

THE PHILADELPHIA BAR ASSOCIATION
PROFESSIONAL GUIDANCE COMMITTEE

Opinion 2015-2
(February 2015)

The inquirer asks about the ethical propriety of a “strategic partnership” with a financial services provider. The inquirer advises that she would refer certain of her clients (most likely those with large settlements) to the financial services provider who would set up a portfolio for the client, which process would include assessing the client’s tolerance for risk, need for funds, analysis of lifetime goals and the like. The accounts thus set up would be charged fees based on the portfolio value and the inquirer would be paid a portion of those fees on an ongoing basis. Should the portfolio decrease in value, the fee paid to the inquirer would decrease. Likewise, should the portfolio increase in value, the fee paid to the inquirer would increase. The inquirer would not be required to refer her clients to the financial services provider. She would refer only those who she decides would benefit from such a relationship.

The inquirer is aware of and has reviewed Joint Bar Association Opinion 2000-100 on the considerations for attorneys in accepting referral fees from non-attorneys. One of the limiting considerations in that opinion is the length of time during which a recurring fee is accepted. This strategic partnership with which inquirer has been presented does not seem to be limited in any way other than by the potential of the client leaving the financial services firm.

The inquirer also notes that the recent addition of Pennsylvania Rule of Professional Conduct (“the Rules”) 5.8b1 would seem to indicate that the contemplated payment pursuant to such an arrangement will no longer be permitted once that Rule takes effect.

New Amendments to the Rules, effective at the end of February 2015, include new Rule 5.8b1 which provides that,

“Rule 5.8 Dealing in Investment Products: Prohibitions and Restrictions

...
(b) A lawyer shall not recommend or offer an investment product to a client or any person with whom the lawyer has a fiduciary relationship, or invest funds belonging to such a person in an investment product, if the lawyer or a person related to the lawyer:

(1) has an interest in compensation paid or provided by a person other than the client or person with whom the lawyer has a fiduciary relationship;....”

Comment 2 to Rule 5.8b1 provides in part that,

“...Clients who place their trust in their lawyer and assume or expect that the lawyer will protect them from harm are likely to feel deceived if substantial sums of money are lost

on investments pursued at the lawyer's recommendation or prompting and the lawyer ...either receives compensation or a pecuniary benefit from a person other than the client...even when the reason for the loss is limited to unexpected market conditions....”

Rule 5.8c1 provides in part that:

(c) For purposes of this Rule:

(1) the term “investment product” includes...services “as an investment manager or investment adviser.”

It is clear that the new Rule, given both the prohibition in 5.8b1 and the definition of “investment product” in 5.8c1, prohibits an attorney from recommending or offering an investment product under the circumstances described in this inquiry.

Furthermore, while Joint Opinion 2000-100 construed the Rules as allowing for receipt of referral fees by attorneys from non-attorney professionals under certain circumstances, the arrangement described by the inquirer, where she would receive a ***continuing payment for an undefined period, and where such payment would continue even if the investments did poorly***, could very well create an impermissible conflict with the client/fiduciary as the attorney would have a disincentive from advising the client/fiduciary to seek investment services elsewhere. At the present time, whether or not this conflict could be waived is no longer relevant given the absolute prohibition under Rule 5.8b1.

Caveat: The foregoing opinion is advisory only and is based upon the facts set forth above. The opinion is not binding upon the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. It carries only such weight as an appropriate reviewing authority may choose to give it.