The Cost of Doing Business (With a Client)

By Robert M. Daniszewski
Assistant Bar Counsel

Trust is a hallmark of a healthy attorney-client relationship. A lawyer earns a client's trust by demonstrating competence and diligence, engaging in regular communications, protecting confidential information, and otherwise meeting or exceeding the standards of the profession as set forth in the Rules of Professional Conduct. Although a client may (or may not) tolerate a lawyer's occasional imperfections, no one who strives to be a good lawyer can afford to jeopardize a client's trust by allowing competing interests to interfere with the loyalty and independence of judgment that a healthy attorney-client relationship requires.

One means by which a competing interest can affect the attorney-client relationship is when a lawyer undertakes to engage in some form of business or commercial transaction with a client. The risks posed by superimposing a business relationship on top of an existing client relationship are obvious: When a lawyer and client enter into a business or commercial transaction, they become, actually or potentially, opposing parties, whether that means buyer and seller, borrower and lender, or co-participants in a joint venture who at some point may assert claims against each other relating to how the enterprise is funded, managed, or conducted. At the very least, the existence of such an overlapping business relationship between the lawyer and client requires a degree of mental compartmentalization for both parties. But even where there's no ambiguity as to when the lawyer is putting on or taking off the "lawyer hat," ancillary business relationships can still be destabilizing to the attorney-client relationship by making it more difficult for the client to perceive the lawyer as a completely loyal and disinterested protector of the client's interests.

Because of the risks inherent to engaging in a business transaction with a client, the Massachusetts Rules of Professional Conduct (like the ABA Model Rules on which they're based) only permit such transactions to proceed if certain strict conditions are met. Specifically, Mass. R. Prof. C. 1.8(a) prohibits a lawyer from entering into a business transaction with a client, or knowingly acquiring an ownership or other pecuniary interest adverse to a client, unless:

(1) the transaction and terms are objectively fair and reasonable and are fully disclosed in a writing that can be reasonably understood;

(2) the client is advised in writing to seek the advice of independent counsel in regard to the transaction; and

(3) the client gives written consent to the terms of the transaction, having been duly informed of the lawyer's role in it, including whether the lawyer is purporting to represent the client in the transaction itself.[1]

[1] As the comments to Rule 1.8(a) note, if it is expected that the lawyer will actually be representing the client in the transaction, there is an even greater risk that it will impair the attorney-client relationship. In this regard, it should be noted that, even if the lawyer complies with the requirements of 1.8(a) in embarking on a

The first requirement – that the transaction be fair and reasonable to the client – is clearly intended to prevent the lawyer from taking advantage of the client in the business relationship. By virtue of this provision, a lawyer is not at liberty to negotiate the best deal available from the client, as would generally be the case in an arm's-length business setting. This restriction is important because a client may assume that the lawyer is being fair and reasonable in negotiating the terms of the arrangement *because of* the trust that formed as a result of the attorney-client relationship. Rule 1.8(a)(1) essentially prohibits lawyers from leveraging that trust in order to sweeten an ancillary business deal. This provision also makes it less likely that the client will, in the future, come to believe that the terms of the transaction unfairly favored the lawyer, which could also damage the attorney-client relationship.

The second and third requirements of Rule 1.8(a) – whereby the lawyer must prompt the client to seek independent legal advice on the transaction and memorialize and secure the client's written consent to terms of the deal – combine to ensure that lawyers do not enter into business or commercial transactions with a client impulsively or as a matter of routine. Rather, these provisions are clearly meant to call both parties' attention to the fact that business dealings between a lawyer and client represent a departure from the norm and must be approached cautiously, if at all.[2]

Although Rule 1.8(a) does not define the term "business transaction," the comments give examples of transactions that are within the ambit of the rule. Among those mentioned in the comments are loans between lawyers and clients. Lawyers who have borrowed money from clients without complying with the requirements of Rule 1.8(a) have received discipline ranging from admonitions to lengthy suspensions. A major factor in determining the appropriate sanction within that range has been whether the terms of the transaction were fundamentally fair to the client. Compare AD 09-09, 25 Mass. Att'y Disc. R. 668 (2009) (lawyer received private discipline for borrowing $5,000 from client without complying with Rule 1.8(a)'s disclosure and consent requirements or advising client to seek independent counsel, but on terms that were otherwise not unfair); with Matter of Ferris, 9 Mass. Att'y. Disc. R. 110 (1993) (three-year suspension for lawyer who induced trustee clients to loan him $50,000 on terms that were unfavorable to trust).

