



ILLINOIS STATE
BAR ASSOCIATION

ISBA Advisory Opinion on Professional Conduct

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This Opinion was **AFFIRMED** by the Board of Governors in January 2010. Please see the 2010 Illinois Rules of Professional Conduct 1.2(a) & (c), 1.4(b), 1.5 and 1.8. This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.

Opinion No. 97-04
January 23, 1998

Topic: Referral fee for referring client to investment advisor

Digest: A lawyer may not properly take a referral fee from an investment advisor for referring a client to the advisor unless the lawyer rebuts the presumption of undue influence that arises when a lawyer enters into a business transaction with the client; the presumption may be rebutted by showing the transaction was fair, the client had the opportunity for independent advice of counsel and consented to the transaction after full disclosure.

Ref.: Weisblatt v. Chicago Bar Assn., 225 Ill.Dec. 993, 684 N.E.2d 984 (Ill.App. 1st Dist. 1997)
Elane v. St. Bernard Hospital, 284 Ill.App.3d 865, 220 Ill.Dec. 3, 672 N.E.2d 820, 824 (Ill.App. 1st Dist. 1996)
In re Anderson, 52 Ill.2d 202, 287 N.E.2d 682, 684 (1972)
Franciscan Sisters Health Care v. Dean, 95 Ill.2d 452, 69 Ill.Dec. 960, 448 N.E.2d 872 (1982)
Lossman v. Lossman, 274 Ill.App.3d 1, 210 Ill.Dec. 818, 653 N.E.2d 1280 (Ill.App. 2nd Dist. 1995)
In re Pagano, 154 Ill.2d 174, 180 Ill.Dec. 729, 607 N.E.2d 1242 (1992)
Illinois Rules of Professional Conduct, Rules 1.2(a) and (c), 1.4(b), 1.5 and 1.8
ISBA Advisory Opinions on Professional Conduct Nos. 89-14 and 799

FACTS

In the first situation, a lawyer refers his client to an investment advisor who is also a lawyer, to manage the client's assets. The investment advisor/Lawyer manages assets for others, by his own efforts and efforts of others he retains. The advisor charges a quarterly fee based on assets under management. The lawyer wishes to collect a percentage of the investment advisor's quarterly fee to the client as a referral fee.

In the second situation, a lawyer refers his client to a broker-dealer and registered investment advisor, licensed under the securities laws of the United States. The dealer is qualified to act as an investment advisor and broker-dealer on a nationwide basis through a network of associated investment advisor representatives (IARs). The dealer seeks referrals from lawyers and other professions to its IARs. When a lawyer refers his or her client to an IAR, who will manage the client's portfolio, the lawyer will be paid an ongoing referral fee if the account is opened. The fee will be a split of the investment management fee in an amount agreed to by the IAR and the lawyer.

Written disclosure of the relationship between the lawyer and the IAR and the amount of the referral fee payments to be made to the lawyer is made in documents provided to and signed by the client upon opening the account.

QUESTION

May either of the lawyers accept a continuing percentage of the investment advisor's fee for referring the client to the advisor as a legal fee or on some other basis.

OPINION

A lawyer may properly charge a "legal fee" only for "legal work," i.e., the provision of legal services. Where the primary service the lawyer performs is referring the case, such a referring lawyer may earn a fee for the referred legal work only to the extent he "agrees to assume the same legal responsibility for the performance of the services in question as would a partner of the receiving lawyer." See Illinois Rules of Professional Conduct Rule 1.5(g). The referring lawyer must also comply with the disclosure and other provisions of Rule 1.5. Retaining "the same responsibility as a partner" generally means that the referring lawyer may be sued by the client for malpractice as if he or she were a partner of the lawyer handling the case. Elane v. St. Bernard Hospital, 84 Ill.App.3d 865, 220 Ill.Dec. 3, 672 N.E.2d 820, 824 (Ill.App. 1st Dist. 1996) (judge could retain legal responsibility for case referred prior to going on the bench and settled afterwards; retaining such financial responsibility for case does not involve judge in improperly practicing law).

Since neither of the lawyers is referring a matter for legal services, neither can properly charge or collect a "legal fee" for non-legal work. However, since the lawyers are receiving a percentage of the advisor's fee, the client may be tempted to assert a claim against them if the investments under perform and the client believes the lawyers failed to advise the client about and protect the client from the investment advisor's actions. See Weisblatt v. Chicago Bar Assn., 225 Ill.Dec. 993, 684 N.E.2d 984 (Ill.App. 1st Dist. 1997) (dismissal of claim for negligent referral of matter affirmed).

