



Committee on Professional Ethics

Opinion #516 - 1/18/80 (51-79)

Topic: Conflict of interest; insurance company lawyer preparing estate plan and will for buyer of insurance.

Digest: Improper for lawyer, employed by insurance company to prepare estate plans for prospective buyers of insurance, to accept retainer to prepare will.

Code: DR 2-103, 3-101(A), 5-105(A),
5-105(C), 5-107(B);
Definition 1.

QUESTION

A lawyer is employed full time by a life insurance company to prepare estate plans for its customers. On occasion, such customers, who are not represented by other counsel, have requested the lawyer to prepare and supervise the execution of a will implementing the estate plan he has devised.

Under the circumstances stated, may the lawyer prepare and supervise the execution of a will implementing the plan?

OPINION

The question posed raises important issues of law which are beyond the jurisdiction of this Committee to resolve. These legal issues arise, inter alia, under such statutes as Sections 479 and 495 of the Judiciary Law, which respectively forbid the solicitation of legal business and the practice of law by business corporations. See, e.g., People v. People's Trust Co., 180 App. Div. 494, 167 N.Y. Supp. 767 (2nd Dept. 1917). Any attempt to determine ethical issues arising under DR 2-103 and DR 3-101(A), which forbid certain kinds of solicitation and abetting the unauthorized practice of law, would depend in substantial part on the way the threshold legal issues are ultimately resolved. Since we have no jurisdiction to resolve issues of law, we believe that these closely related ethical issues are not ripe for consideration or resolution at this time.

There is, however, one important ethical issue which is fully dispositive of the inquiry without reference to the unanswered legal issues. Specifically, we believe that the proposed dual representation would give rise to a basic conflict of interest directly violative of DR 5-105(A).

Where a lawyer's full-time employment is with a life insurance company and involves the preparation of estate plans for prospective purchasers of insurance (presumably designed, where appropriate, to promote the interests of the insurance company), there would be a representation of conflicting interests whenever the lawyer also undertakes to counsel the prospect respecting the disposition of his or her estate or to prepare the person's will, at least where the estate plan or will utilizes life insurance. Under such circumstances the lawyer would be representing differing, conflicting or inconsistent interests "likely" to affect adversely his or her "judgment or ... loyalty." DR 5-105(A) and Definition 1.

An attorney employed full-time by an insurance company at best has a difficult time exercising independent professional judgment in devising estate plans for third parties contemplating the purchase of insurance. See, DR 5-107(B); see also, N.Y. State 350 (1974). The possibility that the same lawyer might also undertake to draft wills implementing those plans passes beyond the level of a reasonable risk that the attorney's advice will be free from conflict.

This is not the type of situation where it is "obvious that [the lawyer] can adequately represent the interest of each" client, so that the dual representation could be permitted by consent" after full disclosure of the possible effect of such representation on the exercise of [the lawyer's] independent professional judgment on behalf of each." DR 5-105(C). Rather, it is one of those "situations where the circumstances establish such delicate conflicting relationships and inescapable divided loyalties that the likelihood of improper conduct or motivation, without any showing of harm and regardless of disclosure and consent, may give rise to professional misconduct." See, Matter of Kelly, 23 N.Y. 2d 368, 378, 296 N.Y.S. 2d 937, 945-946 (1968); and cf., Greene v. Greene, 47 N.Y. 2d 447, 418 N.Y.S. 2d 379 (1979).

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