The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 2001-4

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Withdrawn by Adv. Op. 2020-08

[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

SYLLABUS: It is improper for a lawyer, who is also a licensed insurance agent, to sell annuities through the law firm to estate planning clients of the lawyer. A lawyer's interest in selling an annuity and a client's interest in receiving independent professional legal counsel free of compromise are differing interests. Even if full disclosure and meaningful consent may be obtained, there exists an appearance of impropriety. Also, a lawyer's sale of annuities through a law firm may jeopardize the preservation of client confidences or secrets, for the records of a licensed insurance agent are subject to inspection by the state superintendent of insurance under Section 3905.19 of the Ohio Revised Code.

OPINION: This opinion addresses whether it is ethically proper for a lawyer to sell annuities to estate planning clients of the lawyer.

> Is it proper for a lawyer, who is also a licensed insurance agent, to sell annuities, for a fixed commission, through the law firm to estate planning clients of the lawyer?

This Board previously advised that "[t]he Ohio Code of Professional Responsibility does not prohibit an attorney from providing financial planning services through the law firm to business and estate planning clients of the law firm when the law-related services are provided in connection with and are related to the provision of legal services." Ohio SupCt, Bd Comm'rs on Grievances and Discipline, Op. 2000-4 (2000). It is of no surprise that the Board is now asked to advise upon the ethical propriety of a lawyer selling annuities to estate planning clients.

The Ohio Code of Professional Responsibility through its disciplinary rules and ethical considerations warns lawyers to limit business relations with clients. DR 5-104(A) is the rule that regulates business transactions wherein the lawyer and client have differing interests.

> DR 5-104(A) 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 his [her] professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

"Differing interests" is defined in the Ohio Code of Professional Responsibility as follows:

> "Differing interests" include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest.

Ethical Consideration 5-3 states that "[a] lawyer should not . . . make improper use of his [her] professional relationship to influence his [her] client to invest in an enterprise in which the lawyer is interested."

A client in need of estate planning reasonably expects his or her lawyer to use independent professional judgment in all matters related to the client's estate plan. The value of professional independent judgment is not to be underestimated, for it very well may be one of the primary reasons a client seeks legal advice in estate planning matters.

A lawyer who sells annuities has a significant interest in each sale. The lawyer receives commissions from each sale. The more sales the more commissions. The sale of products creates a "differing interest" between an estate planning client and his or her lawyer.

When a lawyer is responsible for both the estate plan and the sale of annuities or other products to fund the estate, the lawyer's financial interest may adversely affect the independent professional judgment and loyalty of the lawyer to the client. The lawyer's financial interest in the sale of annuities competes with the client's interest in receiving independent judgment regarding his or her estate plan.

The Board acknowledges that DR 5-104(A) provides that a lawyer may enter a business transaction in which there are "differing interests" when the client consents after full disclosure. However, when the lawyer is legal counsel, estate planner, and seller of insurance products to fund the estate, the Board questions whether full disclosure and meaningful consent ever could be achieved.

The Board is not alone in expressing concern regarding consent as a cure to the conflict. Both New York and Rhode Island advise that an attorney may not sell insurance to estate planning law clients. *See* New York State Bar Ass'n, Op. 619 (1991); Rhode Island SupCt, Op. 96-26 (1996).

The Committee on Professional Ethics of the New York State Bar Association expressed its concern in the following manner.

> We recognize that both DR 5-101(A) and DR 5-104(A) permit a client to remit such disqualification of the lawyer if the client consents to the conflict after full disclosure of the circumstances. Given the wide array of life insurance products sold by various companies at differing prices, not to mention the threshold question of whether life insurance products are the most appropriate or economical way to best satisfy the client's needs, however, we do not believe that there could be meaningful consent by the client to the lawyer having a separate business interest of this kind. Since

> the client is entitled to rely upon the lawyer's independent professional judgment, the opportunity for overreaching by the lawyer is too great to be tolerated. We do not believe that a lawyer can, consistent with the duty of competent representation under Canon 6, solicit or accept a client's consent to a direct and substantial conflict between the client's and the lawyer's interests.

New York State Bar Ass'n, Op. 619 (1991).

Citing New York State Bar Ass'n Op. 619 (1991), the Ethics Advisory Panel of the Rhode Island Supreme Court stated: "As a practical matter, consultation and disclosure which are properly and fully carried out would not in most cases result in the client's consent. Aside from the practical considerations, however, the Panel does not believe that there could be meaningful consent by the law client where the estate planning lawyer has a separate interest in selling insurance." Rhode Island SupCt, Op. 96-26 (1996)

A number of ethics committees do permit attorneys to sell insurance to legal clients, but with various conditions as to disclosure, consent, confidentiality, and other ethical concerns, such as whether the transaction is fair and reasonable. State Bar of Arizona, Op. 99-09 (1999); Illinois State Bar Ass'n, Op. 90-32 (1991); Kansas Bar Ass'n, Op. 95-17(a) (1997); Michigan RI 135 (1992); New Hampshire State Bar, Op. 1998-99/14 (2000), North Carolina State Bar Ass'n, Op. RPC 238 (1996); State Bar Ass'n of North Dakota, Op. 98-07 (1998); Utah Sate Bar, Op. 146A1, (1995). Each opinion sets forth caveats that a lawyer must comply with. For example, North Carolina permits an attorney to sell financial products such as annuities but adds the condition that no commission or fee may be earned by the law firm or any lawyers with the firm on any financial product purchased by a client upon the recommendation by the lawyer. *See* North Carolina State Bar Ass'n, Op. RPC 238 (1996). New Hampshire concludes its advisory opinion by listing conditions that a lawyer must meet to sell life insurance to estate planning clients.

- 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.

New Hampshire State Bar, Op. 1998-99/14 (2000)

Satisfying such conditions may be difficult if not impossible, because many of the conditions are subjective, not objective. In addition, the conditions are burdensome, not only to the lawyer, but also to the client. For example, seeking consultation from another attorney will take more of the client's time and more of the client's money.

In this Board's view, a lawyer who sells annuities to his or her estate planning clients is setting his or her foot into a certain ethical trap. The lawyer's independence of professional judgment will always be questioned when a problem arises with regard to the representation. The lawyer's motives will be scrutinized. Was the purchase of the annuity really in the best interest of the client or was it in the best interest of the lawyer?

Even if full disclosure and meaningful consent were obtainable, an appearance of impropriety would still exist. By providing estate planning and selling products to fund the plan, the lawyer creates an appearance of impropriety, for such conduct casts doubt upon the independence of the lawyer's professional legal judgment in the estate planning matter. Further, a lawyer selling annuities to his or her estate planning clients may jeopardize the duty to preserve confidences and secrets under DR 4-101, for the records of a licensed insurance agent are subject to inspection by the state superintendent of insurance under Section 3905.19 of the Ohio Revised Code.

In conclusion, this Board advises that it is improper for a lawyer, who is also a licensed insurance agent, to sell annuities through the law firm to estate planning clients of the lawyer. A lawyer's interest in selling an annuity differs from a client's interest in receiving independent professional legal counsel free of compromise. Even if full disclosure and meaningful consent may be obtained, there exists an appearance of impropriety. Also, a lawyer's sale of annuities through a law firm may jeopardize the preservation of client confidences or secrets, for the records of a licensed insurance agent are subject to inspection by the state superintendent of insurance under Section 3905.19 of the Ohio Revised Code.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.