

New York State Bar Association

Committee on Professional Ethics

OPINION 682 - 6/7/96 (59-95)

Topic: Referral Fees Paid to Lawyer
By Service Provider.

Digest: A lawyer may not accept a fee
from an investment advisor for
the referral of clients to the
advisor.

Code: DR 5-101(A).

QUESTION

May an attorney accept a fee from an investment advisor for referring a client to such advisor?

OPINION

DR 5-101(A) requires that a lawyer obtain client consent to a conflict of interest when the lawyer has a financial interest in the representation. That Rule 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.

The inquiry requires an analysis of our prior opinions regarding the circumstances in which meaningful client consent is possible in the context of a lawyer's financial interest that is in conflict with the client's interests under DR 5-101(A).

A number of our prior opinions allow an attorney to receive a referral fee in a limited situation provided that the client consents after full disclosure, the legal fee and the referral fee together do not constitute an excessive fee for legal services and the attorney remits the referral fee to the client if the client so requests. See N.Y. State 461 (1977). These opinions encompass two different factual situations: (1) the referral concerned a product or service that was fairly uniform among providers and that was required in an objectively determinable quantity incident to the legal services performed by the attorney (*e.g.*, N.Y. State 576 [1986], N.Y. State 626 [1992] and N.Y. State 667 [1994] [mortgages and title insurance in connection with real estate

transaction]); or (2) the referral concerned a product or service that was fairly uniform among different providers and was unconnected with any particular legal services (e.g., N.Y. State 107a [1969] [certificates of deposit]). These opinions involved consentable conflicts because the fungible nature of the products or services and the objectively determinable amount at issue insulate the client from any ill effects from the attorney's conflicting interest.

However, at least two of our prior opinions held that the attorney's receipt of a referral fee or other financial interest in a transaction with the client was absolutely forbidden because the interests of the attorney and client were in such direct conflict in such cases that a client could not give a meaningful consent to the conflict transaction. In these two opinions, the conflict of interest was that the attorney's remuneration varied according to the quantity of the product or service – life insurance – purchased by the client, which was itself based upon the attorney's legal advice regarding estate planning. N.Y. State 619 (1991); N.Y. State 671 (1994). These opinions involved conflicts of interest in which there was the potential that the attorney might give the client different – and from the client's perspective, inferior – legal advice due to the attorney's financial interest. A similar result was reached in N.Y. State 621 (1991), where the attorney had a financial interest in a title abstract company. Thus, meaningful client consent is not obtainable in such situations because the client could suffer from the attorney's conflicting interest.

N.Y. State 671 (1994) appears to be decisive of the question posed here. There it was held that no meaningful consent is available to permit an attorney to retain life insurance referral fees. The services of an investment advisor, similar to life insurance carriers, vary substantially among different providers. Also like life insurance, the amount of the product or services required – *i.e.*, the amount of money entrusted to the investment advisor – is not objectively determined by the transaction, presenting the potential that the attorney might increase the referral fee by recommending that more of the client's funds be entrusted to the advisor without appropriate regard to the client's interests. This potential for affecting the attorney's advice to the client's detriment is precisely what precluded meaningful consent in N.Y. State 619 (1991) and N.Y. State 671 (1994).

Accordingly, disclosure and consent would not cure the direct and substantial conflict between the client's and lawyer's interests inherent in accepting a referral fee from the investment advisor, even where the client is offered the choice to claim the referral fee and the attorney purports to exercise independent judgment in framing his or her initial recommendation to consult an investment advisor. Clients view recommendations of other professionals as part of their representation by their lawyers, and expect that lawyers will act as trusted fiduciaries in such matters.

For the purposes of the preceding analysis, the Committee has assumed that an attorney's acceptance of a referral fee from an investment advisor is lawful. The Committee does not render opinions on questions of law and, thus, does not opine on

whether the proposed arrangement violates any law and perforce would be unethical for that reason. N.Y. State 461 (1977).

CONCLUSION

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