

NEW YORK STATE BAR ASSOCIATION
Committee on Professional Ethics

OPINION 687 - 4/21/97 (45-96)

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

DIGEST: Lawyer licensed as an insurance broker may sell insurance products to clients if the lawyer's professional judgment as a lawyer will not be impaired and it is made clear that, in selling insurance, the lawyer is not exercising professional judgment on the client's behalf; the lawyer may sell insurance products to non-clients subject to the obligation to avoid deceitful conduct and subject to solicitation rules.

CODE: DR 1-102(A)(4), 2-103, 2-104, 5-101(A), 5-104(A).

QUESTION

If a practicing attorney is licensed as an insurance broker, under what circumstances may he or she sell insurance products to clients and non-clients?

OPINION

1. *Sales of Insurance to Clients*

A lawyer who is licensed as an insurance broker and who seeks to sell insurance products to a client must consider whether doing so is proper under DR 5-101(A) and DR 5-104(A). In this context, these provisions address separate but related concerns. DR 5-101(A) is designed to ensure that the lawyer's professional judgment will not be impaired by the lawyer's own interests. DR 5-104(A) is designed to ensure that in a business transaction with a client, the lawyer will not take unfair advantage of the client.

a. DR 5-101 (A)

Before entering into a business transaction with a client, the lawyer must consider whether and how DR 5-101(A) applies. DR 5-101(A) 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.

Does DR 5-101(A) apply? 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. The likelihood that the lawyer's professional judgment will be affected by the lawyer's business interest depends on the nature and scope of the legal representation.

On one hand, the lawyer's professional judgment is most likely to be affected by his or her interests as an insurance broker if, in the context of the particular legal representation, the lawyer would ordinarily have occasion to advise the client concerning the purchase of the type of insurance that the lawyer sells. For example, as we recognized in N.Y. State 619 (1991), lawyers representing clients in estate planning have occasion to counsel their clients concerning the purchase of life insurance. In doing so, a lawyer's professional judgment may be affected if the lawyer is also seeking to sell life insurance products to the estate planning client.

On the other hand, a lawyer's professional judgment probably will not be affected by his or her business interests as an insurance broker if the client's possible need for insurance products is entirely unrelated to the legal representation of that client. For example, the professional judgment of a lawyer representing a business owner in commercial litigation would probably not be clouded by his or her interest in selling personal automobile insurance to the client.

Is it "obvious" that the lawyer can adequately represent the 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 interests. As we have previously held, "[w]hile DR 5-101(A) provides that a client may consent to representation by a lawyer whose financial, business, property or personal interests differ from those of the client, thereby waiving the conflict of interest, consent is ineffective if there is a reasonable probability (viewed objectively) that the lawyer's interests will affect adversely the advice to be given or the services to be rendered" N.Y. State 635 (1992); accord N.Y. State 619 (1991); N.Y. State 595 (1988) (improper for law firm that represents real estate clients, and that has formed and is a principal in an abstract company, to refer clients to the abstract company, except for purely ministerial title searches). 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. This is likely to be the case 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 the 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. For example, in N.Y. State 619 (1991), we concluded that a lawyer engaged in estate planning may not recommend or sell life insurance products to the lawyer's estate planning clients if the lawyer has a financial interest in the sale of the particular products. That is because the lawyer's financial interest would be reasonably likely to interfere with the lawyer's independent professional judgment in advising the client how best to satisfy his or her financial needs in the context of trust and estate planning. Although DR 5-101(A) and DR 5-104(A) would allow the lawyer to engage in business dealings with a client, subject to client consent, when it is "obvious" that doing so will not impair the lawyer's independent professional judgment on behalf of the client, we concluded that it would never be obvious that the lawyer's professional judgment would be unimpaired by his or her self-interest when the lawyer, in the role of lawyer, advises a client to purchase products from the lawyer, in the role of insurance broker. *Accord* N.Y. County 693 (1993).

b. DR 5-104(A)

If DR 5-101(A) does not bar the lawyer from selling insurance to the lawyer's client, the lawyer must also comply with DR 5-104(A) before doing so. DR 5-104(A) 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.

This rule requires the lawyer, before entering into a business transaction with the client, to obtain client consent after making it clear to the client that in the context of the particular transaction, he or she is not exercising professional judgment as a lawyer on behalf of the client. Thus, 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. Thereafter, the lawyer must take care to clarify that, when he or she is acting as an insurance broker, the client should not expect the lawyer to exercise professional judgment for the client's protection. Further, the lawyer must not engage in overreaching, but must deal fairly with the client. N.Y. State 550 (1983).

2. *Sales of Insurance to Non-Clients*

When selling insurance to non-clients, the Code's conflict-of-interest provisions would not apply because the lawyer would not be functioning as a lawyer or dealing with individuals whom he or she represents as a lawyer. Thus, the relevant provisions would be those that apply to lawyers acting in non-lawyer capacities. *See, e.g.*, DR 1-102(A)(4) (lawyer may not "[e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation"). Additionally, insofar as insurance customers might be interested in retaining the lawyer's services, the lawyer's conduct would be governed by statutes, court rules and disciplinary rules (*i.e.*, DR 2-103 and 2-104) dealing with solicitation of legal employment. *See, e.g.*, N.Y. State 536 (1981).

The lawyer-broker must make certain, however, that an attorney-client relationship is not inadvertently created. If the prospective purchaser may know that the broker is also a lawyer (*e.g.*, because insurance is sold out of the law office), steps must be taken to clarify that in recommending insurance products, the broker will not be functioning as a lawyer and, thus, will not be exercising professional judgment as a lawyer on behalf of the purchaser. Similar clarification may be required if, at a later point, the purchaser indicates an expectation that the broker will bring his or her legal judgment to bear in recommending insurance products.

CONCLUSION

A lawyer who is licensed as an insurance broker may sell insurance products subject to various limitations discussed above.
