

14-03

**Opinion No. 14-03**

**Utah Ethics Opinion**

**Utah State Bar Ethics Advisory Opinion Committee**

**April 22, 2014**

ISSUE

1. Do the Utah Rules of Professional Conduct prohibit referral agreements between two attorneys that require one of the attorneys (the "Referring Attorney") to refer to the other (the "Receiving Attorney") all clients that have a certain specified type of products liability claim?

OPINION

2. The Committee concludes that an agreement between two attorneys which requires the Referring Attorney to refer to the Receiving Attorney all clients that have a certain specified type of claim may likely violate various provisions of the Utah Rules of Professional Conduct (the "Rules").

FACTS

3. The Referring Attorney, licensed to practice in the State of Utah, and the Receiving Attorney, licensed to practice elsewhere, enter into an agreement governed by Utah law (the "Agreement") to jointly pursue certain kinds of products liability claims (the "Claims") of individuals located in the State of Utah. The Agreement provides in relevant part:

1. Referring Attorney will generate the cases by placing advertising and/or arranging for medical testing and diagnosis of prospective clients and would be entitled to reimbursement from the Receiving Attorney for the costs of doing so.

2. In return for the Receiving Attorney's agreement to pay those expenses, the Referring Attorney would be required to exclusively refer to the Receiving Attorney all clients having such Claims who contact the Referring Attorney. The Referring Attorney would not be allowed to represent such clients himself or to refer such clients to any other attorney.

3. The Referring Attorney will place advertising, accept incoming calls from potential clients, obtain medical

records from potential clients, arrange for medical testing, and perform certain other related tasks, before turning the clients over to Receiving Attorney for further action.

4. The Receiving Attorney will decide in his sole discretion the venue, jurisdiction, timing, counts, and content of complaints or petitions, joinder of plaintiffs and/or defendants, and any other strategic issues relating to the Claims.

5. The Referring Attorney will ask clients to sign new fee agreements directly with the Receiving Attorney, identifying the Receiving Attorney as the clients' attorney, will inform the clients of the division of fees between the two attorneys, and will inform the clients of any other matters deemed by either attorney to be required by the Rules of Professional Conduct.

6. The Referring Attorney will not be required to perform any services except those specified in the Agreement or required by the Utah Rules or by any other ethical rules governing the Claims or any resulting cases.

7. The Receiving Attorney will pay the Referring Attorney specified portions of the fees recovered by the Receiving Attorney for the clients on their Claims.

ANALYSIS

4. The fee sharing agreement between the two attorneys is governed by Rule 1.5, which provides that there may be a division of fees between lawyers in different firms, but on the following condition:

(e)(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

(e)(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and

(e)(3) the total fee is reasonable.

The Committee does not have enough information to fully evaluate the fee sharing arrangement between the attorneys under the Agreement. For example, it is unclear if the Referring Attorney retains any [responsibility for the matter after the referral or if the Referring Attorneys share of the fee is based upon services provided. If the Referring Attorney is not compensated based upon the proportion of services performed by him or he has not retained joint responsibility for the specific matter, which it appears he has not, then the arrangement violates Rule 1.5. *See also*

Va. State Bar Legal Ethics Op. 1739 (April 13, 2000).

5. The Agreement does not appear to comply with the provisions of Rule 7.2 - Advertising. In Utah Ethics Advisory Opinion No. 07-01, the Committee opined that an agreement which contemplates the exclusive referral of clients to one lawyer or firm, is not permitted, as it violates Rule 7.2(b). The Rule provides:

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services; except that a lawyer may:

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a lawyer referral service;

(3) pay for a law practice in accordance with Rule 1.17; or

(4) divide a fee with another lawyer as permitted by Rule 1.5(e).

