Prepared for Juan Antunez

Steve Leimberg's Estate Planning Email Newsletter - Archive Message #1962

Date: 16-May-12
From: Steve Leimberg's Estate Planning Newsletter
Subject: **Adkisson & LeVine on Florida Bar v. Doherty: Florida Supreme Court Disbars Attorney Who Sold Annuities to Elderly Couple**

"For the last decade, the sale of life insurance, annuities, and financial services by attorneys has proliferated. Some attorneys argue that this is a win-win for themselves and clients, the first finally getting to make the substantial commissions that otherwise went to some insurance agent or planner who did little or nothing and bore little of the risk, and the latter possibly getting a more tightly-integrated estate and financial plan that meets their goals.

If the sales commissions are the same as the client would otherwise pay to an independent insurance agent, these attorneys suggest, where is the harm? If you are an attorney who has gotten into the insurance, annuities or financial services game, you'd better document your compliance with Florida Bar v. Doherty's trifecta of disclosure, advice to seek independent counsel, and written waiver, in each and every case, or you might find that your ticket has been pulled too."

In Florida Bar v. Doherty, the Florida Supreme Court disbarred an attorney who sold annuities to an elderly couple while concurrently acting as their estate planning attorney. Doherty failed to disclose the conflict to his clients, advise them to seek independent counsel, or obtain a written waiver. As **Jay Adkisson** and **Richard LeVine** point out in their commentary, the Doherty case contains a number of important lessons for attorneys that engage in the sale of products.

Jay Adkisson is a partner in the Newport Beach, California, law firm of **Riser Adkisson LLP**, and is currently the Vice-Chair of the Insurance and Financial Services Committee of the ABA-RPTE section.

Richard LeVine practices with the international law firm of **Withers Bergman LLP** in their New Haven, Connecticut and New York City offices. He frequently advises clients on private placement life insurance, annuity and captive property and casualty insurance strategies.

Here is their commentary:

EXECUTIVE SUMMARY:

The Florida Supreme Court disbarred an attorney who sold annuities to an elderly couple while concurrently acting as their estate planning attorney, but who failed to disclose the conflict to his clients, advise them to seek independent counsel, or obtain a written waiver.

FACTS:

Florida Attorney Doherty ("Attorney") was also a licensed annuity salesman in Florida and provided financial planning services to his clients.

Husband and Wife came to Doherty first for financial planning, and then to provide estate planning services due to their advanced ages and declining health. Doherty assisted the elderly couple with their estate planning.

Very soon thereafter, Husband passed and Wife decided to consolidate her annuity holdings from six annuities to three annuities. Attorney thus submitted applications for three annuities to Conseco Insurance Company.

Coincidentally, Attorney was in a dispute with Conseco about chargebacks in the amount of $86,370 that were owed by Attorney to Conseco, because some of Attorney's clients who purchased annuities had died too soon after the annuities were issued.

Attorney entered into a settlement with Conseco whereby Attorney was to pay Conseco $10,000 up front, and then 50% of any commissions that he received on the sale of Conseco products until the chargebacks were returned. If no commissionable sales were made within 6 months of the agreement, the entire chargeback would become due and payable.
Apparently to avoid losing his 50% commissions on the sale of annuities to Client, Attorney cancelled the Conseco applications and instead submitted applications for annuities with Washington National that would have paid him commissions not subject to offset.

Simultaneously, Attorney was working with Wife to revise her own estate planning documents now that she was a widow. Attorney did so, and created two new trusts in the process.

One new trust was to hold title to Wife's condo, but had the peculiar instruction that when she passed the proceeds were to be used to purchase more annuities -- and limited in the trust document to either Conseco or Washington National annuities -- and Attorney was named the Trustee of that new trust.

The second new trust was an educational trust for the couple's grandchildren, and Doherty named himself the Trustee of this new trust too.

Attorney was also named Wife's personal representative and the successor Trustee of an existing trust, and "was given final and uncontestable authority to determine whether certain estate planning methods the client effectuated were successful."

