

## NEBRASKA ETHICS ADVISORY OPINION FOR LAWYERS

NO. 23 - 03

### QUESTION PRESENTED

Is it proper for a lawyer to refer a client to a licensed insurance agent and receive a “split commission” from the agent or insurance company for said referral?

**Short Answer:** No. A lawyer's interest in selling life insurance or other financial products and a client's interest in receiving independent professional legal counsel free of compromise are differing interests. Given the generic request and limited facts presented here, the conflict is not waivable.

### FACTS

An inquiry was made to the Nebraska Ethics Committee requesting an opinion given the following factual scenario:

New York Life Insurance Company (NYL) desires to create a Professional Alliance Partnership (PAP) that would allow Nebraska lawyers or law firms to share commissions with a NYL agent for referring a NYL financial product to their client. The NYL program requires one or more of the lawyers within the PAP or firm to maintain proper insurance licensing. And upon the referral and sale of the insurance product, the NYL agent and the law firm would then split the applicable commission 50/50.

### NEBRASKA COURT RULES OF PROFESSIONAL CONDUCT

The portions of the ethical code applicable to this inquiry include:

Neb. R. of Prof. Cond. § 3-501.7

(a) Except as provided in paragraphs (b) and (c), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(2) there is a significant risk that the representation of one or more clients 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.

Neb. R. of Prof. Cond. § 3-501.8

(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 in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

### **ANALYSIS**

A lawyer's acceptance of referral fees from non-lawyer professionals is an issue that has long divided state ethics committees. The analysis by each state committee is whether the referral fees pose a significant risk that the client's representation will be materially limited by the lawyer's personal interest under Model Rule 1.7-- Neb. R. of Prof. Cond. § 3-501.7,

and the extent to which the referral fee is subject to the rigorous requirements for business transactions with clients under Model Rule 1.8—Neb. R. of Prof. Cond. § 3- 501.8. To our knowledge, the exact issue here has not been addressed by this committee or others within the State of Nebraska.

Many state ethics committees which have found the referral fee to create a significant risk to the client's representation under Rule 1.7, and that no amount of disclosure or explanation can overcome a lawyer's financial interest in directing a client to a specific service provider under Rule 1.8. *See* Ariz. Eth. Op. 06-02 (Ariz. State Bar, Comm. on the Rules of Prof'l Conduct 2006) (automobile dealer); Ariz. Eth. Op. 95-10 (Ariz. State Bar, Comm. on the Rules of Prof'l Conduct 2006) (medical practitioners); Colo. Abstract No. 96/97-13 (Colo. Bar Ass'n, Ethics Comm. 1997) (investment advisor); Haw. Eth. Op. 46 (Disciplinary Bd. of the Haw. Sup. Ct. 2003) (any service provider); Ind. Eth. Op. 3 (Ind. State Bar Ass'n, Legal Ethics Comm. 2008) (financial advisor); Iowa Eth. Op. 99-04 (Iowa Sup. Ct., Bd. of Prof'l Ethics & Conduct 1999) (investment advisor); Ky. Eth. Op. E-390 (Ky. Bar Ass'n, Ethics Comm. 1996) (investment advisor); Ky. Eth. Op. E-264 (Ky. Bar Ass'n, Ethics Comm. 1982) (categorical presumption that a non-lawyer referral fee is unethical); Me. Eth. Op. 184 (Me. Bd. of Overseers of the Bar, Prof'l Ethics Comm'n 2004) (investment advisor); Md. Eth. Op. 2005-04 (Md. State Bar Ass'n 2005) (financial services company); Md. Eth. Op. 2000-34 (Md. State Bar Ass'n 2000) (stockbroker); Md. Eth. Op. 99-18 (Md. State Bar Ass'n 1999) (investment advisor); Md. Eth. Op. 96-17 (Md. State Bar Ass'n 1995) (investment advisor); Nev. Eth. Op. 24 (Nev. State Bar, Comm. on Ethics & Prof'l Responsibility 1997) (investment advisor); N.Y. Eth. Op. 682, 1996 WL 742860 (N.Y. State Bar Ass'n, Comm. on Prof'l Ethics 1996) (investment advisor); N.Y. Eth. Op. 671, 1994 WL 848635 (N.Y. State Bar Ass'n, Comm. on Prof'l Ethics 1994) (life insurance company); N.Y. Eth. Op. 619, 1991 WL 164533 (N.Y. State Bar Ass'n, Comm. on Prof'l Ethics 1991) (life insurance products); 2006 N.C. Eth. Op. 2, 2006 WL 6135366 (N.C. State Bar 2006) (financing company); 1999 N.C. Eth. Op. 1, 1999 WL 33262178 (N.C. State Bar 1999) (investment advisor); Ohio Adv. Op. 2003-1, 2003 WL 1947992 (Ohio

