

NEW YORK STATE BAR ASSOCIATION

Committee on Professional Ethics

Opinion 647 - 6/8/93 (2-93)

Topic: Attorneys; bail bond agent.

Digest: If not illegal, an attorney ethically may act as a bail bond agent for nonclient, but may not for client.

Code: DR 1-102; DR 2-103; DR 103(B)(l); EC 1-5

QUESTION

May an attorney ethically act as a bail bond agent or have an interest as a shareholder in an insurance agency selling bail bonds to (1) clients and (2) nonclients?

OPINION

The question posed requires an interpretation of Insurance Law §6804(c)¹ which provides:

Any member of the bar having any financial interest by which he is to profit from the giving of bail shall be guilty of a misdemeanor.

A literal reading of this section seems to answer the question directly by making it an illegal practice for an attorney to profit from the sale of bail bonds. Illegal conduct is per se unethical. DR 1-102; EC 1-5; N.Y. State 576 (1986); N.Y. State 499 (1978). The interpretation and application of the Insurance Law are not within the jurisdiction of this Committee.

We note, however, that the Attorney General, in a 1945 opinion interpreting the

¹ The current §6804(c) of the Insurance Law of New York was originally the last sentence of §554-b(5) of the New York Code of Criminal Procedure. Section 554-b was added to the Code in 1922. In 1970, the Code of Criminal Procedure was repealed and replaced in 1971 by the new Criminal Procedure Law without the various provisions contained in §554-b(5). Shortly thereafter, also in 1971, §331-a(4) was added to the Insurance Law and this section was identical to §554-b(5) of the old Code. Then, in 1984, the Insurance Law was amended (re-arranged) and §331-a(4) was adopted verbatim as §6804.

identical language then found in the Code of Criminal Procedure §554-b(5), concluded that the Superintendent of Insurance was not precluded from issuing a license to attorneys who solicit bail bonds "as regular agents of an insurance company." The opinion went on to state that the statutory language should not be construed as disqualifying a practicing attorney, who desires to perform the usual and ordinary functions of an agent, from obtaining a license as a bail bond agent of a recognized insurance company. Ordinarily, the only financial interest which a bail bond agent, whether or not a member of the Bar, would have in furnishing a bail bond, would be the usual and regular commission to be received upon the premiums for the bond. The quoted statutory language, the Attorney General held, must "therefore, be held to prohibit only direct or indirect compensation received by attorneys upon the issuance of bail bonds, other than the ordinary commission which may be earned by any licensed agent." 1945 N.Y. Op. Att'y Gen. 200.

Assuming there is no legal impediment to an attorney acting as a bail bond agent or having an interest as a shareholder in an insurance agency that sells bail bonds, the ethical issues turn on a number of factors.

An attorney may participate in an independent business providing no conflict of interest results. N. Y. State 556 (1984); N.Y. State 493 (1978). Because an attorney simply would be receiving ordinary commissions on the sale of the bonds through a separate business, a conflict of interest with a person who is not a client is remote.²

The bail bond agency may not be used to solicit clients for the attorney's law practice in violation of any statute or rule. N.Y. Judiciary Law §479; DR 2-103; N.Y. State 556 (1984). Whether the proposed conduct violates any rule against solicitation is a question of law. N. Y. State 556 (1984). As an ethical matter, we conclude that even with the full disclosure contemplated by N.Y. State 576 (1986) (allowing real estate attorneys to also act as agents for title insurance companies) and N.Y. State 549 (1983) (allowing an attorney to accept referrals from a collection agency in which the lawyer has an interest), because of the vulnerability of one accused of a crime, the disclosure ordinarily will not obviate the conflict. The lawyer's interest may be to protect the insurance company by assuring the defendant appears at trial, even though the whereabouts of the defendant may be a secret. The accused ordinarily will not be in a position to give informed consent.

Thus, assuming no legal barrier exists, an attorney ethically may profit from an insurance agency's sale of bail bonds so long as the lawyer does not represent the person for whom the bond is posted. N.Y. State 595 (1988).

² Where an attorney personally advances funds to a client for bail bond premiums or for bail itself, however, there is conflict of interest. DR 5-103(B)(I). See Suffolk County 87-7 (undated) indexed in ABA/BNA Lawyers' Manual on Professional Conduct 901:6303 (interpreting Insurance Law §6804[c]). The concern is that an attorney in such a situation would place the attorney's own recovery ahead of their client's, resulting in an obvious conflict.

CONCLUSION

For the reasons stated above, the first question is answered in the negative and the second question is answered in the affirmative.