From the proposed arrangement, it appears that the Receiving Attorney intends to pay to the Referring Attorney more than is permitted by Rule 1.5(e), as discussed above. Therefore, there is a violation of Rule 7.2.[1]

6. The exclusivity provision raises conflict concerns as well. Rule 1.7 - Conflict of Interest: Current Clients, prohibits a lawyer from representing a client if "[t]here is a significant risk that the representation of one or more clients will be materially limited ... by a personal interest of the lawyer." The exclusivity provision of the Agreement could result in a material limitation on the Referring Attorney's judgment in making the referral. Again, it is possible that a client that falls within the exclusivity provision of the Agreement would be better served by an attorney other than the Receiving Attorney. However, because of the Agreement, the Referring Attorney cannot refer the client to the attorney who may be better suited to assist. *See also* Conn. Bar Assoc. Comm. Prof. Ethics, Informal Opinion 97-34 (1997); Ken. Bar Assoc. KBA-390; John S. Dzienkowski and Robert J. Peroni, *Conflicts of Interest in Lawyer Referral Arrangements with Nonlawyer Professionals*, 21 Geo. J. Legal Ethics 197 (Spring 2008). The obligation of competence under Rule 1.1 can require an evaluation of the specific client's needs and interests before a referral. [2] Additionally, although not directly applicable, Rule 5.4(c) provides, "[a] lawyer shall not permit a person who ... pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment...." The Referring Attorney should not permit the Receiving Attorney to interfere with the judgment of the Referring Attorney, which may include referrals.

7. The exclusivity provision of the Agreement can lead to the violation of other provisions of the Utah Rules. Rule 2.1 - Advisor, requires that a lawyer "shall exercise independent professional judgment and render candid advice" in representing a client, which includes referring a client to another attorney. Because of the exclusivity provision of the Agreement, the Referring Attorney may not be exercising independent judgment and give sound advice in every situation. For example, a potential plaintiff may have a unique circumstance that renders referral to the Receiving Attorney not in the client's best interest. *See* Colo. Bar. Assoc. Ethics Comm., Letter Op. 96/97-13 (regarding referrals to nonlawyers).

8. With the proposed arrangement, there is a potential violation of Rule 7.1 - Communications Concerning a Lawyer's Services. The Rule provides, "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services." The Committee does not have information on the nature or substance of the proposed advertising, but it could be deemed misleading if the Referring Attorney suggests in the advertising that s/he will represent the client in all respects, since the Agreement specifically limits the services the Referring Attorney can perform to basic preliminary matters. *See also* Conn. Bar Assoc. Comm. Prof. Ethics, Informal Opinion 97-34 (1997); Ala. Bar. Assoc. RO-93-23. Likewise, Rule 1.4 - Communications, imposes an obligation on the attorney to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation," which could include disclosure of the limited services that the attorney may provide under the Agreement and that the client will be referred to another attorney.

9. It appears that the Receiving Attorney will decide in his/her sole discretion various strategic matters. It is unclear if the Receiving Attorney intends to consult with the client regarding this matter or even consult with the Referring Attorney. It is noted that Rule 1.2(a) and Rule 1.4(a)(2) require attorneys to consult with clients regarding the means by which the objectives of the representation will be achieved or fulfilled.

10. It is also noted that before the Referring Attorney discusses a matter subject to referral under the Agreement, the requirements of Rule 1.6 - Confidentiality of Information, must also be satisfied. Rule 1.6 states:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph.

(b) Before the matter is disclosed to the Receiving

Attorney, the Referring Attorney will probably need informed consent from the client.

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Notes:

[1] It is noted that the Model Rules of Professional Conduct ("Model Rule"), Rule 7.2 (b), prohibit exclusive referral provisions in reciprocal referral agreements. Model Rule 7.2(b) states:

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;

(3) pay for a law practice in accordance with Rule 1.17; and

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if

(i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement.

Utah's version of Rule 7.2 (b) does not contain an anti-exclusivity provision such as the Model Rule, but, unlike the Model Rule, Utah's version of Rule 7.2(b) provides for a division of fees if in compliance with Rule 1.5(e), referenced above.

[2] Emily S. Lassiter, Liability for Referral of Attorneys, 24 J. Legal Prof. 465 (1999/2000) ("Throughout the past few years, attorneys have been held liable under the doctrine of 'negligent referral.'")

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