Bd. of Comm'rs on Grievances & Discipline 2003) (lender); Ohio Adv. Op. 2000-1, 2000 WL 202051 (Ohio Bd. of Comm'rs Grievances & Discipline 2000) (financial services group); S.D. Eth. Op. 96-6 (State Bar of S.D., Ethics Comm. 1996) (investment advisor); Tex. Eth. Op. 536, 2001 WL 557898 (Tex. Comm. on Prof'l Ethics 2001) (investment advisor); Vt. Adv. Eth. Op. 98-08 (Vt. Bar Ass'n, Prof'l Responsibility Comm. 1998) (investment advisor); Wash. Adv. Op. 1399 (Wash. State Bar, Comm. on Prof'l Ethics 1991) (financial services firm); W. Va. Eth. Op. 2006-01 (W. Va. Lawyer Disciplinary Bd. 2006) (financial services provider).

There are essentially an equal number of ethics committee opinions which have concluded that the fee-for-referral practice is not per se unethical, but will be acceptable only when the fee will not compromise the lawyer's judgment and the lawyer obtains the client's informed consent after full disclosure. *See* Ariz. Eth. Op. 05-01 (Ariz. State Bar, Comm. on the Rules of Prof'l Conduct 2005) (investment advisor); Cal. Eth. Op. 1999-154, 1999 WL 692059 (Cal. State Bar, Standing Comm. on Prof'l Responsibility & Conduct 1999) (portfolio manager); Cal. Eth. Op. 1995-140, 1995 WL 530133 (Cal. State Bar, Standing Comm. on Prof'l Responsibility & Conduct 1995) (life insurance agent); Conn. Eth. Op. 99-1, 1998 WL 988218 (Conn. Bar Ass'n, Prof'l Ethics Comm. 1998) (investment advisor); Conn. Eth. Op. 97-36, 1997 WL 816057 (Conn. Bar Ass'n, Prof'l Ethics Comm. 1997) (investment advisor); Conn. Eth. Op. 97-16, 1997 WL 700650 (Conn. Bar Ass'n, Prof'l Ethics Comm. 1997) (investment advisor); Conn. Eth. Op. 94-25 (Conn. Bar Ass'n, Prof'l Ethics Comm. 1994) Aon Risk Solutions | Specialty | Professional Services 3 (investment advisor); D.C. Eth. Op. 361 (D.C. Bar Ass'n 2011) (any service provider); Fla. Eth. Op. 02-8, 2004 WL 4953224 (Fla. State Bar Ass'n 2004) (securities dealer); Ga. Eth. Op. 03-3 (Ga. Bar Formal Advisory Op. Bd. 2004); Ill. Adv. Op. 97-04, 1998 WL 24872 (Ill. State Bar Ass'n, Comm. on Prof'l Ethics 1998); Iowa Eth. Op. 98-06 (Iowa State Bar Ass'n, Comm. on Ethics & Conduct 1998) (investment advisor); Kan. Eth. Op. 96-05 (Kan. Bar Ass'n, Ethics Advisory Ops. Comm. 1996) (investment advisor); Md. Eth. Op. 86-69 (Md. State Bar Ass'n 1986) (real estate agent); Mich. Eth. Op. RI 339, 2006 WL 4510655