Wife herself passed only two months after her Husband, before any annuity sales were completed. The wife's survivors successfully challenged Attorney's appointments as personal representative and trustee and had him removed.

A Referee was appointed to gauge Attorney's ethical conduct, and found that Attorney had assumed "multiple, concurrent yet discrete, professional roles in behalf of [the client], i.e., estate planner, trustee and successor trustee of a number of trusts, financial products salesperson, personal representative, and attorney."

But the Referee did not find that Attorney had ever attempted to advise Husband or Wife of his "multiple and conflicting positions."

Although there did not appear to be any evidence that Attorney's financial planning for his clients had caused them any losses, or that they had been disadvantaged by his commissions, the Referee nonetheless recommended that Attorney be disbarred, and asserted two grounds:

- Attorney did not challenge the Referee's first ground, which was that Florida Bar Rule 4-1.7(a)(2) provides to the effect that a

lawyer shall not represent a client if there is a substantial risk that the representation of the client will be materially limited by the lawyer's responsibilities to another client, a former client or a third person, or the lawyer's personal interests.

- Attorney did vigorously challenge the Referee's second ground, which was that Florida Bar Rule 4–1.8(a) provides to the effect that that 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 the transaction is fair and reasonable to the client, the client is advised in writing of the desirability of seeking independent legal counsel, and the client gives informed, written consent to the essential terms of the transaction.

In sustaining the Referee's finding on this latter point, the Florida Supreme Court noted that an attorney is simply not allowed to enter into a business transaction with a client unless the transaction is fair to the client and three elements are met:

- The terms of the transaction and fully disclosed and transmitted to the client;

- The client was advised in writing to seek independent counsel; and

- The client gives informed and written consent to the attorney's role in the transaction, including whether attorney is representing the client in the transaction.

Here, Attorney failed to meet any of these elements, but instead complained that selling annuities and financial services was not a "business transaction" with a client at all, and certainly not one that implicated the Bar Rule, since Attorney acquired no interest in the annuities purchased.

This argument fell on deaf ears, with the Court holding that "rule 4-1.8(a) is not so limited in its scope and application." The Court pointed to the official comment to Model Rule 1.8(a) (followed by Florida) which indicates that the rule "applies to lawyers engaged in the sale of goods or services related to the practice of law, for

example, the sale of * * * investment services to existing clients of the lawyer's legal practice."

The Florida Supreme Court also noted that the Supreme Court of Ohio* had similarly disciplined an attorney who both prepared a will and advised the client to invest funds into an annuity.

Thus, the Florida Court concluded:

> Like the respondent in [the Ohio case, Attorney] held himself out as a lawyer and a Certified Financial Planner. His professional relationship with the client involved both legal work, including amending her will and executing two trusts on her behalf, and financial services, namely brokering the sale of Conseco and Washington National annuities. It is clear that [Attorney] stood to earn a commission from the sale of the annuities had those transactions been completed. It is also clear that he did not disclose his financial interest in the transactions to the client in writing as required by rule 4–1.8(a). Accordingly, we approve the referee's recommendation that [Attorney] be found guilty of violating rule 4–1.8(a).

As his final (literally) argument, Attorney argued that disbarment was too harsh of a sanction. It didn't help that the Referee had identified four aggravating factors:

- Attorney had previously served a two-year suspension from the practice of law;
- Attorney acted with a selfish motive;
- Attorney refused to acknowledge the wrongful nature of his conduct; and
- Attorney had substantial experience in the practice of law.

But, even with these aggravating factors, did the mere sale of annuities to his clients rise to the level of serious misconduct? Yes, explained the Court:

> The evidence demonstrates that [Attorney's] conduct created a

> clear conflict of interest in that there was a substantial risk that his representation of the client would be limited by his own interests. [Attorney] acted purposefully to make his personal, pecuniary interests at least as important as those of his client and her estate. He advised his client to select various means of estate planning and wealth management that would earn him a personal financial benefit. Additionally, {Attorney] participated in a business transaction with his client and failed to disclose his substantial interest in the transaction. We believe his actions amount to egregious misconduct.

