinions

Cal. State Bar Formal Opinion No. 1999-154

Cal. State Bar Formal Opinion No. 1997-148

Cal. State Bar Formal Opinion No. 1995-141

Los Angeles County Bar Assn., Formal Opinion No. 457 (1990)

Los Angeles County Bar Assn., Formal Opinion No. 431 (1984)

ABA Formal Opinion No. 95-392

FACTS AND ISSUES PRESENTED

The Attorney, an estate planning attorney (the “Attorney”), often does business with a financial planning company (the “Company”). The Company has invited the Attorney to become an employee. The Attorney would be expected to render legal services to the Company’s customers,¹ who would also receive financial planning advice directly from the Company’s non-lawyer employees.

¹ The facts presented by Attorney in his inquiry indicate that his job at Company would require him to “provide legal services” to Company’s customers. The choice of this language indicates, and we assume for purposes of this Opinion, that Attorney would be in an attorney-client relationship with Company’s customers directly. This Opinion also assumes that Company is owned, at least in part, by non-lawyers or, if owned entirely by lawyers, is not

The Company would not charge the customers separately for the legal services. Instead, the Company would charge customers based on a percentage of the total value of the customer's estate, whether the Attorney provides legal services or not. The customers would pay the fees directly to the Company. The Attorney would be paid a set salary as an employee, whether or not the Attorney provides legal services to particular customers of the Company.

The Attorney seeks this Committee's opinion on whether this proposed arrangement is prohibited by the California Rules of Professional Conduct and, as specifically noted by Attorney, Rule 1-310 (Forming a Partnership with a Non-Lawyer)² or Rule 1-320 (Financial Arrangements with Non-Lawyers).³

authorized to practice law in California. The Committee's opinion thus does not address any question regarding the impact of a similar financial arrangement when an attorney has an attorney-client relationship with a financial planning company only. This Opinion also does not address the possibility that, even if there were no attorney-client relationship between Attorney and any customer of Company, the activities of Company itself would amount to the practice of law. See, e.g., *People v. Volk*, (1999) 805 P.2d 1116, 1118 (Colo.) [attorney disciplined for aiding the unauthorized practice of law under a disciplinary rule substantially the same as Rule 1-300 where the attorney admitted that the counseling and sale of living trusts by a company that was the attorney's client, where the company acted through non-lawyers, constituted the unauthorized practice of law by the company].

² Unless otherwise stated, all Rule references in this Opinion are to the California Rules of Professional Conduct.

³ The Committee notes that the topics of multi-disciplinary practice, and associations between lawyers and non-lawyers in combined practices of providing legal and non-legal services to clients, are in a state of flux. Nationally and internationally, jurisdictions and bar organizations are reconsidering the practical realities of modern legal practice. The District of Columbia, for example, recently revised its rules to allow lawyers to practice law within entities owned or controlled by non-lawyers, under certain circumstances. See D.C. Rules Prof. Conduct 1.7, 5.4; 70 U.S.L. Week 2805, 2806. California does not authorize lawyers to practice in multi-disciplinary associations.

DISCUSSION

In General, California Rules Prohibit Members From Sharing Legal Fees with Non-Lawyers.

Lawyers can ethically be employed by non-lawyers in a wide variety of situations, even if the lawyers perform legal services. The application of Rule 1-320 will depend on the particular circumstances of each specific situation. We limit this opinion only to the facts presented in this inquiry.

With limited exceptions that do not apply here, Rule 1-320(A) provides that, “[n]either a member nor a law firm shall directly or indirectly share legal fees with a person who is not a lawyer”⁴ The rationale behind this Rule and its intended application are, primarily, to protect the integrity of the attorney-client relationship, to prevent control over the services

⁴ Rule 1-320(A) provides:

Neither a member nor a law firm shall directly or indirectly share legal fees with a person who is not a lawyer, except that:

(1) An agreement between a member and a law firm, partner, or associate may provide for the payment of money after the member’s death to the member’s estate or to one or more specified persons over a reasonable period of time; or

