

Utah Ethics Opinions

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UTAH STATE BAR

Ethics Advisory Opinion Committee

Opinion No. 01-02

Issued February 21, 2001

¶ 1 **Issue:** Does a lawyer violate the Utah Rules of Professional Conduct if he agrees to discount his fees to a client until a referral fee initially charged to the client by a lawyer-referral service is reimbursed to the client?

¶ 2 **Opinion:** A lawyer who agrees to discount his fees to a referred client in order to permit the client to be reimbursed for the referral fee that the client originally paid to the referral service makes an indirect payment to the referral service and, therefore, violates the prohibition against payment of referral fees on a fee-per-case basis under Utah Rules of Professional Conduct 7.2(c).

¶ 3 **Facts:** A Utah lawyer referral service charges a referral fee to participating lawyers. It also charges a referral fee to its customers who are referred to lawyers. In order to make its business more appealing to the general public and businesses, the referral service also asks each participating lawyer to discount by 10% the lawyer's usual fees to a referred client until the client is credited with an amount equal to the referral fee that the client paid to the referral service. Because not all participating lawyers agree to discount their legal fees, the referral service cannot guarantee to its customers that their referral fees will be reimbursed to them through the proposed payment arrangement.

¶ 4 **Analysis:** Under Utah Rules of Professional Conduct 7.2(c) (2000), "[a] lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the usual charges of a lawyer referral service or other legal service organization, but only as allowed by the provisions of Rule 1.5(e)." The relevant comment to Rule 7.2(c) further explains that the rule restricts the lawyer's ability to pay referral fees by specifying that the "lawyer is allowed to pay for advertising permitted by this Rule, but otherwise is not permitted to pay another person for channeling professional work on a fee-per-case basis."

¶ 5 Thus, a Utah lawyer may pay a fee to an organization

that provides referrals so long as that fee is not calculated on a per-referral basis. In addition, if the referral organization consists entirely of lawyers, the payment of the referral fee must comply with the limitations imposed by Rule 1.5(e) on the division of fees between lawyers who are not in the same firm. (fn1) Based on the facts submitted to the Committee, we assume that the referral service comprises nonlawyers, rather than lawyers and, therefore, do not address the issue as to lawyer-generated referrals.

¶ 6 Under the proposed arrangement, the payment of a referral fee to the referral service is made initially by the client and later may be reimbursed by the participating lawyer by the lawyer's discount in an amount equal to the referral fee initially paid by the client to the referral service. That arrangement is by nature a payment made on a fee-per-case basis because it cannot occur until the client hires the lawyer upon the referral provided by the referral service. The fact that the participating lawyer does not pay the referral fee directly to the referral service does not avoid the violation of the prohibition against the payment of referral fees on a fee-per-case basis.

¶ 7 On the other hand, this indirect payment seems to serve as a pretext for avoidance of the prescriptions of Rule 7.2(c). By agreeing to rebate the client's referral fee out of the client's bill, the lawyer agrees to pay a referral fee on a fee-per-case basis to the referral service through the acts of a third person, the client. The payment arrangement, therefore, is structured in such a way as to accomplish indirectly what is expressly prohibited by Rule 7.2(c), and it triggers the provisions of Utah Rules of Professional Conduct 8.4(a): "It is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct . . . or do so through the acts of another."

¶ 8 The purpose of the payment arrangement implemented by the referral service is, by the admission of the referral service, "[t]o make the referral business more appealing to the general public and businesses." The discount offered by the participating lawyer to the client is intended as, and constitutes, a benefit to the referral service. In the different but related context of determining whether a lawyer gave "something of value" to a third party in exchange for a referral, thus violating the provisions Rule 7.2(c) or its equivalent, several state bar associations have concluded that a lawyer who discounts her fees to clients referred by a third party clearly gives something of value to that third party because she creates an incentive for clients to use the third party's services. The Connecticut Bar, for instance, has determined that the discount offered by a lawyer to participants in a fund raising for a charitable organization was "something of value" because it provided an incentive

to the public to participate in the contest, and it did not constitute a referral fee only because the charitable organization did not recommend the lawyer's services. (fn2) Likewise, the New York State Bar has concluded that a payment arrangement under which a client obtains a discount from the lawyer recommended to the client by an accounting firm and under which the same client contemporaneously enters into a separate contingency fee agreement with the referring accounting firm for a fee in an amount approximately equal to the lawyer's discount is unethical because "it involves compensation by the lawyer to the accounting firm in connection with the referral of the client." (fn3) The California State Bar reached a similar conclusion when it found that a lawyer offering a discount on legal fees for clients to be referred by a third party gave something of value to that third party because it promoted the third party's practice and, therefore, violated the prohibition against compensating someone for recommending the lawyer's services. (fn4)

¶ 9 Thus, the fee reduction that is offered by a participating lawyer to a client referred by the referral service and advertised by the referral service to promote its business constitutes an indirect form of payment from the lawyer to the referral service. Although a participating lawyer is not required to discount fees to the client, when he agrees to do so, he also agree to pay indirectly a referral fee to the referral service that is calculated on a per-referral basis. Through the provisions of Rule 8.4(a), the payment of that fee violates Rule 7.2(c).

Footnotes

1. This interpretation of Rule 7.2(c), as amended in 1999, is based on two assumptions: first, that the Rule 1.5(e) limitation that was inserted into Rule 7.2(c) in 1999 is intended to apply only if the referral source is a lawyer and is not intended to prohibit lawyers from paying referral fees to non-lawyers; second, that the newly adopted language explaining the prohibition against fee-per-case referral fees contained in the related comment to Rule 7.2(c) is intended to prohibit the payment of a fee-per-case referral fee to a lawyer referral service, but is not intended to prohibit the payment of referral fees authorized by Rule 1.5(e). The Utah Supreme Court Advisory Committee on the Rules of Professional Conduct recently adopted, and will soon publish for comment, some proposed changes to Rule 7.2(c) that the Committee has recommended in order to clarify the application of the Rule consistent with the two assumptions described above.

2. Conn. Ethics Op. 94-7, 1994 WL 780747 (Conn. Bar Ass'n.). *See also* Mich. Ethics Op. RI-147, 1992 WL 510838 (Mich. Bar Ass'n) (lawyer allowed to discount fees to clients referred by Chamber of Commerce as long as Chamber of Commerce did not advertise discount as

incentive for membership in Chamber of Commerce).

3. N.Y. Comm. on Prof. Ethics Op. 727, 2000 WL 567964 (N.Y. St. Bar Ass'n).

4. Cal. Ethics Op. 1983-75, 1983 WL 31676 (Cal. St. Bar Ass'n). *See also* Iowa Sup. Ct. Bd. of Professional Ethics and Conduct, Op. 96-06 www.iowabar.org/ethics (1996) (lawyer's participation in group of entities operating a referral service that requires lawyers to pay a referral fee and to discount their fees to referred clients violates provisions of Rule 7.2(c)); Pa. Ethics Op. 93-107, 1993 WL 851217 (Pa. Bar Ass'n) (lawyer violates Rule 7.2(c) when lawyer reduces fees for person who referred clients to lawyer).

Rule Cited:

7.2 (c)