(Mich. State Bar, Comm. on Prof'l & Judicial Ethics 2006) (insurance company); Mich. Eth. Op. RI-317, 2000 WL 1288357 (Mich. State Bar, Comm. on Prof'l & Judicial Ethics 2000) (investment advisor); Mo. Informal Adv. Op. 960124 (Mo. Bar Office of Chief Disciplinary Counsel 1996) (investment advisor and securities broker); N.J. Eth. Op. 416, 1979 WL 26315 (N.J. Sup. Ct., Advisory Comm. on Prof'l Ethics 1979) (real estate broker); N.J. Eth. Op. 12 (N.J. Sup. Ct., Advisory Comm. on Prof'l Ethics 1963) (title insurance company); N.Y. Eth. Op. 845, 2010 WL 6470555 (N.Y. State Bar Ass'n, Comm. on Prof'l Ethics 2010) (real estate broker); N.Y. Eth. Op. 667, 1994 WL 593253 (N.Y. State Bar Ass'n, Comm. on Prof'l Ethics 1994) (mortgage broker); N.Y. Eth. Op. 626, 1992 WL 465628 (N.Y. State Bar Ass'n, Comm. on Prof'l Ethics 1992) (title insurance company); N.Y. Eth. Op. 576, 1986 WL 68785 (N.Y. State Bar Ass'n, Comm. on Prof'l Ethics 1986) (title insurance company); Okla. Adv. Op. 316, 2001 WL 1636210 (Okla. Bar Ass'n, Legal Ethics Comm. 2001) (life insurance and financial products); Pa. Eth. Op. 2000-100, 2000 WL 567996 (Pa. Bar Ass'n, Comm. on Legal Ethics & Prof'l Responsibility 2000) (any service provider); R.I. Eth. Op. 99-08 (R.I. Sup. Ct., Ethics Advisory Panel 1999) (investment advisor); S.C. Adv. Op. 00-16, 2000 WL 33201791 (S.C. Bar Ethics Advisory Comm. 2000) (debt management services); Utah Eth. Op. 99-07, 1999 WL 1167097 (Utah State Bar, Ethics Advisory Op. Comm. 1999) (investment advisor); Va. Legal Eth. Op. 1581, 1994 WL 16814926 (Va. State Bar, Legal Ethics Comm. 1994) (company purchasing commercial paper secured by real estate); Va. Legal Eth. Op. 209, 1971 WL 233378 (Va. State Bar, Legal Ethics Comm. 1971) (real estate agent); Wis. Eth. Op. E-00-04 (Wis. State Bar, Committee on Prof'l Ethics 2001) (any service provider).

Most state ethics opinions, including multiple opinions from the same state ethics committee on the subject, address questions about the specific referral relationships posed by individual lawyers and firms. The specificity of the permissible (or impermissible) referral relationship is thus a function of the question posed to the state ethics committee as opposed to the relationship itself.

We as a committee likewise do not believe a blanket rule of either permitting or prohibiting referral fees is appropriate. Rather, the circumstances of each referral fee must be assessed independently. Such circumstances include: the relationship between the type of representation currently being provided by the lawyer and the services for which the referral fee will be paid; whether the client actually needs the services for which the referral fee will be paid; whether the client is given other entities or individuals that provide the same service; whether the fees to be received by the lawyer are reasonable; how the fees to be received by the lawyer compare to similar services and fees; whether the lawyer intends on offsetting or returning the referral fees to the benefit of the client; and, above all, whether the conflict can truly be waived by the client's full disclosure.

