

LEGAL ETHICS OPINION 1754

ATTORNEY AND LIFE INSURANCE AGENT
SHARING COMMISSION GENERATED BY
PURCHASE OF SURVIVORSHIP POLICY TO
FUND CLIENT'S IRREVOCABLE LIFE
INSURANCE TRUST.

You have presented a hypothetical situation in which Attorney's practice is principally in the area of estate planning. Attorney also holds a life and health insurance license and is an agent for Insurance Company. When Attorney recommends that Client establish an irrevocable life insurance trust, Attorney also discloses that he is a licensed insurance agent and recommends that Attorney, Client and Insurance Agent (an employee of Insurance Company) collaborate to design a comprehensive insurance plan for client. Attorney advises client that Attorney will receive one-half of the commission on the survivorship policy used to fund the trust. After disclosure, Client approves placement of the insurance policy with Attorney and Insurance Agent. Upon issuance of the policy, Insurance Company issues a check to Attorney and a check to Insurance Agent for their shares of the insurance commission.

Under the facts you have presented, you have asked the committee to opine as to whether it is ethical for Attorney and Insurance Agent to share the commission generated by the purchase of a survivorship policy to fund Client's irrevocable life insurance trust.

The appropriate and controlling disciplinary rules relative to your inquiry are:

RULE 1.7 Conflict of Interest: General Rule

(b) 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 interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

RULE 1.8 Conflict of Interest: Prohibited Transactions

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

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- (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
- (3) the client consents in writing thereto.

This committee has opined in the past that an attorney may receive reasonable compensation from a title insurance agency in the form of legitimate fees based upon the attorney's having rendered services for the agency. See LEO 1564. This situation seems comparable in that the attorney is rendering a separate service to the client in the design of a comprehensive insurance plan. Since the basis of that payment is not related to legal services but based on premiums paid for specific insurance policies the committee believes this is not per se improper.

The underlying question deals with the attorney's legal practice and insurance agent status and the conflict that is created when providing legal advice to a client as well as services as an insurance agent. Rule 1.7(b) seems to allow the lawyer to provide the representation to the client as long as it is not limited by the lawyer's own interests of promoting his insurance business. Comment [4] to Rule 1.7(b) seems particularly helpful in outlining that the loyalty to a client is impaired when a lawyer fails to consider or recommend an appropriate course of action for a client because of the lawyer's own interests. That sort of conflict in effect forecloses other alternatives that would be available to the client.

To avoid such a conflict in the present situation, the Committee cautions that during the course of representing a party in estate planning where insurance related products are obtained from the attorney and insurance agent, it would be improper for the attorney to engage in the representation without full and adequate disclosure to the client. Comment [6] in Rule 1.7 specifically addresses the issues that a lawyer may not allow his business interests to affect his representation of a client. The lawyer may not refer clients to an enterprise in which the lawyer has an undisclosed interest.

Furthermore, since the transaction will create a business relationship between the attorney and the client, Rule 1.8(a) requires that the transaction must be fair and reasonable and the terms fully disclosed to the client, in writing. In addition, the client must be given a reasonable opportunity to seek advice of independent counsel and consent in writing to the transaction. The written requirements of Rule 1.8(a) dictate that adequate disclosure and consent must be secured, since this committee has opined in the past that the sufficiency of the disclosure must be resolved in favor of the client, and against the attorney, since it is the attorney who seeks to profit in advising his client to utilize the services of the business in which the attorney has a pecuniary interest. See LEO 1564.

In conclusion, the committee opines that the attorney in your request may participate in the compensation arrangement so long as the dictates of Rules 1.7 and 1.8 are followed. The committee notes that the conclusions in this opinion are in line with those of a number of other jurisdictions. See, DC Op. No. 305 and the authorities cited therein.