



# Ohio Board of Professional Conduct

## **OPINION 2019-10**

Issued October 4, 2019

Withdraws Adv. Op. 2000-1

### **Lawyer Acceptance of Referral Fees from Financial Services Group**

**SYLLABUS:** A lawyer is prohibited from accepting a referral fee from a financial services group for referring clients in need of financial services. A lawyer involved in a business relationship and referral fee agreement with a financial services group acquires a pecuniary interest adverse to the client. A material limitation conflict is present when a lawyer enters into a business relationship and referral fee agreement with a financial services group due to the personal interest of the lawyer in earning a referral fee. Full disclosure and consent of the client does not resolve a conflict of interest arising from a referral fee agreement between a lawyer and a financial services group.

This nonbinding advisory opinion is issued by the Ohio Board of Professional Conduct in response to a prospective or hypothetical question regarding the application of ethics rules applicable to Ohio judges and lawyers. The Ohio Board of Professional Conduct is solely responsible for the content of this advisory opinion, and the advice contained in this opinion does not reflect and should not be construed as reflecting the opinion of the Supreme Court of Ohio. Questions regarding this advisory opinion should be directed to the staff of the Ohio Board of Professional Conduct.



# Ohio Board of Professional Conduct

65 SOUTH FRONT STREET, 5<sup>TH</sup> FLOOR, COLUMBUS, OH 43215-3431

Telephone: 614.387.9370 Fax: 614.387.9379

[www.bpc.ohio.gov](http://www.bpc.ohio.gov)

HON. JOHN W. WISE

CHAIR

PATRICIA A. WISE

VICE-CHAIR

RICHARD A. DOVE

DIRECTOR

D. ALLAN ASBURY

SENIOR COUNSEL

KRISTI R. MCANAU

COUNSEL

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**QUESTION PRESENTED:** May a lawyer accept a fee from a financial services group for referring clients in need of financial services?

**APPLICABLE RULES:** Prof.Cond.R. 2.1, 1.7, 1.8, 5.4.

**OPINION:** Financial services groups are approaching Ohio lawyers and offering to enter into business relationships based on the referral of clients in need of financial services. The groups typically offer clients financial services through investment planners, investment advisors, and money managers and may offer insurance services or accounting services through affiliated specialists or firms. Upon referral, the financial services group initiates a meeting with the client and lawyer. The lawyer reviews and approves the plan or product before it is offered to the client. The lawyer offers the client legal advice about the plan and product. The lawyer receives a fee for each client referred.

The financial services group and the lawyer negotiate the fee in advance of the referral. The fee may be a one-time fee per referral, a one-time fee based on how much of the product the client buys, a percentage of the returns realized for the client, or a percentage of the fees paid by the client to the financial services group throughout the period the client's funds are invested.

This opinion addresses whether the proposed activity is ethical subject to the Ohio Rules of Professional Conduct. The opinion does not address whether a referral fee from a financial or investment advisor complies with any state or federal laws, because questions of law are beyond the advisory authority of the Board of Professional Conduct.

#### *Independent Professional Judgment*

In representing a client, a lawyer must exercise independent professional judgment and render candid advice including economic considerations. Prof.Cond.R. 2.1. When consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. *Id.* at cmt. [4]. As part of their representation, clients expect lawyers to make appropriate referrals to other individuals or groups when the need becomes apparent during the legal representation. If, during the legal representation, a lawyer ascertains that a client needs financial services, the lawyer has a fiduciary duty to counsel the client accordingly, and may refer the client to appropriate resources. The lawyer's duty of loyalty demands that any referral be made in the client's best interest, free of compromise and conflict, and not based upon financial incentives that a particular company may offer the lawyer. To do so undermines the fiduciary nature of the relationship between the lawyer and client. *See, e.g.,* Vermont Bar Ass'n, Op. 98-8 (undated) and New York State Bar Ass'n Op. 682 (1996). In addition, a lawyer's independent professional judgment is compromised when the lawyer is involved in a business relationship and referral fee agreement as described.