(2) A member or law firm undertaking to complete unfinished legal business of a deceased member may pay to the estate of the deceased member or other person legally entitled thereto that proportion of the total compensation which fairly represents the services rendered by the deceased member;

(3) A member or law firm may include non-member employees in a compensation, profit-sharing, or retirement plan even though the plan is based in whole or in part on a profit-sharing arrangement, if such plan does not circumvent these rules or Business and Professions Code section 6000 et seq.; or

(4) A member may pay a prescribed registration, referral, or participation fee to a lawyer referral service established, sponsored, and operated in accordance with the State Bar of California’s Minimum Standards for a Lawyer Referral Service in California.

rendered by attorneys from being shifted to lay persons, and to ensure that the best interests of the client remain paramount. *See, e.g., Gassman v. State Bar*, (1976) 18 Cal. 3d 125, 132; *Gafcon, Inc. v. Ponsor & Associates*, (2002) 98 Cal. App. 4th 1388, 1418; Cal. State Bar Formal Opinion No.1997-148.

Based on the facts presented by the Attorney, we conclude that the Attorney's financial arrangement with the Company is prohibited by Rule 1-320(A). *See* State Bar Formal Opinion No. 1999-154 ("To the extent that [a lawyer's] company performs legal services or offers legal advice, rule 1-320(A) prohibits [the lawyer] from sharing with a non-lawyer any fee received as compensation for those services or advice.").

The threshold question is whether the inquiry presents a situation in which there are "legal fees" paid by the customers of the Company. We believe that there would be under the arrangement presented. The Attorney would be providing legal services to the Company's customers. Because the legal services provided by the Attorney to those customers would be part of the "package" of services rendered by the Company, the fees paid by those customers would consist in part of legal fees. That the payments made by the Company's customers would be dictated by a percentage of the value of the estate, rather than broken down into non-legal versus legal fees, is not determinative. Whatever the payment by the customer, if the customer has received legal services through an attorney-client relationship with the Attorney, the customer's payment would be directed at least in part toward legal services. Whether the Company promotes only the financial planning services it provides or also the legal services provided by Attorney as justifications for the fee it collects from its customers, or as an inducement to attract customers, the fees collected would necessarily represent both.

Having concluded that the payments to the Company by the customers includes legal fees, it is clear under the facts presented that legal fees are being shared with non-attorneys. That fact that the Attorney is not directly compensated by the Company's customers does not change

this conclusion. There is improper fee splitting under Rule 1-320 where income derived in part from the Attorney's legal services for the Company's customers – *i.e.*, the Attorney's legal fee – is shared with the Company itself.⁵

Because the Company would derive income (and the Company's non-lawyer principals would thus be compensated) from a fund generated at least in part by the fees received from the Company's customers, at least some of whom will have received legal services from the Attorney, we conclude that the Attorney would be violating Rule 1-320's prohibition against sharing legal fees with non-lawyers "directly or indirectly." The words "or indirectly" are significant. It is consistent with the Rule's breadth that "a mere change in payment arrangements cannot provide a subterfuge to avoid ethical rules that otherwise apply." *See* State Bar Formal Opinion No. 1997-148 (even if marketer establishes relationship with client by giving seminar on living trusts, and collects fees directly from client for purpose of having attorney prepare such a trust, if marketer thereafter shares fees with attorney for attorney's work in preparing the trust, this is impermissible sharing of legal fees); *see also, Cain v. Burns*, (1955) 131 Cal. App. 2d 439, 442 (attorney paid investigator for services rendered to clients, contingent upon legal recovery obtained on behalf of client; the fact that investigator was paid from attorney's "general fund"

⁵ Compensation paid by an attorney to non-attorney employees, even if that compensation is derived from legal fees, is generally not prohibited by Rule 1-320, so long as the amount of compensation is set in advance and not subject to or contingent upon the legal fees collected by the attorney. *See* Rule 1-320(A)(3); Los Angeles County Bar Assoc., Formal Opinion No. 457 (1990) (bonus paid to paralegal by attorney does not constitute sharing of legal fees because not based on percentage of attorney's fees or on fee the attorney was to receive on particular case, and not expected by paralegal).

