

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-376
Issued: March 1995

A member of a law firm asks the following questions:

Question 1: May I sell insurance to a client, and receive a commission for it, when the sale of insurance is related to my representation of the client, and the legal representation involves estate and employee benefit planning?

Answer: Yes.

Question 2: Is disclosure to my client of my receipt of a commission necessary?

Answer: Yes.

Question 3: May I make the sale if there is no relationship between the insurance and the legal representation?

Answer: Yes.

Question 4: Is disclosure to my client of my receipt of a commission necessary?

Answer: Yes.

Question 5: May I prospect for insurance clients who are not now legal clients? What if they desire to become legal clients in the future?

Answer: Qualified no.

Question 6: Can I adjust my legal fees (discount) or would that be considered a rebate of commissions in violation of insurance statutes?

Answer: See Opinion.

Question 7: Can insurance commissions be considered partnership income, even if the commission is paid directly to me as an individual?

Answer: See Opinion.

Question 8: May I receive a referral fee from another insurance agent if I refer a client to him/her in connection with a legal matter? What disclosures are necessary to the client and to the insurance agent?

Answer: No.

Question 9: Are the answers to the above questions altered by using a low-load insurance product?

Answer: See Opinion.

References: ABA Rule 5.7. KBA Rules 1.7, 1.8(a), and 7.20(2); KBA Ops. E-103 (1975) and E-74 (1973); Michigan Op. RI-135 (1992).

OPINION

We note that the requestor does not contemplate operating a business or partnership with a non-lawyer. However, it is appropriate for us to note that this request raises issues relating to the delivery of law-related services (sometimes referred to as “ancillary business”). Also, we acknowledge that the American Bar Association has addressed the delivery of law-related services by enacting a restrictive provision, Rule 5.7, “Provision of Ancillary Services,” then repealing this restrictive provision, and enacting a revised liberal version of the rule “in the short span of just 30 months.” See ABA/BNA Law.Man.Prof.Con. 91:405, 410-413.

This Committee is not in a position to adopt changes to Kentucky’s Rules of Professional Conduct, and it is, therefore, inappropriate for this Committee to engage in an extended policy debate regarding these matters in order to answer the questions presented. We mention the existence of the debate regarding “ancillary business” as a means of emphasizing the limited nature of this opinion because at present the Kentucky Rules of Professional Conduct do not include a provision relating to law-related services. Notwithstanding the absence of a rule in Kentucky regarding “ancillary business” we note that the current version ABA Rule 5.7 provides that:

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer’s provision of legal services to clients; or

(2) by a separate entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law related services knows that the services of the entity are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term “law related” services denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services and that are not prohibited, as unauthorized practice of law when provided by a non-lawyer.

While the new ABA Rule allows for the delivery of “law-related services,” the lawyer must be mindful to conform all aspects of the lawyer’s work (traditional or non-traditional/law related/ancillary) to the requirements of the Professional Rules. ABA Rule 5.7(a)(1). The Rule also suggests that the Rules will apply even if the “law-related business is kept entirely separate (permissible dual practice) if there is a risk of client confusion or misunderstanding concerning the Lawyer’s role.” See ABA Rule 5.7(b)(2).

Without further comment on law-related services generally, the Committee believes that the Kentucky Rules of Professional Conduct permit the lawyer to sell life insurance products to the lawyer’s clients when the sale of such insurance is related to the legal matter being handled by the lawyer, provided the applicable Rules of Professional Conduct are followed. The idea of selling insurance is already allowed with respect to the title insurance, and it is apparent that the client might benefit from such transactions. On the other hand we find that the sale of life insurance products to clients constitutes a business transaction with a client, and that there is the potential for conflicts of interest; for example, the client’s needs to maintain confidentiality regarding the client’s health, and an insurer’s need to have complete disclosure of all health questions. Accordingly, the lawyer must be satisfied of compliance with Rules 1.7, 1.8(a). See Michigan Op., RI-135 (1992). Further, all fees and commissions must be disclosed to the client, and the client should consent to such arrangement in writing.

Further, to make our position as clear as possible, we emphasize that a lawyer has a duty of loyalty to the client, and that advising a client about the disposition of the client’s estate after death, and the sale of life insurance raises inherent problems of conflicts of interest as the insurer pays the agent (lawyer) to maximize insurance sales, and the lawyer’s responsibility to maintain independence may be compromised; accordingly, it is necessary for the lawyer to disclose all of these matters in writing to the client, and to obtain the client’s consent. The disclosure should advise the client that it is appropriate to obtain independent advice, counsel, in these unique circumstances.

As Kentucky has not yet adopted ABA Rule 5.7, the lawyer should not operate an insurance agency or insurance business out of his or her law-firm, for the purpose of selling insurance to non-clients. While we have no apparent reason to suggest that the lawyer should be prohibited from selling insurance to a client when the sale is unrelated to the legal services being provided, as long as there is compliance with the Rules of Professional Conduct, the rule in this jurisdiction has been that such business should be kept separate from the lawyer’s law practice unless the volume of such business is so small that separate quarters are not economically feasible. See, e.g. KBA E-103 (1975) and E-74 (1973).

For the reasons discussed above, questions 1 through 4 are answered “Yes,” subject to our stated concerns about the lawyer’s responsibility to maintain the lawyer’s loyalty to the client, to assure that there is no interference with the lawyer’s responsibility to maintain independence of professional judgment, to protect the client’s confidential information relating to the representation, and to make the appropriate disclosures, in writing, as stated above.

We emphasize that the lawyer may not solicit legal business personally or by telephone from current or former insurance customers unless they are also current or former clients.

Michigan Op. RI-135. “Prospecting” for insurance clients from the lawyer’s law office is inconsistent with our earlier opinions regarding the separation of other businesses from the lawyer’s law practice, and invites misunderstandings and possible violations of the advertising rules. For this reason, Question 5 is answered with a “Qualified No.” The answer is qualified because if the insurance business is sufficiently separate from the lawyer’s law practice then that business may advertise for insurance customers purchasers like any other insurance agency. However, the separate business may not be used to circumvent the rules governing lawyer advertising.

From the standpoint of the Rules of Professional Conduct, a lawyer may discount the lawyer’s fees as there are no minimum fees under Rule 1.5, nor would it be permissible for the Kentucky Bar Association to establish minimum fees. On the other hand, the Committee cannot answer questions of law. Whether or not contemplated conduct might be in violation of “insurance statutes” is a matter that may be better addressed by an Attorney General’s opinion and not an ethics opinion. Accordingly, we cannot answer Question 6. The same is true of Question 7, which presents questions of law and not questions of Professional Conduct.

In the opinion of the Committee the lawyer should not accept referral fees for referring clients to other insurance agents. There is no apparent justification for accepting such fees as the lawyer is providing no substantial additional service to the client, and the suggested practice is difficult to reconcile with Rules 1.7 and 1.8(a). We also fear that such arrangements might lead to improper “feeding” of business. See Rule 7.20(2).

Question 9 does not change the relevant considerations.

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). Note that the Rule provides: “Both informal and formal opinions shall be advisory only; however, no attorney shall be disciplined for any professional act on his part performed in compliance with an opinion furnished to him on his petition, provided his petition clearly, fairly, accurately and completely states his contemplated professional act.”