

COMMITTEE ON PROFESSIONAL ETHICS

Opinion 08-03

Topic: Third-party payors; clients referred by independent retirement advisors

Digest: It is ethically prohibited for a lawyer to enter into a solicitation agreement with a third-party investment advisor and receive fees from commissions paid to that investment advisor.

Code: 22 NYCRR 1200.20 (DR 5-101(A))
22 NYCRR 1200.23 (DR 5-104(A))

QUESTIONS

1. May a lawyer execute an agreement with an investment advisor and receive fees from the commissions paid to the investment advisors?

OPINION

2. A lawyer proposes to execute a solicitation agreement with investment advisors. The solicitation agreement provides, in part: "the sole service to be rendered by the solicitor under this agreement is to introduce clients to the investment advisor in those states in which he/she has been approved by the investment advisor prior to solicitation. Solicitation is defined as referring clients to the investment advisor for investment advisory services only and involves no specific recommendations or analysis of any products" The agreement purports to allow the lawyer to be paid for legal services from commissions paid to investment advisors for services rendered by the lawyer. The lawyer indicates that full disclosure would be made to clients regarding distribution of their commissions. The lawyer proposes to provide services, including drafting of wills or trusts, as well as, powers of attorney, health care proxies and quit-claim deeds.
3. 22 NYCRR 1200.20 (DR 5-01) provides as follows: "*a lawyer shall not accept or continue employment if the exercise of professional judgment on behalf of the client will be reasonably affected by the lawyer's own financial, business, property, or personal interest, unless a disinterested lawyer would believe that the representation of the client would not be adversely affected thereby and the client consents to the representation after full disclosure of the implications of the lawyer's interest.*"

4. A lawyer who is employed by a third party will not be able to exercise professional judgment on behalf of the client. Clearly, payment to the lawyer requires that the client be a customer of investment advisors. Obviously, the lawyer would not be able to independently evaluate the services of investment advisors because the payment of fees to lawyer depends on his employment with investment advisors. The lawyer could not exercise independent judgment because of his own personal interest in continuing his relationship with investment advisors. That is, the lawyer would not be able to advise his client to terminate a relationship with investment advisors in the event that the lawyer independently determined that such a relationship was inappropriate.
5. Since the exercise of professional judgment on behalf of the client will be or may reasonably be affected by the lawyer's own financial interest, his execution of the proposed solicitation agreement, which would make the lawyer a representative of investment advisors would not allow the lawyer to exercise independent professional judgment on behalf of the client.
6. In NY State Bar Op. 711 (1999), the New York State Bar Association opined that both DR 5-101 (a) and DR 5-104(A) prohibited a lawyer in estate planning from recommending life insurance products to the lawyer's clients if the lawyer has a financial interest in the sale. And because the opportunity for overreaching by the lawyer was "to great to be tolerated" the conflict could not be cured by disclosure and client consent. The same restrictions apply in this case.
7. In Suffolk County Bar Op. 99-1(1999), a lawyer agreed to be on the Home Savers of America, Inc. list of referral attorneys. The lawyer was ethically prohibited from being on that list. The opinion stated: "*Economic pressures may arise if the attorney becomes the beneficiary of a sizable amount of client referrals through Home Savers of America, Inc., such that the attorney's ability to exercise independent professional judgment may be affected by the amount of income he/she would lose if the number of referrals from Home Savers of America, Inc. was decreased....*" Thus, the lawyer's financial interest would be "clearly intertwined" with the Home Savers referral list and "can easily be deemed to affect the lawyer's ability to exercise his or her best independent professional judgment in representing the client in any matter involving Home Savers of America." Therefore, any lawyer who is on the Home Savers referral list would be violating DR 5-101(A)

CONCLUSION

8. A lawyer is ethically prohibited from executing a solicitation agreement for an investment company and acting as a lawyer for clients of that company.