

WHAT ACTIVITIES ARE PERMISSIBLE BY UNLICENSED AGENTS OR BROKERS IN NEW YORK

Frederick J. Pomerantz and Leonard M. Fisher, Esq.

212.490.3000

On October 30, 2003, Governor George Pataki announced that he had signed legislation making it easier for New York State's licensed agents and brokers to be licensed to do business in other states and compete more efficiently. The law, Senate Bill 5729, enacted a New York State version of the National Association of Insurance Commissioner's (NAIC) Producer Licensing Model Act, (NAIC Model Act) which provides uniform procedures and guidelines for the licensing of insurance brokers and agents.

New York was one of the last remaining states to adopt a version of the NAIC Model Act. It was critical for New York, a major commercial and financial center, to adopt the NAIC Model Act in order to foster a competitive environment for New York's insurance business. The legislation will help New York insurance companies doing business in multiple states to compete more effectively on a national basis.

As enacted, S-5729 preserved New York's traditional licensing categories of agents and brokers but, at section 2101(k), added the term "producer" defined as "an insurance agent, insurance broker, reinsurance intermediary, excess lines brokers, or any other person required to be licensed under the laws of this state to sell, solicit or negotiate insurance"

Other amendments to Section 2101 specifically define the terms "negotiate" or "negotiation," "sell" or "sale" and "solicit" or "solicitation" in the context of an insurance transaction.

Section 2101 of the New York Insurance Law has produced a number of inquiries concerning the extent to which unlicensed persons, principally those employed by an insurer or insurance agency or broker, may participate in the transaction of insurance matters, including sales and services. In responding to such inquiries, it is important to note the authority and responsibility of a person who is licensed as an insurance agent or broker. Once that is done, the prohibitions against certain acts by unlicensed persons, as well as the permitting of such acts by licensed insurers or insurance agents or brokers, become clear. The public has a deep interest in the competent and trustworthy transaction of insurance. Consequently, insurance laws require persons to pass an examination demonstrating sufficient knowledge of the kinds of insurance they propose to transact before they can be licensed.

An insurance agent is defined in N.Y. Ins. Law § 2101(a) as "any authorized or acknowledged agent of an insurer...and any subagent or other representative of such an agent, who acts as such in the solicitation of, negotiation for, or sale of, an insurance, health maintenance organization or annuity contract, other than as a licensed insurance broker..."

Section 2101 (a) further provides that the term "insurance agent" shall not include certain employees, officers or persons, who do not solicit or accept from the public, outside of an office of an insurer, if such officer or employee does not receive a commission or other compensation for his or her services which is directly dependent upon the amount of business done.

Another notable exception from the definition of "insurance agent" is made for a person whose activities are limited to advertising without the intent to solicit insurance in [New York] through communications in printed publications or other forms of electronic mass media whose distribution is not limited to residents of [New York], provided that the person does not sell, solicit or negotiate insurance that would insure risks residing, located or to be performed in [New York.]

An opinion of the New York Insurance Department's Office of General Counsel, OGC Opinion No. 2004-288 dated December 1, 2004, on the subject of permissible duties of unlicensed customer service representatives of agency or

brokerage, clarified what activities unlicensed employees or officers of an insurance agent or broker may engage in without having to obtain a license.

The inquirer who initiated the question stated that he had received inquiries from members of his organization who were confused about the new Producer Licensing Law. The inquirer noted that the new legislation left unchanged the exemption in Section 2101(a)(1) from the definition of insurance agents. However, the inquirer stated that the new law added a new Section 2101(c)(2) regarding insurance brokers and added similar language in Section 2101 (k) which, as noted previously, defines an insurance producer.

The inquirer stated that one of its members forwarded an insurer's list outlining activities such insurer regards as authorized and unauthorized activities for unlicensed employees to engage in. Specifically, the inquirer asked what activities "customer service representatives" of an insurance agency or insurance brokerage are permitted to engage in.

The list provided as follows:

Authorized Activities:

Perform secretarial/receptionist duties such as:

- Answering phones
- Scheduling appointments (provided there is no discussion about insurance coverage, cost or related issues)
- Maintaining files and records
- Referring prospect or customer to agent or a licensed sales producer, where appropriate
- Word processing and data entry
- Assisting with advertising and mailing campaigns
- Accept payments on existing policies that are made in the office in situation in which there are no coverage discussions
- Secure expiration dates from prospects limited to the date the policy expires and the current carrier, and whether they would be interested in speaking to the agent or a licensed sales producer
- Take loss information from customers and report this information to claims department
- Handle changes to existing policies that do not involve any discussion of coverages or require the binding of additional coverages, increasing or decreasing coverages, removal of coverages, or the addition of vehicles
- Inform insureds as to coverages indicated in the policy record
- Receive requests for coverage for transmittal to the agent or a licensed sales producer

Unauthorized Activities:

