

Nebraska Ethics Advisory Opinion for Lawyers
No. 81-11

AN ATTORNEY EMPLOYED BY AN INSURANCE COMPANY MAY NOT BE RETAINED BY THE INSURED'S ATTORNEY IN ORDER TO ASSIST IN DRAFTING THE INSURED'S ESTATE PLAN WHERE THE INSURED-CLIENT WOULD COMPENSATE BOTH ATTORNEYS FOR SERVICES RENDERED EVEN AFTER FULL, WRITTEN DISCLOSURE TO THE CLIENT AND THE CLIENT'S OWN ATTORNEY.

FACTUAL SITUATION

An attorney employed by an insurance company seeks to be retained by an insured's attorney in order to assist the insured's attorney in drafting an estate plan for the insured. The attorney receives a flat salary from the insurance company and a percentage bonus on the amount of life insurance premiums generated. The attorney before entering into such an arrangement would provide a lengthy written notice and disclosure to the insured and insured's attorney which explains the attorney's relationship with the insurance company and that both the attorney and the insured's local lawyer will be compensated by the insured.

QUESTIONS PRESENTED

May an attorney employed by an insurance company be retained by the insured's attorney in order to draft the insured's legal documents to implement an estate plan which normally includes an insurance purchase where the client would compensate both attorneys for services rendered after full, written disclosure to the client and the client's own attorney.

DISCUSSION

EC5-14 of the Code, as amended by the Supreme Court of Nebraska on May 9, 1975, provides:

"Maintaining the independence of

professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant."

EC5-15 gives further guidance to the attorney who wishes to represent two or more clients having potentially differing interests:

"If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests. If a lawyer accepted such employment and the interests did become actually differing, he would have to withdraw from employment with likelihood of resulting hardship on the clients; and for this reason it is preferable that he refuse the employment initially. On the other hand, there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation. If the interests vary only slightly, it is generally, likely that the lawyer will not be subjected to an adverse influence and that he can retain his independent judgment on behalf of each client; and if the interests become differing, withdrawal is

less likely to have a disruptive effect upon the causes of his clients."

DR 5-101 states:

"Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.

(A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests."

DR 5-105 reads as follows:

"Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.

(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105 (C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105 (C).

(C) In the situations covered by DR 5-

105 (A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each."

Applying the above ethical considerations and disciplinary rule to the present situation, it appears that an attorney may not ethically be retained by the insured or the insured's attorney while the attorney is concurrently employed by the insurance company. A lawyer's independent professional judgment on behalf of the insured is in danger of being impaired in that the attorney has a potentially long-term and profitable relationship with the attorney's employer, the insurance company. The attorney has a substantial economic stake in maintaining the continued goodwill of the insurance company. Therefore, the attorney is in danger of either consciously or unconsciously being influenced by a desire to maintain an economically profitable relationship with the insurance company.

The attorney may be placed in an impossibly equivocal position by simultaneously trying to protect inevitably adverse interests. The insurance company is, of course, in the business of selling life insurance and the attorney may actually receive a percentage bonus on the amount of life insurance sold. The insured, on the other hand, seeks most economically and efficiently to be provided with an estate plan by the insured's attorney(s). There exists, then, a danger that an attorney will subvert the paramount interest of the insured so as to enrich either him/herself or the outside sponsor.

The attorney in the present case seeks to avoid the potential conflict of interest by making full, written disclosure to the insured. Even after disclosure, however, a lay client may not be able to effectively consent to dual representation in that the attorney, him/herself, cannot simultaneously protect inevitably adverse interests. A further danger is that an

unsophisticated client may be exploited even after the written disclosure is made. Furthermore, in the area of estate planning there is not a dearth of attorneys so as to justify simultaneous representation where an attorney is faced with conflicting loyalties toward two clients.

Canon 7 provides:

"A Lawyer Should Represent a Client
Zealously Within the Bounds of the Law."

Canon 7 indicates that an attorney owes complete and undivided loyalty to a client who has retained the attorney. It may be difficult for an attorney to represent the insured with the same degree of vigor as would be possible if the attorney had undivided loyalty to the insured. The representation of the insured may be less searching, demanding or effective because the attorney has strong ties to the insurance company. An attorney must be free to be able to advise a client in such a way as protect the client's interests zealously.

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