NEW HAMPSHIRE BAR ASSOCIATION

Ethics Committee Formal Opinion #1998-99/14

Lawyers Selling Insurance to Their Clients

May 10, 2000

Presented to the Board of Governors May 18, 2000

QUESTION:

May a lawyer who is also a licensed broker for life and health insurance sell such insurance products to her estate planning clients?

FACTS:

A lawyer has an active estate planning practice. One common method to insure that an estate has sufficient liquidity at the time of death is for the estate-planning client to purchase life insurance. Accordingly, on many occasions, the lawyer will recommend that her clients purchase such insurance.

The lawyer also has a license from the State of New Hampshire to sell life and health insurance to individuals. The lawyer/broker would like to offer to sell such insurance to her clients. Since the lawyer/broker would receive a commission from the insurance company, she would disclose that to her clients. The clients would remain free to purchase insurance from anybody, or not purchase insurance at all.

The lawyer/broker does not maintain an active business of selling insurance to the general public. She does not advertise her ability to sell insurance to members of the public generally or to prospective clients of her law practice.

RESPONSE:

Lawyers increasingly are trying to supplement their income by offering additional services that are not traditionally legal in nature, or by associating with other professionals who will provide the services for their clients. In the field of estate planning, lawyers for years have offered trust services for clients, at quite a healthy profit to the firm. At least one recent article suggests that lawyers are branching out. Zevitas, *Gaining a Competitive Edge with Financial Expertise*, Lawyers Weekly USA B8 (November 29, 1999). The subtitle of that article says it all: "Lawyers Can Increase Profits by Earning Certification as Financial Planners, Insurance Agents or Securities Brokers."

The situation presented in this opinion differs from that presented in a recent opinion dealing with the receipt of a referral fee from a financial advisor. Opinion 1998-1999/10 (2000). In that opinion, the lawyer sought to receive a profit from nonlegal work others would do for the client. In this opinion, the lawyer seeks to receive a profit from nonlegal work the lawyer intends to perform.

The Committee noted that the client in this case receives a substantial amount of protection under the Rules of Professional Conduct, as discussed below, precisely because the lawyer performs the work in conjunction with legal representation. For this reason, the Committee is able to conclude that the activity, though fraught with difficulty, is permissible.

A. Dual Practice.

This Committee has dealt with situations where a lawyer operates an ancillary business out of his law office. See "Dual Practice: Attorney as a Realtor," Opinion 1987-88/2 (NH, 1987); "Attorney/Realtor Related Questions," Opinion 1989-90/12 (NH, 1990). So has the New Hampshire Supreme Court. In the Matter of Unnamed Attorney and Unnamed Title Company, 138 N.H. 729 (1994) (financial records of a title company held subject to audit under Supreme Court Rules 50 and 50_A).

In addition, in 1994 the American Bar Association adopted Model Rule 5.7 dealing with a lawyer's responsibilities regarding law-related services. Model Rule 5.7 provides, in general, that a lawyer shall be subject to the provisions of the Rules of Professional Conduct with respect to the provision of law-related services. The New Hampshire Supreme Court, however, has not adopted that Rule.

A distinct pattern emerges from these three lines of research. The lawyer selling insurance to her clients can expect that the Rules of Professional Conduct and the Supreme Court Rules will be applied to her insurance business.

This conclusion will probably not present as much of a direct burden on her insurance business as it did on the real estate brokerage business or the title company business. In the real estate broker opinions, the Committee concluded that it would be difficult to conduct the real estate business in the ordinary way, since the Rules of Professional Conduct would forbid a number of usual real estate brokerage practices.

In the present opinion, however, the lawyer does not provide insurance to people who are not already her legal clients. Accordingly, the lawyer would presumably expect that the insurance business (as well as the estate planning business) would be subject to the Rules of Professional Conduct, including among other things Rule 1.7 (conflict of interest), Rule 1.8 (transactions with clients), Rule 1.6 (confidentiality of communications), and Rule 1.5 (reasonableness of fees).

B. Lawyer's Own Interests in Selling Insurance.

A lawyer must be careful that her ability to make a profit on the sale of insurance does not cloud her professional judgment as to whether insurance is really needed by the client. Rule 1.7(b) provides:

> A lawyer shall not represent a client if the representation of that client may be materially limited ... by the lawyer's own interest, unless:
>
> > (1) the lawyer reasonably believes the representation will not be adversely affected; and
> >
> > (2) the client consents after consultation and with knowledge of the consequences.

The consent requirement of Rule 1.7(b) appears similar on many respects to the requirements of Rule 1.8(a)(2), discussed below. Under Rule 1.7(b)(2), however, the client must consent not only with the terms of the transaction, but also to the conflict of interest of the lawyer.

Those Committee members who felt that the Rules banned the practice rested their conclusions on Rule 1.7(b)(1). They felt that no lawyer could reasonably believe that a large commission for selling life insurance would not limit the representation. They shared the sentiments of Jay Foonberg, a writer on matters relating to the business of law and "an ABA activist," who viewed the conflict as inherently irresolvable.