- Prospect or solicit for insurance

- Quote premiums
- Discuss or provide advice concerning coverages, limits or deductibles
- Interview customers for the purpose of developing information as part of the completion of an application
- Bind new policies or make changes to existing policies that require the binding of additional coverages, increasing or decreasing coverages, removal of coverages, or the addition of vehicles
- Accept payments on new policies
- Accept payments on existing policies outside the office
- Receive compensation based on sales
- Be involved in any activity or transaction that is not in compliance with company policies and procedures or that is in violation of state licensing or other laws

The New York Insurance Law does not use the term "customer service representative." Clearly, in using that term the inquirer was referring to unlicensed in-office employees or officers of an insurance agent or broker. Further, new subsection (k) of Section 2101 includes a new definition, "insurance producer", defined as "an insurance agent, insurance broker, reinsurance intermediary, excess lines broker, or any other person required to be licensed under the laws of [New York] to sell, solicit or negotiate insurance...." Subsection (k) also contains exemptions from licensing. To the extent that the exemptions in subsection (k) differ from those in amended subsections (a) and (c), the specific exemptions that are contained in amended subsections (a) and (c), for agents and brokers respectively, govern.

Various subsections of NYIL §2101 carve out activities that may be performed without obtaining a producer's/agent's license. For example, an officer, director or employee of a licensed insurer or a licensed insurance producer, is not required to be licensed provided such individual does not receive any commission on policies written or sold to insure risks located in New York. In addition, officers, directors or employees, whose activities are executive, administrative, managerial, clerical or a combination of any of these, and are only indirectly related to the "sale," "solicitation" or "negotiation" of insurance, are not required to be licensed. Also excluded from licensing requirements are officers, directors, or employees whose function relates to underwriting, loss control, or inspection, or the processing, adjusting, investigation or settling of a policy claim. In addition, persons who secure and furnish information for the purpose of group life insurance, group property/casualty insurance, and group annuities, group or blanket accident health insurance or for purposes of enrolling individuals under plans issuing certificates under such plans or otherwise assisting in administering such plans, or individuals who perform administrative services related to mass marketed property/casualty insurance, are also excluded from licensing requirements, provided no commission is paid to such individuals for such services.

Of interest, a person whose activities in New York are limited to advertising without the intent to solicit insurance in New York through communication in printed publications or other forms of electronic mass media, and whose distribution is not limited to residents of this state, need not be licensed provided that the person does not sell, solicit or negotiate insurance covering risks residing, located or to be performed in New York.

Finally the New York legislature enacted the NAIC Model Act's exemption from licensing with respect to multi-state risks for a person who, not being a resident of New York, sells, solicits or negotiates a contract for commercial property/casualty risks to an insured with risks located in more than one state insured under that contract, provided that such person is otherwise licensed as an insurance producer to sell, solicit or negotiate that insurance in the state where the insured maintains its principal place of business, and the contract of insurance covers risks located in that state. See NYIL §2101(c)(8).

In defining the authority of a licensed agent to solicit, negotiate, or sell contracts of insurance, it is also helpful to look at the dictionary definition of these terms: (1) To "solicit" is to seek or try by persuasion; to ask, request, plead or invite. This term implies an attempt to urge a particular individual to do some particular things; for example, to purchase an insurance contract. (2) To "negotiate" is to bring about mutual agreement, to transact business, to communicate with another to arrive at the settlement of some matter; to discuss or arrange a sale. The term implies the discussion and settling of terms and conditions of a business transaction, for example, the terms, conditions, benefit amounts and rates of an insurance contract. (3) To "sell " is defined, alternatively, as "to promote sale of", "to influence or induce to purchase" or "to dispose of or manage for profit".

With regard to brokers, N.Y. Ins. Law § 2101 (c) defines "brokers" as any person, firm, association or corporation who or which for any compensation, commission or other thing of value acts or aids in any manner in soliciting, negotiating or selling, any insurance or annuity contract or in placing risks or taking out insurance, on behalf of an insured other than himself....

Interestingly, if a person does not receive compensation, commission or other thing of value, that person is not required to be licensed as a broker under Section 2101 (c). By contrast, the definition of "agent" is a function of acts such as solicitation, negotiation and sales of insurance. Regardless of whether compensation is received by a person, if he is acting as an agent for an insurer, New York law requires him to be licensed as an agent.