And with that, Attorney's ticket was pulled.

COMMENT:

For the last decade, the sale of life insurance, annuities, and financial services by attorneys have proliferated. Some attorneys argue that this is a win-win for themselves and clients -- the first finally getting to make the substantial commissions that otherwise went to some insurance agent or planner who did little or nothing and bore little of the risk, and the latter possibly getting a more tightly-integrated estate and financial plan that meets their goals.

If the sales commissions are the same as the client would otherwise pay to an independent insurance agent, these attorneys suggest, where is the harm?
As yet, some Courts aren't buying it. Instead, as in this Opinion, some Courts see the sale of insurance products and financial services to Clients as a "business transaction" that is not per se impermissible, but requires not only that the transaction be fair to the client, but also each and every of the elements of (1) written disclosure to clients, (2) advice to seek independent counsel, and (3) written waivers by clients.

But who out in the field is really making such written disclosures to clients, telling them to seek independent counsel, or obtaining written waivers? Which is another way of saying, what insurance or annuities salesperson wants to tell their clients how much commission they are getting, and to go ask somebody else about it?

Further, there are many unanswered questions as to how far disclosure must go. The intent of Rule 1.8 is to provide the fullest and fairest disclosure to the client, since obviously the attorney is acting as a

fiduciary in relation to the client. Does this include the lavish golf junkets and vacations that insurance companies rain on their high producers? Does an attorney have to disclosure to his client the number or percentage of clients that are also sold insurance products or financial services? The answers to these questions are probably yes.

Of course, such conflicts have been seen in other transactions where the attorney ends up with stock, earns a commission as a mortgage broker, etc., but all these instances have required the trifecta of disclosure, advice to seek independent counsel, and written waiver. Bottom line: there is no special waiver for attorneys who sell insurance products and financial services on the side.

Notably, an attorney who is licensed to sell insurance and financial products can perform estate planning for a client so long as that same client is not also the attorney's customer for those products, and vice versa. The problem comes when the attorney wears both hats at the same time. An Attorney can be either an estate planner or financial planner, has entered the ethical minefield when trying to play dual roles with the same client.

This is especially worrisome given the comment by the Referee that the attorney assuming “multiple, concurrent yet discreet [sic] professional roles in behalf of [the client], i.e. estate planner, trustee and successor trustee, financial products salesperson, personal representative, and attorney” is problematic. If the roles of estate planner, trustee and personal representative for a client by themselves are deemed to be conflicting positions, as suggested by the court’s opinion, then punctilious adherence to the conflict rules regarding sales of financial products or insurance is even more important.

Notice the case doesn’t even mention whether the client might have suffered financial harm from the proposed annuities suggested by her attorney (there couldn’t have been any actual harm since the client died before any of the sales were completed). This implies that the objective fairness of the terms of the insurance or financial product is irrelevant and provides no help to an attorney who failed to make the required disclosures.

Here, it didn’t help that Attorney had previously served a two-year suspension in another state, since the Florida Bar is well known for dropping the axe on repeat offenders, especially those who move to

Florida after having been disciplined elsewhere. It also didn't help that Attorney had been accused of making false statements on his errors and omissions insurance application, which the Court touched on only briefly in passing.

One might even get the impression that Attorney was simply a "bad actor" and the Court was just taking out the trash. But that overlooks that Attorney utterly failed to satisfy the trifecta of disclosure, advice to seek independent counsel, and written waiver.

If you are an attorney who has gotten into the insurance, annuities or financial services game, you'd better document your compliance with this trifecta in each and every case, or you might find that your ticket has been pulled too.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Jay Adkisson

Richard LeVine

CITE AS:

LISI Estate Planning Newsletter #1962, (May 16, 2012) at http://www.leimbergservices.com/

CITES:

Florida Bar v. Doherty, No. SC-332 (March 29, 2012)
*Stark County Bar Ass'n v. Buttacavoli, 96 Ohio St.3d 424, 775 N.E.2d 818 (2002).