The facts of the inquiry are unlike those of *Gafcon, supra*. *Gafcon* involved the representation of an insured party by the attorney employee of an insurance company. No legal fee was paid by the insured, and the primary issue raised with respect to the insurance company's employment of counsel for the insured was whether the insurance company was engaged in the unauthorized practice of law. In ruling that this arrangement did not constitute the practice of law by the insurer, the court in *Gafcon* noted (1) an insurance company has a direct pecuniary interest in the underlying third party action against its insured, and (2) having such an interest, it is entitled to have counsel represent its own interests as well as those of the insured., as long as their interests are aligned. *Gafcon, Inc. v. Ponsor & Assocs.*, 98 Cal. App. 4th at 1414. The Court in *Gafcon* rejected the argument that counsel's status as a salaried employee in this circumstance inherently creates a temptation for counsel to violate or disregard ethical rules. *Id.*

instead of directly from the attorney's fees upon which it was based" does not remove this from the prohibition of splitting legal fees).

It could be argued that if the portion of the fees generated by the Company's customers that is attributable directly to the Attorney's legal services does not exceed the Attorney's salary, the Attorney could not be deemed to "share" these legal fees. In other words, if all of the legal fees generated by the Attorney's legal services would cover only the Attorney's salary, there would be none to be shared with the Company (and thus none to be shared with the Company's non-lawyer principals). This question was considered by the ABA Standing Committee on Ethics and Professional Responsibility, in relation to Model Rule of Professional Conduct 5.4, which provides – in language materially similar to Rule 1-320 – that a "lawyer or law firm shall not share legal fees with a non-lawyer." The ABA's Standing Committee determined that, in providing legal services to others, "a corporation may not *reap profits* from the work of its in-house attorneys." ABA Formal Opinion No. 95-392 (emphasis added). If the facts presented in this inquiry showed this to be the case – namely, if the legal fees generated by the Attorney's legal services were paid solely to the Attorney, and the Company did not profit from these legal fees – then there would be no violation of Rule 1-320. Whether other Rules would be violated by such an arrangement would still need to be considered, but those are not the facts presented in this inquiry.

On the facts of this inquiry, the Company would not charge its customers separate fees for legal services. Because of this, it cannot readily be determined what is being charged to the customer for legal services. Therefore, the danger remains that the Company "is in a position to view its legal department as a profit center." *Id.* Rule 1-320 was intended to prohibit this and the concomitant danger that the Company would exercise control over the matters handled and services rendered by the Attorney for the Company's customers.

This Committee has previously considered a similar issue and reached the same conclusion. *See* Los Angeles County Bar Association Formal Opinion No. 431 (1984). In Opinion 431, the Committee considered a company which provided business management

services for entertainment industry clients, and which proposed to enter into an agreement with a law firm to provide services directly to the company's clients. The company would be primarily responsible for collecting the client's payments for the legal fees and, in turn, compensating the law firm for its fees and expenses. However, the company also proposed to charge to each client a 20% fee override, as pure profit for the company, based upon the legal service hours provided by the law firm to the client. This Committee determined that the 20% fee override is "a clear case of fee splitting" under the rule which preceded Rule 1-320. *Id.*

In the situation presented in Opinion 431, the fee override determined to be improper as it related to the law firm was "based solely on the number of service hours rendered by Law Firm to the clients," whereas in this inquiry, the fee collected from customers by the Company is not based on the number of legal service hours provided by the Attorney. Nonetheless, the material aspect of the prohibited fee-splitting arrangement in Opinion 431 was that the company received compensation that was directly tied to legal services provided by the law firm. To an extent which has not been quantified by the Attorney in this inquiry, the Company would receive compensation from its customers that may be in part based on legal services provided by the Attorney. It is irrelevant to our conclusion that the Company's compensation is *also* derived, to some similarly unquantified extent, from financial planning services provided by non-lawyers.⁶

⁶ The inquiry also raised the issue of whether the proposed arrangement violates Rule 1-310. Rule 1-310 prohibits an attorney from forming a partnership with a non-lawyer. Considering the application of both of these Rules in the context of "[a] lawyer providing non-legal services through non-lawyer employees or business entities in which non-lawyers also have an interest," the State Bar has determined that "[t]ogether, these rules require that both the structure of the business relationship and the division of income from non-legal services be separate and distinct from the lawyer's law practice." State Bar Formal Opn No. 1995-141.