The New York State Bar Association Committee provides helpful insight through a series of matters involving when lawyers may, and may not, accept fees for referral clients to other professionals similar to what has been proposed under the current circumstances involving NYL. That committee found that lawyers may accept fees for referring clients to real estate brokers, mortgage brokers, or title insurance companies (if lawyers obtain clients' informed consent), but must decline referral fee opportunities from investment advisors and life insurance agents on the ground that meaningful consent is unattainable. *Compare* N.Y. Eth. Op. 845, 2010 WL 6470555, at \*7 (permitting a referral fee from a real estate broker), and N.Y. Eth. Op. 667, 1994 WL 593253, at \*3 (permitting a referral fee from a mortgage broker), and N.Y. Eth. Op. 626, 1992 WL 465628, at \*2 (permitting a referral fee from title insurance company), and N.Y. Eth. Op. 576, 1986 WL 68785, at \*7 (permitting a referral fee from a mortgage broker and title insurance company), *with* N.Y. Eth. Op. 682, 1996 WL 742860, at \*2 (prohibiting referral fees from an investment advisor), and N.Y. Eth. Op. 671, 1994 WL 848635, at \*2 (prohibiting referral fees from a life insurance company), and N.Y. Eth. Op. 619, 1991 WL 164533, at \*2 (prohibiting referral fees from a life insurance company).

Following the N.Y. Committee's analysis, the different outcomes are attributable to whether a professional's product or service falls into one of two categories: (1) the product or service is fairly uniform among providers and the client requires an objectively determinable amount of the product or service given the legal services provided by the lawyer; or (2) the product or service substantially varies among providers and the client does not require an objectively determinable amount of the product or service given the legal services provided by the lawyer. NY Eth. Op. 682, 1996 WL 742860, at \*1.

In the N.Y. Committee's view, the products and services offered by real estate brokers, mortgage brokers, and title insurance companies align with the first category, and thus produce consentable conflicts. The N.Y. Committee characterizes these products and services as fungible in nature and believes the objectively determinable amount at issue in a real estate transaction better insulates a client from the referring lawyer's conflicting interest. N.Y. Eth. Op. 845, 2010 WL 6470555, at \*4-5; N.Y. Eth. Op. 682, 1996 WL 742860, at \*1-2.

In contrast, the N.Y. Committee regards the products and services offered by investment advisors and life insurers as squarely positioned in the second category, with the result being a non-waivable conflict. The N.Y. Committee reasons that these professionals' services vary substantially among different providers and emphasizes that the referring lawyer's remuneration fluctuates according to the quantity of the product or service purchased by the client. NY Eth. Op. 682, 1996 WL 742860, at \*1-2.

Thus, because the amount of the client's payment to the professional is not objectively determined by the transaction, such as with estate planning services, the N.Y. Committee believes that these circumstances invite lawyers to provide legal advice to advance their pecuniary interest to clients' detriment. *Id.*

We as the Nebraska advisory committee find the reasoning of the New York Committee persuasive and well-reasoned. We likewise believe receiving a fee for the referral and eventual sale of annuities, life insurance, or similar financial products, will create conflict with the client that cannot be reasonably waived when the lawyers/law firm's services to the client are even tangentially related to estate planning services.

The general question posed to this committee is essentially whether NYL, through one of its brokers, may establish relationships with Nebraska lawyers and law firms and then split commissions for any financial services referred from the lawyer and sold to the client. But the exact types of financial services being referred by the lawyer and sold is not detailed, nor is the type of representation being provided by the lawyer when the referral was made, or the size, scope and reasonableness of the referral fee contemplated. Consequently, it is impossible for this committee to affirmatively state whether the referral for a fee is ethically permitted---the devil of such analysis will always be in the factual detail.

What the committee can say, however, is that if the financial products being referred and sold to the NYL agent are those traditionally provided by an investment advisor or life insurance agent, there is a strong likelihood such a referral would be a non-waivable conflict under § 3-501.8. We will not speculate on the multitude of factual scenarios which may arise and be waivable conflicts or those that would not---rather the committee affirmatively states that the types of referrals for financial products generically referenced by NYL to this committee do indeed create an ethical minefield for the referring lawyer and one which must be carefully analyzed before proceeding in making such a referral.