

ILLINOIS STATE BAR ASSOCIATION
ISBA Advisory Opinion on Professional Conduct

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**Opinion No. 10-02
October 2009**

Topics: Referral arrangements; professional independence; conflicts of interest.

Digest: A lawyer may not enter into a referral arrangement with a real estate company that would require the lawyer to use the real estate company's affiliated title insurer for the lawyer's clients as a condition of receiving referrals from the real estate company. Other Illinois and federal law governing the lawyer's conduct may also apply to the proposed arrangement.

Ref.: 2010 Illinois Rules of Professional Conduct, Rules 1.0(e), 1.7(a), 1.7(b), 2.1, 5.4(c), and 7.2(b).

ISBA Opinion Nos. 84-01, 90-03, 94-21, 96-06, and 99-02.

Facts

The inquiring lawyer states that a real estate company (the Real Estate Company), from which the lawyer had regularly received referrals for over thirty years, recently formed an affiliated title company (RTC). Real Estate Company advised that the lawyer needs to agree to use RTC exclusively as title insurer for clients referred to the Lawyer by the Real Estate Company to be assured of continued referrals. The lawyer declined and has received no new referrals from the Real Estate Company.

Question

The inquiring lawyer asks whether a lawyer would violate the 2010 Illinois Rules of Professional Conduct by agreeing to the referral arrangement proposed by the Real Estate Company.

Opinion

The proposed referral arrangement would be contrary to the Illinois Rules in three respects. First, Rule 2.1 provides that a lawyer shall exercise independent professional judgment and render candid advice. And Rule 5.4(c) further provides that a lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services. Moreover, as a fiduciary, a lawyer owes the client a duty to act in the client's best interest at all times to the exclusion of all other private interests.

The exclusive and mandatory aspects of the proposed long-term relationship between a lawyer and the Real Estate Company and RTC will inevitably impair the lawyer's ability to provide truly independent professional judgment to clients with respect to any important title insurance issues that may arise. Thus, it is professionally improper under Rules 2.1 and 5.4(c) for a lawyer to permit his or her professional independence to be compromised in this way. See ISBA Opinion No. 96-06 (October 1996) (lawyer may not permit parent to restrict the representation of child).

Second, Rule 7.2(b) generally forbids a lawyer from giving "anything of value to a person for recommending the lawyer's services...." Under the proposed business relationship, the lawyer gives Real Estate Company and RTC something of value, the commitment to use RTC for real estate transactions involving the lawyer's clients in exchange for continued referrals. It is professionally improper for the lawyer to participate in such a referral system. See ISBA Opinion No. 84-01 (October 1984) (bank referrals); and ISBA Opinion No. 99-02 (September 1999) (social security referrals). Although Rule 7.2(b)(4) generally permits reciprocal referral arrangements between lawyers and other nonlawyer professionals, such referral arrangements must not be exclusive. Rule 7.2(b)(4)(i). And the client must be informed of the existence and nature of the agreement. Rule 7.2(b)(4)(ii).

Third, a conflict of interest arises when a lawyer has agreed, to assure continued referrals, to use RTC as exclusive title insurer for transactions of clients referred by the Real Estate Company. Rule 1.7(a)(2) provides that a conflict of interest exists if: "there is a significant risk that the representation ... will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." Rule 1.7(b) might nevertheless permit the representation if the lawyer "reasonably believes that the lawyer will be able to provide competent and diligent representation" and the client gives "informed consent."

"Informed consent," as defined by Rule 1.0(e), "denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Comment [6] further explains: "The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information

reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel.” This advice is consistent with prior Committee opinions. See, e.g., ISBA Opinion No. 90-03 (November 1990) (to obtain valid consent, the disclosure to the client must be adequate); and ISBA Opinion No. 94-21 (March 1995) (the conflicted lawyer’s belief that the representation will not be adversely affected must be objectively reasonable).

Under the facts submitted, even if the proposed referral arrangement among the lawyer, Real Estate Company and RTC was otherwise permissible, it appears unlikely that an independent lawyer would conclude that there would be no material limitation on the representation. The lawyer’s personal interest in receiving future referrals from the Real Estate Company is substantial, and it seems improbable that RTC would always be the appropriate title insurer for every client referred to the lawyer by that Real Estate Company. Consequently, Rule 1.7(b) also prevents a lawyer from entering into the proposed arrangement.

Conclusion

A lawyer who agrees to the proposed arrangement with the Real Estate Company would violate the Illinois Rules of Professional Conduct in at least three respects. First, a lawyer must exercise independent professional judgment in the representation of a client and may not allow a nonlawyer who refers clients to the lawyer to direct or control the representation of a client, including the selection of a title insurer. Second, a lawyer may not give anything of value to another in exchange for client referrals and may not agree to an exclusive referral arrangement. Third, the mandatory aspects of the referral relationships result in a conflict of interest between the lawyer and the client, and the nature of the conflict makes it unlikely that the lawyer could obtain a valid consent to the conflict.

Finally, it should be noted that other law, particularly Illinois and federal statutes and regulations applicable to real estate transactions, may apply to the type of proposed arrangements between Realtor, RTC and certain lawyers. However, the potential effect of such other law is beyond the scope of this Committee’s function.