

Opinion 671 - 11/4/94 (40-94)

Topic: Conflict of interest; acceptance of referral fee from insurance company by attorney

Digest: An attorney engaged in estate planning may not accept referral fee from insurance company for recommending client

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

QUESTION

May an attorney engaged in estate planning accept a referral fee from an insurance company for recommending a client who ultimately purchased life insurance from the company?

OPINION

In New York State 619 (1991), this Committee opined that it was an impermissible conflict of interest under both DR 5-101(A) and DR 5-104(A) for a lawyer engaged in estate planning to recommend the purchase of life insurance products to the lawyer's clients where the lawyer has a financial interest in the planning service that sells the recommended products. We also held that because "the opportunity for overreaching by the lawyer [was] too great to be tolerated," the conflict could not be cured by disclosure and client consent.

N.Y. State 619 is decisive of the question posed. Unlike real estate mortgages or title insurance policies,¹ where banks and title companies offer

¹ In N.Y. State 667 (1994), we opined that pursuant to DR 5-107(A)(2) and EC 2-21 and assuming there was no violation of any statute or regulation, a lawyer ethically could accept a referral fee from a mortgage broker for referring a real estate client to the broker "where the client consents after full disclosure, the attorney remits the referral fee to the client if the client requests the attorney to do so, the aggregate fees received from the transaction by the attorney are not excessive, and the attorney exercises independent professional judgment on behalf of the client." We reached a similar conclusion in N.Y. State 576 (1986)

similar products, life insurance is not a relatively fungible commodity, but comes in a wide variety of forms and prices. Moreover, while the client would customarily make or readily accede to the initial judgment that he or she needs a mortgage loan or title protection in order to consummate a real estate transaction, a sale of life insurance involves "the threshold question of whether life insurance products are the most appropriate or economical way to best satisfy the client's needs," and "[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." N.Y. State 619.

Where a lawyer has a financial interest in recommending the purchase of life insurance, "the lawyer's independent professional judgment would unavoidably be affected in considering the appropriateness of or recommending, life insurance products for a particular client." N.Y. State 619.

Accordingly disclosure and consent could not cure the direct and substantial conflict between the client's and the lawyer's interests inherent in accepting a referral fee from an insurance company, even where the client could elect to claim the referral fee and the attorney purports to exercise independent judgment in framing his or her initial recommendation to purchase life insurance.

CONCLUSION

For the reasons given herein, the question is answered in the negative.

with respect to additional fees received by an attorney for a real estate client in the attorney's capacity as agent for a title company.