> [Foonberg] believes that the fact that [the lawyer] makes so much money from insurance commissions makes it inherently *impossible* for her to give her clients unbiased advice about insurance policies.

Zevitas, *Gaining a Competitive Edge with Financial Expertise*, supra at B9 (emphasis in original.)

This Committee has dealt with a number of ethical inquiries involving conflict of interest over the years. During that time, the Committee has enunciated a harsh reality test concerning issues related to conflicts under Rule 1.7.

> Under this test, a lawyer attempting to resolve such an issue should ask himself or herself whether, if a disinterested lawyer were to look back at the inception of this representation once something goes wrong, would that lawyer seriously question the wisdom of the first attorney's requesting the client's consent to this representation or question whether there had been full disclosure to the client prior to obtaining the consent.

NH Op 1988_89/24. While the harsh reality test applies primarily to conflicts between clients in multiparty representation, the Committee believes that it may have some bearing on the type of conflict of interest presented in the current situation.

The Committee believes that the courts will feel a strong temptation to apply the harsh reality test, or some other strict test to the selling of life insurance. "There are no transactions which courts will scrutinize with more jealousy than dealings between attorneys and their clients." Spilker v. Hankin, 188 F.2d 35 (D.C. Cir. 1951).

C. Business Transaction with Client.

When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate business controlled by that lawyer, the lawyer must comply with Rule 1.8(a) which provides:

> A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
>
> > (1) the transaction and terms in which the lawyer acquires the interest are: (i) fair and reasonable to the client, and (ii) agreed to by the client after consultation;
> >
> > (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
> >
> > (3) the client consents in writing to the essential terms of the transaction.

Accordingly, the attorney should make these disclosures and secure the requisite approvals **before** selling the insurance.

Opinion 87-3 (Vermont, 1987) approved the practice of selling title insurance to clients. The Vermont Opinion concluded that a lawyer who offers title insurance to his clients "should be fully informed as to the competing products available in the market and should discuss such products with his client to the extent of significant differences." This is certainly sound advice. A deep understanding of the market for insurance products would help any lawyer represent her client.

The Vermont opinion also concluded that the lawyer may have some obligations with regard to the soundness of the company carrying the policy. A lawyer who knows that a company does not have a firm financial base should not offer that company's products to her clients. Beyond that, however, we cannot say.

While the Vermont opinion may offer a somewhat analogous situation, there are inherent differences; selling life insurance is not like selling title insurance. There are a lot more types of life insurance products, such as whole life versus term, than are available in title insurance. In addition, there is substantially more room to disagree about the level of insurance warranted. It is this flexibility and the consequent opportunity and temptation, that most concerns the Committee.

As a practical matter, a disgruntled client (or one who receives contrary advice about the necessity for insurance from another source) may be quick to seize on the lawyer's interest in getting a commission. Such a lawyer may feel quite uncomfortable having her judgment second-guessed at a later date. The lawyer may feel even more uncomfortable if that second-guessing results in the invalidation of the contract.

If a court down the road believes that the estate planning lawyer gave her client bad advice about the insurance, or failed to follow the requisite ethical rules, the estate planning lawyer may find herself in the position of having to disgorge the premiums, as well as the commissions.

D. Confidentiality.

The confidentiality of communications may put the lawyer in a bind if, for example, the client had health problems. The lawyer as representative of the insurance company may well have an obligation to the insurance company to disclose this information. Clearly, in those circumstances, it would not be possible to sell the client insurance.

There was also some concern that attorney-client privilege which would ordinarily attach to discussions about estate planning might be compromised by discussion about insurance. When the lawyer has her broker's hat on, the privilege may not be preserved.

E. Fees.

The Vermont Opinion, supra, concluded that "the attorney should take [the title insurance] commission into consideration in determining a client's bill." Life insurance can be quite profitable, as much or more than title insurance. There was sentiment within the Committee that the lawyer should address the fee issue with each client. Many felt that the high commissions for the sale of life insurance should cause the fees for estate planning to be substantially reduced.

CONCLUSION:

A lawyer may sell life insurance to her clients provided she complies with Rules 1.7(b) and 1.8(a):

- The transaction and terms must be fair and reasonable to the client.
- The lawyer must believe the representation will not be adversely affected.

- Such belief must be reasonable.
- The lawyer must consult with the client before entering into the transaction.
- The client must be given an opportunity to consult another attorney.
- The client must understand the consequences of the transaction.
- The client must consent in writing to the terms of the transaction, and to the conflict of interest.

As discussed above, the Rules of Professional Conduct may well create something of an impediment to the ordinary course of the business of selling life insurance. Lawyers should be especially careful to make sure that the desire to generate an insurance commission does not cloud their judgment as to the advice given to clients.