



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 1.7 and 1.8(a). 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. 99-06
November, 1999

TOPIC: Conflict of Interest; Referral of Client to Trust Company; Business Transactions with Client

DIGEST: A lawyer who receives fees as a trust administrator from a trust company to whom he refers clients has a conflict of interest and is involved in a business transaction with a client; the lawyer must disclose his relationship with the trust company to the client, the method and source of his compensation, and obtain the client's consent after disclosure.

REF.: Illinois Rules of Professional Conduct, Rules 1.7(b), 1.8(a)
ISBA Opinion on Professional Conduct, Nos. 90-02, 90-20, 97-04
In re Anderson, 52 Ill.2d 202, 287 N.E.2d 682, 682 (1972)
In re Schuyler, 91 Ill.2d 6, 61 Ill.Dec. 540, 424 N.E.2d 1137 (1982)
Franciscan Sisters Health Care v. Dean, 95 Ill.2d 452, 69 Ill.Dec. 960, 448 N.E.2d 872 (1982)

FACTS

An Illinois trust company has developed a lawyer/trust administrator program in which licensed Illinois lawyers, who practice substantially in the area of estate planning, enter into an agency relationship with the trust company. The agency agreement provides that the lawyers will furnish trust administrator services for trusts in which the trust company has been named trustee. The lawyers perform the

administrative services for the trust from their law offices and may continue to render legal services to the clients in matters related to the trust or otherwise, for which they bill separately.

Once accepted as a trust administrator, the lawyers may refer clients and other persons as potential customers for the trust company's services. The lawyer will bill his clients for legal services in preparing trust instruments and other documents. The trust company does not prepare the trust documents or otherwise practice law.

Assets of the trusts are deposited with the trust company and administered by the trust company's investment advisors or, at the option of the client, in self-directed accounts. Services of the trust company personnel are paid from the trust assets pursuant to an established fee schedule, and the lawyer/trust administrator is paid a fee by the trust company, again under a published fee schedule, from the fee paid to the trust company from the client's trust.

The lawyer/trust administrator acts as a conduit of information between the trust company and its customers, directs payments from the trust, forwards customer investment directives, and responds on behalf of the trust company to customer inquiries. The lawyer/trust administrator offers no investment advice with respect to the trusts. The lawyer's relationship with the trust company, his compensation as trust administrator, and other relevant information are set out in an extensive written disclosure and consent form which the client must sign as a part of the trust agreement.

Inquiry is made as to whether the arrangement described violates any provision of the Rules of Professional Conduct.

OPINION

A variety of issues created by relationships involving lawyers, their clients and fiduciary institutions have been considered by this Committee.

We have stated, for example, that a lawyer who is both a director and lawyer for a bank may not insist that his client designate the bank as a fiduciary, even where the relationship is disclosed to the client. See Opinion No. 90-02 (1990).

We have also opined that it is professionally improper for a lawyer employed by an institution marketing revocable living trusts to prepare or review such documents for possible use by his clients. Such an arrangement, we felt, posed significant conflict of interest problems that would prevent the lawyer from fairly representing the consumer/client and acting in his best interests. In addition, the lawyer violated Rule 5.5(b) by aiding the unauthorized practice of law by the institution in connection with its preparation of the trust documents. See Opinion No. 90-20 (1991).

Finally, we have held that the referral of clients to an investment advisor or securities broker, whereby the referring lawyer is paid a fee from the funds being managed for the client, may be permissible provided that appropriate disclosures are made. See Opinion No. 97-04 (1998).

The Committee considers the arrangement outlined above sufficient to satisfy the concerns expressed in our prior opinions, provided that appropriate safeguards are employed to satisfy the rules regarding conflicts of interest.

I.

Where a lawyer's representation of a client may be limited by the lawyer's responsibilities to a third person or by the lawyer's own interests, the lawyer may undertake or continue the representation only if he reasonably believes that the representation will not be adversely affected and the client consents after disclosure. Rule 1.7(b) states the general rule:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or 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 disclosure.

Here, the lawyer as an agent of the trust company is expected to develop business for the trust company by recommending the trust company's services to the lawyer's clients and others. Where the trust company is selected by the client, the lawyer is paid a fee for his services as trust administrator by the trust company based upon the fee for trust services paid by the client/customer. The lawyer accordingly has an incentive to recommend the trust company's services over those of a competing fiduciary. The relationship between the lawyer and the trust company, and the compensation generated by that relationship, involve "responsibilities to a third person" and "the lawyer's own interests," as described in the rule.

Nonetheless, the lawyer may, in the Committee's judgment, reasonably believe that his representation of the client may not be adversely affected by his relationship with the trust company. Since the client may disagree, however, it is incumbent upon the lawyer, pursuant to Rule 1.7(b) of the Rules of Professional Conduct, to disclose his relationship with the trust company, the fee arrangement and method of calculation (including the source of payment to him), and all other aspects of the relationship. Although the rule does not by its terms require that the disclosure be in writing, the Committee has noted that that is the more prudent practice.

In our Opinion No. 97-04, **supra**, the Committee had occasion to consider two slightly different referral arrangements involving lawyers, their clients, and an investment adviser and securities broker. In each case, the referring lawyer was paid a portion of the management fee generated by the investment of the client's funds. We pointed out that such an arrangement constituted a business transaction with a client, governed by Rule 1.8 of the Rules of Professional Conduct, which provides:

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

- (1) the lawyer knows or reasonably should know that the lawyer and 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.

We stated that, under pertinent Illinois case law, a presumption of undue influence arises where a lawyer benefits from a business transaction with a client. The presumption may be rebutted only by clear and convincing evidence. Generally, this requires a showing of 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, 682 (1972); In re Schuyler, 91 Ill.2d 6, 61 Ill.Dec. 540, 424 N.E.2d 1137 (1982); Franciscan Sisters Health Care v. Dean, 95 Ill.2d 452, 69 Ill.Dec. 960, 448 N.E.2d 872 (1982).

As in Opinion No. 97-04, the investment of the client's trust assets in the case at hand is clearly a business transaction. The profits realized from the investment program are the basis for the trust company's fees from which, in turn, the lawyer/trust administrator's fees are paid. As in Opinion No. 97-04, these fees are not for legal services performed; they emanate from a business transaction in which the lawyer and the client are jointly interested.

Since the amount of the lawyer/trust administrator's fee is affected by the performance of the trust being administered, there is at least the potential for a conflict of interest between the lawyer and his client. The client's objectives with respect to the trust program may dictate a relatively conservative investment approach, which may generate lesser fees to the trust administrator (and the trust company) than would a more aggressive approach. Disclosure must therefore be made and the client's consent obtained in the same manner as prescribed with respect to Rule 1.7(b).

It should also be remembered that a conflict of interest problem, although initially addressed by appropriate disclosure and consent, imposes a continuing duty on the part of the lawyer to make supplemental disclosures as developing circumstances warrant.

For the reasons given, the Committee believes that the arrangement described is not professionally improper.

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