The comments to Rule 1.8 also clarify that a lawyer's purchase of property from a client falls within the scope of the rule. Mass. R. Prof. C. 1.8, Comment [1]. The case of Matter of Duggan, 22 Mass. Att'y Disc. R. 305 (2006), serves as good illustration of how such a purchase transaction can infect and derail a simultaneous legal representation. In Duggan, a lawyer

---

business relationship with a client, the transaction may nevertheless be prohibited as a conflict under Rule 1.7(a)(2) for which the lawyer cannot reasonably request a waiver under Rule 1.7(b)(1). In other words, Rule 1.8(a) does not supersede or provide a safe harbor from Rule 1.7.

[2] The comments to Rule 1.8(a) make clear that these requirements do not apply to business transactions with a client that are, in fact, in the ordinary course of the client's business, such as where a lawyer for a fast food franchise buys a sandwich and fries from the restaurant like any other customer. See Mass. R. Prof. C. 1.8(a), Comment [1]. Lawyers are thus free to engage in ordinary consumer transactions with entities that *happen to be* clients, both because there is no real risk of overreaching in those situations and because it would be impracticable for lawyer to comply with the requirements of Rule 1.8(a) in those situations. Id.

representing a couple facing foreclosure engaged in a purchase and lease-back arrangement with them that was never fully reduced to writing or independently reviewed by separate counsel. Moreover, the lawyer imposed terms that, as a practical matter, the clients would only be able to meet through resolution of their related problems with the IRS and the Massachusetts DOR, which the lawyer was also purporting to handle. This presented a conflict insofar as the lawyer had a personal financial stake in the outcome of representation. As it happened, after the lawyer purchased the clients' house at foreclosure, the couple balked at his rent demands, prompting him to commence eviction proceedings. Unsurprisingly, the couple successfully sued the lawyer for his various breaches of duty in this fiasco. Based on his violations of Rule 1.8(a) and his impermissible conflicts of interest under Rule 1.7, the lawyer received a six-month suspension.

As seen in cases such as Duggan, a Rule 1.8(a) "business transaction" can come about as a direct offshoot of the lawyer's legal representation of the client. However, it should be noted that Rule 1.8(a) does *not* apply to "ordinary fee arrangements between client and lawyer." Those are covered by Rule 1.5.[3] Therefore, at least at the time of the initial engagement, it is not incumbent on a lawyer to advise a prospective client to seek independent legal advice on whether to retain the lawyer or on the reasonableness of the lawyer's fees. However, there are situations in which Rule 1.8(a) applies to an agreement concerning a lawyer's own fees. First, to the extent that the legal fee includes, or is to be secured by, an interest in the client's business or other property (not including a cash retainer, of course), the transaction *is* considered a "business transaction" for purposes of Rule 1.8(a). Thus, in Matter of Balliro, 29 Mass. Att'y Disc. R. 11 (2013), a lawyer arranged for and prepared mortgage documents to secure his clients' payment of legal fees without complying with the provisions of Rule 1.8(a). The lawyer also engaged in other misconduct in connection with the transaction, including multiple conflicts of interest, resulting in a stipulated suspension of a year and a day.