Prof.Cond.R. 1.8 is also implicated by the factual scenario. Division (a) provides that a lawyer shall not enter into a business transaction with a client or acquire a pecuniary interest adverse to a client unless certain conditions are met. The Board finds that the business relationship between the lawyer and financial services group involves a lawyer's pecuniary interest adverse to a client. The client has an interest in investing and earning as much as possible, while at the same time reducing any fees associated with the investment so as to maximize returns. However, the lawyer's interest in the transaction is to direct the client to a particular financial services group in order to obtain

a referral fee. Because of the lawyer's business relationship with the financial services group, there is never any consideration of whether the client may be able to obtain comparable financial services elsewhere for a more favorable fee or return.

Even if one considers the interests of the client and lawyer to be aligned, the transaction and terms on which the lawyer acquires the interest can never be fair and reasonable to the client. Prof.Cond.R. 1.8(a)(1). Instead, the Board is of the view the business relationship is inherently unfair and unreasonable to the lawyer's client. Maine Prof. Ethics Op. 184 (2004). The overriding *purpose* of the business relationship between the lawyer and financial services group and referral fee arrangement is to influence the lawyer to make recommendations for the benefit of an investment advisor and the lawyer, not to address the best interest of the client.

Furthermore, Prof.Cond.R. 1.8(f) prohibits a lawyer from accepting compensation for representing a client from someone other than the client unless certain conditions are met. A referral fee paid by a financial services group to a lawyer falls within the ambit of this rule because the fee provides compensation to a lawyer for expected legal services in connection with the client's decision to use the particular financial services group. For all the reasons discussed above, a lawyer's independent professional judgment and the lawyer-client relationship will be compromised when a lawyer enters into this type of business relationship with a financial services group.

Lastly, a lawyer's representation of a client creates a conflict of interest if there is a substantial risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for a client will be materially limited by the lawyer's own personal interests. Prof.Cond.R. 1.7(a)(2). The principles of loyalty and independent judgment are fundamental to the attorney-client relationship and underlie the conflict of interest provisions of these rules, and a lawyer's own personal interest should not be permitted to dilute the lawyer's loyalty to the client. Prof.Cond.R. 1.7, cmt. [1]. The arrangement with the financial services group creates a substantial risk of interference with the lawyer's independent professional judgment in considering alternatives for the client and may foreclose courses of action that should be pursued on behalf of the client.

#### *Prohibited Business Relationship*

The proposed business relationship involves activities that consist of the practice of law, such as reviewing and approving the financial services plan prior to presentation

to the client, as well as joint meetings with the client for the purpose of discussing and offering legal advice about the plan. The financial services group, while not asking lawyers to form a legal partnership as defined under state law, is asking for ongoing business associations or relationships with lawyers or law firms. The formation of partnerships between lawyers and nonlawyers, when any of the activities include the practice of law, is prohibited. Prof.Cond.R. 5.4(b).

#### *Client Consent*

The question then becomes whether a client may consent to the lawyer's representation and acceptance of a referral fee. The Board is of the opinion that full disclosure and client consent are not permissible in this situation. Prof.Cond.R. 1.7, 1.8(a), and 1.8(f) provide for a disclosure and client consent to otherwise impermissible conflicts, but Prof.Cond.R. 2.1 and 5.4(b) do not. Because of the joint application of these rules to the issues raised, the full disclosure and consent exceptions applicable to only some of the above referenced rules do not apply.

**CONCLUSION:** Lawyers will naturally desire to develop relationships with professionals in other fields in order to have the ability to refer clients to competent professionals able to assist in matters beyond strictly legal questions and to create potential new pools of clients, however to do so in exchange for a referral fee is problematic. The lawyer-client relationship and the lawyer's ability to maintain independent professional judgment is compromised when a lawyer is involved in a business relationship and referral fee agreement with a financial services group. The lawyer has a material limitation conflict when entering into this type of relationship. The lawyer has acquired a pecuniary interest adverse to the client that cannot be cured because the transaction and terms are simply not fair and reasonable to the client. A lawyer's own personal interest should not be permitted to dilute the lawyer's loyalty to the client. For a similar reason, a lawyer cannot accept compensation from a financial services group for the legal advice provided to a client in connection with the group's investment services because of the lawyer's lack of independent professional judgment. Finally, a lawyer is unable to enter into a business relationship of this type with the financial services group because at least one of the proposed activities of the relationship consists of the practice of law. Because of the joint application of the Rules of Professional Conduct to the issues raised, the full disclosure and consent exceptions applicable to only some of the above referenced rules do not apply.