

NEW YORK STATE BAR ASSOCIATION

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Committee on Professional Ethics

Opinion 619 - 3/14/91 (26-90) Topic: Conflict of interest; dual practice as lawyer, financial planner and life insurance agent.

Digest: Lawyer engaged in estate planning may not recommend or sell to lawyer's estate planning clients life insurance products in the sale of which lawyer has substantial financial interest.

Code: Canons 5, 6;
DR 5-101(A), 5-104(A),
5-105(C);
EC 5-2.

QUESTION

May a lawyer who is engaged in estate planning recommend to the lawyer's clients the purchase of life insurance products where the lawyer has a financial interest in the sale of the particular products recommended?

OPINION

A lawyer's private practice includes counselling clients in trust and estate matters. In some of these matters, the purchase of life insurance products is an appropriate means to achieve some of the client's financial or estate planning objectives.

The lawyer proposes to establish a physically separate office, in the same building in which the lawyer practices law, which separate office would offer financial planning services. The financial planning services office would be affiliated with a life insurance company and sell that company's products. Under various arrangements being considered, the lawyer might be a part-time employee of the life insurance company or of the financial planning services enterprise, or otherwise have some interest in this venture. The lawyer asks whether he may, through this separate office, offer life insurance products to clients who come to the lawyer for legal counsel in trust and estate matters. We conclude that the proposed arrangement is impermissible.

Canon 5 of the Lawyer's Code of Professional Responsibility enjoins, "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client." Two disciplinary rules under Canon 5 bear directly upon the present question. DR 5-101(A) provides:

Except 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 own financial, business, property, or personal interests.

DR 5-104(A) states:

A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

Where a lawyer advises a client on trust and estate matters, a central object of the representation is how best to satisfy the financial needs of the client and of those for whom the client wishes or is obliged to provide. A frequent topic in trust and estate planning is whether and to what extent life insurance products should be used to satisfy some of the client's financial objectives and, if so, which ones. Where a lawyer has a financial interest or affiliation with a particular life insurance agency or company, the lawyer's independent professional judgment would unavoidably be affected in considering the appropriateness of or recommending, life insurance products for a particular client. See N.Y. State 516 (1980).

We recognize that both DR 5-101(A) and DR 5-104(A) permit a client to remit such disqualification of the lawyer if the client consents to the conflict after full disclosure of the circumstances. Given the wide array of life insurance products sold by various companies at differing prices, not to mention the threshold question of whether life insurance products are the most appropriate or economical way to best satisfy the client's needs, however, we do not believe that there could be meaningful consent by the client to the lawyer having a separate business interest of this kind. Since the client is entitled to rely upon the lawyer's independent professional judgment, the opportunity for overreaching by the lawyer is too great to be tolerated. We do not believe that a lawyer can, consistent with the duty of competent representation under Canon 6, solicit or accept a client's consent to a direct and substantial conflict between the client's and the lawyer's interests.

For this reason, notwithstanding the unqualified language of the provision for client consent in DR 5-101(A), an "obviousness" test, see DR 5-105(C), and the "reasonable probability" test of EC 5-2 should be applied to DR 5-101(A) to prevent a lawyer's firm soliciting client consent to the purchase of other products

or services where the lawyer's self-interest is directly involved. *See* N.Y. State 595 at 6-7 (1988); N.Y. State 208 (1971). That is, a lawyer should not accept a professional employment that conflicts with the lawyer's own interests unless it is obvious that the lawyer can adequately represent the client notwithstanding the lawyer's own interests. *Cf.* DR 5-105(C). For the same reasons, these tests should be applied to DR 5-104(A).

CONCLUSION

For the reasons stated, the question posed is answered in the negative.