The other exception is where a lawyer seeks to *change* the financial terms of the representation that is already underway. That situation is generally regarded as coming within the ambit of Rule 1.8(a) unless the only change in the terms of the representation is an increase in the applicable hourly rate, the increase will only operate prospectively, and the client is given sufficient advance notice of the increase. Cf. Matter of Weisman, 30 Mass. Att'y Disc. R. 440 (2014) (lawyer who renegotiated existing fee agreement on terms later found to be unfair to his organizational client suspended for one year for this and other misconduct). See also Board of Bar Overseers, *Massachusetts Bar Discipline: History, Practice and Procedure,* Ch. 11, at 227-28 and n. 55 (2018).

An entirely separate category of "business transactions" that is expressly within the scope of Rule 1.8(a) is "law-related services." These are defined in Rule 5.7(b) as "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."

[3] Among other things, Rule 1.5 prohibits lawyers from charging clearly excessive fees, requires the use of written fee agreements in most instances, and regulates what must and may be included in a contingent fee agreement.

Whether a lawyer either directly provides law-related services to a client (i.e., under the rubric of the lawyer's representation of the client), or provides the services through an entity controlled by the lawyer (individually or with others), the lawyer must comply with all of the requirements of Rule 1.8(a). Mass. R. Prof. C. 5.7, Comment [5]. In fact, Massachusetts lawyers should generally assume that *all* of the Rules of Professional Conduct apply to the provision of law-related services, even though the rule authorizes lawyers, in certain limited circumstances involving the provision of law-related services by a separate entity, to disclose to the client, explicitly and in writing, that the services are not legal services and that the rules of professional conduct do not apply. However, even where that exception is available with respect to other Rules of Professional Conduct, Rule 1.8(a) will still apply where the client is being referred to a separate entity controlled in whole or in part by the lawyer. See Mass. R. Prof. C. 5.7, Comment [5].

Comment [9] to Rule 5.7 provides a non-exclusive list of activities that constitute law-related services if provided to a client by a lawyer or any entity controlled by a lawyer. They include title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.

Real estate conveyancers should take particular note of the inclusion of the sale of title insurance as a law-related service under Rule 5.7. The comments to Rule 1.8 also specifically refer to the sale of title insurance as a law-related service that is within the scope of that rule. See Mass. R. Prof. C. 1.8, Comment [1]. **Therefore, Massachusetts lawyers must comply with the provisions of Rule 1.8(a) in the sale of title insurance, even though Rule 1.8(a) imposes disclosure and consent requirements that go beyond what is currently required under applicable federal or state mortgage regulations.** Accordingly, Massachusetts conveyancers must (a) disclose to the buyer the cost of the policy; (b) advise the clients of the desirability of seeking independent legal advice as to the purchase of the policy; (c) clearly inform the clients of the lawyer's role in the sale of the policy (which presumably includes disclosure of the lawyer's share of the policy commission); *and* (d) secure the clients' written consent to the terms of the transaction.

Moreover, because Rule 1.8(a)(2) requires the lawyer to give the client a *reasonable opportunity* to seek the advice of independent counsel in the transaction, the client needs some advance notice in making an informed decision to purchase title insurance. It is not sufficient to secure the client's written consent to the purchase of owner's title insurance coverage for the first time at or shortly before the closing, by presenting the client with a form to be signed along with the other purchase and mortgage documents. As discussed above, business transactions with a client, of which the sale of title insurance is clear example, cannot be routinized in this fashion. To do so invites discipline. Seller beware.

Regardless of practice area, Massachusetts lawyers would be well advised to exercise extreme caution with respect to any arguable "business transaction" with a client. Even if the lawyer can avoid running afoul of Rule 1.8(a), and the transaction does not give rise to an impermissible conflict of interest under Rule 1.7, an ancillary business relationship may

nevertheless cause friction in the attorney-client relationship and erode the client's trust and confidence in the lawyer.

As in all matters, bar counsel encourages Massachusetts lawyers to contact our Ethical Helpline to obtain direct, personal guidance on interpreting and applying the Rules of Professional Conduct to any ethical dilemma that may arise. The Helpline is open on Mondays, Wednesdays, and Fridays from 2:00 to 4:00 p.m. Please call us at 617-728-8750.