To the extent either lawyer continues to do legal work for the client, he or she may charge a reasonable fee for the legal services performed. The lawyer should make clear to the client the role of the lawyer and the role of the investment advisor and the difference between the two roles. See

Rule 1.4(b), 1.2(a) and (c).

However, referring a client to an investment advisor in return for a percentage of the advisor's fee is a business transaction with the client, governed by the provisions of Illinois Rule 1.8, Conflict of Interest: Prohibited Transactions. Either lawyer may charge a fee for providing business (as opposed to legal) services to the client provided the lawyer complies with Rule 1.8, related case law, and the law governing investment advisors.

Rule 1.8(a) provides:

Unless the client has consented after disclosure, a lawyer shall not enter into a business transaction with the client if:

- (1) the lawyer knows or reasonably should know that the lawyer and the client have or may have conflicting interests therein; or
- (2) the client expects the lawyer to exercise the lawyer's professional judgment therein for the protection of the client.

Case law provides that when a lawyer enters into a business transaction with the client, there is a presumption of undue influence on the part of the lawyer. The lawyer must introduce clear and convincing evidence to rebut this presumption. To rebut the presumption the lawyer generally must show full disclosure of all relevant information, a transaction that was fair and reasonable, and that the client had the advice of independent counsel, or the opportunity for such advice, before entering into the transaction. In re Anderson, 52 Ill.2d 202, 287 N.E.2d 682, 684 (1972) (respondent suspended for inter alia putting client's home in land trust with lawyer as joint beneficiary). Franciscan Sisters Health Care v. Dean, 95 Ill.2d 452, 69 Ill.Dec. 960, 448 N.E.2d 872 (1982); Lossman v. Lossman, 274 Ill.App.3d 1, 210 Ill.Dec. 818, 653 N.E.2d 1280 (Ill.App. 2nd Dist. 1995) (lawyers rebutted presumption of undue influence as to bonus that was part of original fee agreement but failed to rebut presumption as to bonus not part of original fee agreement). See also In re Pagano, 154 Ill.2d 174, 180 Ill.Dec. 729, 607 N.E.2d 1242 (1992) (presumption that increase in lawyer's fee product of undue influence can sometimes be rebutted without client having advice of independent counsel).

Thus, if the lawyer can show the client consented to the arrangement after full disclosure, and show that the fee is fair and reasonable and the client had the advice of independent counsel, or was urged to seek such advice, the lawyer may rebut the presumption of undue influence for this business transaction. See In re Pagano, supra; Lossman v. Lossman, supra. Full disclosure would include informing the client about the risks of the transaction and the fact that the lawyer would not be involved in any way to protect the client's interest but would continue to receive a portion of the advisor's fee. It would be prudent to put such disclosure in writing. Liability for this business transaction, and costs of defense in connection with it, may not be covered by the lawyer's malpractice insurance policy. The lawyer must also comply with the law governing investment advisors and the payment of referral fees.

If the lawyer were to receive a one time referral fee for a business transaction, for example, for referring the client to a car dealer who sold the client a car, in place of receiving an ongoing percentage of the fee the advisor will charge for the indefinite future, it would be easier for the

lawyer to show that the client did not reasonably expect the lawyer to exercise his or her professional judgment for the protection of the client during the course of the advisor/client relationship. Where the lawyer continues to receive a fee, and the client sues the lawyer, the lawyer must rebut the presumption of undue influence by clear and convincing evidence showing that the client consented after full disclosure or that the client did not reasonably expect the lawyer would continue to look after the client's interest.

With respect to charging a legal fee for non-legal services, Opinion No. 799 (1982) held that where a lawyer received a \$25 fee from a title company for providing "back title" evidence, the lawyer could not keep the fee and had to turn it over to the client. The fee was found not "reasonable" because it was arbitrary and not based on any of the factors required to be considered in determining a reasonable fee. Since the current inquiry does not involve a fee for legal services but, rather, a business transaction with the client, and since Rule 1.8 was enacted in 1990 after Opinion No. 799 was published, that opinion is not controlling.

Opinion No. 89-14, also published before Rule 1.8 was enacted, states that a lawyer/insurance agent who refers a client to another agent and receives an insurance commission is engaging in a business transaction with the client and must obtain the client's consent for such transaction after full disclosure. It does not discuss the presumption of undue influence or whether the lawyer's continuing to receive a commission over time could lead the client to believe the lawyer would also be continuing to exercise the lawyer's professional judgment for the protection of the client. See Rule 1.8(a)(2).

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