**The Prohibition Of Legal Fee-Splitting Arrangements With Non-Lawyers Is Consistent
With Various Other California Legal And Ethical Requirements.**

There are various ethical guidelines for members engaging in business relationships with non-attorneys found in other California Rules that are consistent with the general fee-splitting prohibition found in Rule 1-320. For example, Rule 1-600 expressly addresses the concern arising from a non-governmental entity that furnishes or pays for legal services, prohibiting any licensed attorney from belonging to any organization that interferes with his or her independent professional judgment.⁷ Also, it is impossible to tell, at least on the facts presented, what fee would actually be charged to the Company's customers specifically for the legal services rendered to them by the Attorney. As raised in this Committee's Formal Opinion 431, it is thus difficult, if not impossible, to determine if the legal fee charged "disproportionately exceeds the quality or amount of legal services rendered so as to shock the conscience of ordinarily prudent attorneys practicing in the community," in other words, if the fee is unconscionable under Rule 4-200. This is yet another danger with fee-splitting arrangements between lawyers and non-lawyers, when there is no breakdown of the fees by services rendered.

An additional consideration is the application of Rule 3-310(F),⁸ which requires that an attorney not accept compensation from someone other than the client, unless there is no

⁷ Rule 1-600 states: "A member shall not participate in a nongovernmental program, activity, or organization furnishing, recommending, or paying for legal services, which allows any third person or organization to interfere with the member's independence of professional judgment, or with the client-lawyer relationship, or allows unlicensed persons to practice law, or allows any third person or organization to receive directly or indirectly any part of the consideration paid to the member except as permitted by these rules, or otherwise violates the State Bar Act or these rules."

⁸ Rule 3-310 (F) states:
(F) A member shall not accept compensation for representing a client from one other than the client unless:
(1) There is no interference with the member's independence of professional judgment or with the client-lawyer relationship; and
(2) Information relating to representation of the client is protected as required by Business and Professions Code section 6068, subdivision (e); and

interference with the attorney's independent judgment and certain other requirements are met. The general purpose of this restriction is to ensure that no one other than the client has influence or control that would in any way impair the attorney's loyalty to the client. In the situation at issue, circumstances could arise that would place the welfare or interest of the Company, which pays the Attorney's salary, at odds with the best interests of the client, to whom the Attorney owes undivided loyalty.

An additional complication could occur if the Attorney receives confidential information from the client that might have some impact on the Company. This could potentially threaten the Attorney's obligation to "maintain and preserve the confidences and secrets" of the client, pursuant to California Business and Professions Code section 6068(e).⁹

In all, these issues also relate to the policy underlying the fee-splitting prohibition found in Rule 1-320, and its application to the situation presented in this Inquiry.¹⁰

CONCLUSION

Here, the financial arrangement proposed between the Attorney and the Company would involve the sharing of legal fees, collected from the Company's customers in part based on legal

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- (3) The member obtains the client's informed written consent, provided that no disclosure or consent is required if:
 - (a) such nondisclosure is otherwise authorized by law; or
 - (b) the member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or the public.

⁹ Section 6068(e) reads, in part:

It is the duty of an attorney to do all of the following:

...

- (e) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.

¹⁰ Another rule which may be implicated in the described facts is Rule 1-400. Assuming the Company solicits business in a way which includes legal services among its offerings to clients, the Attorney would need to be sure that such solicitations comply with the rules relating to advertising and solicitations.

services rendered to them by the Attorney, with the Company's non-lawyers. This is prohibited by Rule 1-320.

This Opinion is advisory only. The Committee acts on specific questions submitted *ex parte*, and its opinion is based on the facts set forth in the inquiry submitted.