Under Section 2101(c), the most notable exceptions to the definition of an "insurance broker" are:

- Any salaried full-time employee who counsels or advises his or her employer relative to the insurance interests of the employer or of the subsidiaries or business affiliates of the employer provided that the employee does not sell or solicit insurance or receive a commission;
- An officer, director or employee of a licensed insurance producer, provided that the officer, director or employee does not receive any commission on policies written or sold to insure risks residing, located or to be performed in [New York] and;
- The officer, director or employee's activities are executive, administrative, managerial, clerical or a combination of these, and are only indirectly related to the sale, solicitation or negotiation of insurance; or
- The officer, director or employee's function relates to underwriting, loss control, inspection or the processing, adjusting, investigating or settling of a claim on a contract of insurance; or
- The officer, director or employee is acting in the capacity of a special agent or agency supervisor assisting licensed insurance producers where the person's activities are limited to providing technical advice and assistance to licensed insurance producers and do not include the sale, solicitation or negotiation of insurance...
- A person whose activities in [New York] are limited to advertising without the intent to solicit insurance in [New York] through communications in printed publications or other forms of electronic mass media whose distribution is not limited to residents of [New York], provided that the person does not sell, solicit or negotiate insurance that would insure risks residing, located or to be located or to be performed in (New York).

In its opinion, OGC noted that agents and brokers may delegate certain activities to their officers or employees, provided that the insurer or other principal does not prohibit or restrict the delegation and the insurance law does not otherwise prohibit the activity. Subject to the above, in-office delegation is within the discretion of the licensee, who must exercise reasonable judgment based upon considerations such as:

- the nature and complexity of the task being delegated;

- the education, training, experience and other personal qualifications of the officer or employee who will be performing the task; and
- the type and extent of supervision and internal controls that will be in place.

With respect to the list of unauthorized activities that was drawn up by the inquirer, OGC noted in its opinion that certain of those activities, such as soliciting insurance, may be engaged in by an unlicensed employee of an agent (but not of a broker) inside the office, pursuant to Section 2101(a)(1). Section 2101(a)(1) prohibits such employee of an agent from receiving a commission or other compensation for services which commission or compensation is directly dependent upon the amount of business done. In addition, other activities such as quoting premiums and accepting payments on policies may be merely administrative or ministerial in nature. As a result, an unlicensed employee of an agent or broker under certain conditions may also engage in such activities provided that, among other things, such employee is not compensated based on sales and there is no discussion of insurance coverage.

With regard to the list of authorized activities that was submitted by the inquirer, such activities as specifically outlined would be acceptable, provided that, among other things, the employee is not compensated based upon sales and there is no discussion of coverage. OGC also noted in its opinion that unlicensed employees and officers that engage in any delegated activity do so only on behalf, and in the name, of the licensee, via the authority so delegated by the licensee. Thus, the licensee and any sublicensee must properly supervise the non-licensee and will be held strictly accountable by the Department for the activities of such non-licensees.

By contrast with licensed persons, unlicensed persons have not established that they have both the required knowledge of insurance and the authority to solicit, negotiate and sell insurance contracts. Thus, as OGC points out, it is incumbent upon the licensee and sublicensee to ensure that the unlicensed person is adequately trained, trustworthy and aware of the limits on his or her ability to act on behalf of the licensee.

Although New York was one of the last remaining states to adopt a version of the NAIC Model Act, it was one of the first to recognize, in this era of lightning fast communication and of business typically transacted via the internet, that in order to foster a competitive environment for New York's insurance business, and to enable New York insurance companies to do business in multiple states to compete more effectively on a national and international basis.

Thus, of interest to producers of business, the New York Insurance Law was also recently amended by Chapter 418 of the Laws of 2000 to redefine "referral" in such a manner as to permit referrals by non-licensees to New York State licensed insurance agents or brokers as long as they do not include a discussion of specific policy terms and conditions and where the compensation paid for referrals is not based upon the purchase of insurance by such person. Specifically, Sections 2114, 2115 and 2116, applying, respectively, to life and health and accident agents and brokers, property/casualty agents, and property/casualty insurance brokers, now permit licensed insurance producers to pay referral fees to unlicensed individuals and entities (e.g., banks, travel agents, etc.) as long as those referrals do not include a discussion of specific insurance policy terms and conditions and where the compensation for the referrals is not based upon the purchase of insurance by such unlicensed persons.

If advertisements or web sites contain, or if an advertisement is framed by, recommendations, endorsements or promotions from a non-licensee concerning the advertised products or services, this would constitute a referral.

Referrals may not direct New York residents to the products or services of unlicensed agents or brokers. Such a referral to an unlicensed agent or broker would constitute solicitation as outlined in prior Department opinions. In addition, compensation may not be paid for such referrals. One way to avoid such a violation would be the inclusion of a clear and conspicuous disclaimer on the referring web site indicating that the insurance products or services being offered are unavailable to New York residents. A disclaimer stating "not available in all states" would be sufficient.

However, it should be noted that the New York Insurance Law does not prohibit licensees from purchasing lists of customer names and related information from non-licensees for the purposes of soliciting insureds. The compensation payable to non-licensees for such lists may be contingent upon the successful placement by the licensee of the insurance and may be a percentage of the insurance commission the licensee earned from placing the business. New York Insurance Department Circular Letter 2001-5.