

NEW YORK STATE BAR ASSOCIATION  
**Committee on Professional Ethics**

Opinion 711 – 1/7/98 (41-98)

Topic: Conflict of interest; dual practice as lawyer and insurance agent.

Digest: Lawyer representing clients in estate planning may not sell long-term care insurance to clients.

Code: DR 5-101(A); DR 5-104(A).

**QUESTION**

May a lawyer who is licensed as an insurance broker sell long-term care insurance to clients whom the lawyer represents in estate planning?

**OPINION**

In N.Y. 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 if 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. A lawyer representing clients in estate planning now inquires whether the same restrictions apply to the sale of a different insurance product – namely, long-term care insurance. We conclude that the same restrictions do apply. Therefore, a lawyer who is licensed as an insurance broker may not sell long-term care insurance to clients whom the lawyer represents with respect to estate planning.

As we discussed in N.Y. State 687 (1997), the general question of whether a practicing attorney licensed as an insurance broker may sell insurance products to his or her clients is governed by two disciplinary rules. The first, DR 5-101(A), addresses the danger that the lawyer's exercise of professional judgment in rendering legal services will be influenced by the lawyer's financial interest as an insurance broker. It 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.

As discussed in Opinion 687, DR 5-101(A) applies to the sale of insurance to a client if the lawyer's exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's interest, as an insurance broker, in selling insurance products to that client. If DR 5-101(A) applies, the lawyer must consider whether it is obvious that the lawyer can adequately represent the client in this matter notwithstanding the lawyer's own interest. See N.Y. State 635 (1992); N.Y. State 619, *supra*; N.Y. State 595 (1988). If it is obvious that the lawyer can adequately represent the client, then the lawyer may continue the representation and offer the insurance products for sale to the client with the client's consent, after full disclosure of the risks that the lawyer's professional judgment could be affected by the lawyer's self interest.

We recognized in Opinion 687 that DR 5-101(A) will generally permit the lawyer-broker to sell insurance to a client, with the client's consent after full disclosure, when advice about the purchase of insurance products is merely tangential to the representation, because the client is not seeking legal advice about which insurance product to purchase or because there is no room for judgment about which insurance product to purchase. On the other hand, if there is a reasonable probability (viewed objectively) that the lawyer's professional judgment will be adversely affected by the lawyer's business interests, then the lawyer must not offer to sell insurance to client. This bar is likely to exist when advising the client about the purchase of insurance is central to the representation, or the client would benefit from the lawyer's professional judgment about which product to choose.

The second rule, DR 5-104(A), addresses the danger that, in purchasing insurance products, the purchaser will be misled to believe that the lawyer selling these products will be exercising professional judgment as a lawyer for the benefit of the purchaser. It provides:

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.

In the context of selling insurance products, the lawyer would have to be clear that he or she is acting exclusively as an insurance broker and not as a lawyer; and the lawyer, before entering into the business transaction with the client, must obtain client consent after making clear to the client that in the context of the particular transaction, the lawyer is not exercising professional judgment as a lawyer on behalf of the client. Further, the lawyer must not engage in overreaching, but must deal fairly with the client.

Based on these provisions, we conclude that a lawyer is categorically forbidden from selling long-term care insurance to clients whom the lawyer represents in estate

planning. For purposes of our analysis, long-term care insurance has many of the same characteristics as life insurance (*e.g.*, a wide array of insurance products sold by various companies at different prices, and threshold questions of whether long-term care insurance products are the most appropriate or economical way to satisfy the client's needs). Furthermore, when a lawyer advises a client in estate-planning matters, central objects of the representation include how best to satisfy the financial needs of the client and of those for whom the client wishes to or is obliged to provide; how to conserve the client's assets in the event of various contingencies; and how to provide for various health-related contingencies (such as by means of a health care proxy or living will). Thus, advice about the purchase of long-term care insurance is not likely to be "merely tangential" to the representation, but central to it. This conflict cannot be cured by disclosure and client consent.

### **CONCLUSION**

A lawyer may not sell long-term care insurance to the lawyer's own clients if the representation relates to estate planning or other matters or areas of practice that might reasonably cause the lawyer's professional judgment on behalf of the client to be affected by the lawyer's own financial or business interests.

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