

Utah Ethics Opinions

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Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 96-08

Approved November 1, 1996

Issue: May an attorney represent a person who seeks to obtain payment under the terms of a client-solicitation agreement entered into with another attorney, where the agreement involved the payment of a "finder's fee" to the person?

Opinion: Although a "finder's fee" agreement between an attorney and a client may be a violation of Rule 5.4(a) of the Utah Rules of Professional Conduct, the Rule governs the ethical conduct of attorneys. Thus, the solicitation agreement did not violate any duty of the non-lawyer parties under the Utah Rules of Professional Conduct. Therefore, absent a violation of Rule 3.1 concerning non-meritorious actions, the plaintiff's new attorney may seek recovery under the solicitation agreement on behalf of his non-lawyer client.

Analysis: In this request for an ethics opinion, the following facts were alleged: A non-lawyer client ("Client") engaged a Utah attorney ("Attorney A") to consider a potential case against an employer. Attorney A felt the potential claim had merit, but, given the particular facts of the case, concluded it would be economical only if at least 100 plaintiffs with similar claims were involved. He offered the client a "finders fee of \$500 per head" (the "Solicitation Agreement") if the client could get a least 100 other people to sign up with the attorney as individual plaintiffs. Client agreed and found such other plaintiffs, who engaged Attorney A, and they successfully pursued their claims in court. Attorney A collected contingent fees from the plaintiffs.

Client then made demand on Attorney A to pay under the Solicitation Agreement. Attorney A refused, saying that such an agreement was never entered into, and, even if it was, such an agreement is not permitted under the Utah Rules of Professional Conduct. Attorney B, who has been engaged by Client to pursue a claim against Attorney A to recover under the Solicitation Agreement, seeks guidance as to whether instituting such a suit would itself violate Rules

8.4. (fn1)

First, for purposes of this opinion, we will assume, without deciding, that the Solicitation Agreement was entered into by Attorney A and that it violated Rule 5.4(a), which limits the ability of a lawyer to share legal fees with a non-lawyer. (fn2) However, the Rules of Professional Conduct only apply to lawyers. Therefore, while Attorney A may have acted unethically and violated the Rules by entering into the Solicitation Agreement, such unethical conduct does not impose any restrictions on Client nor does it automatically render the Solicitation Agreement void or a nullity as a matter of contract law. (fn3)

Second, even if the conduct of Attorney A in entering into the Solicitation Agreement was improper, the impropriety occurred at the time of the formation of the agreement. Nothing in the institution of an action later to enforce such an agreement on behalf of Client would amount to Attorney B's "knowingly assisting or inducing" Attorney A to violate the Rules under Rule 8.4(a).

It is for the courts to decide whether the Solicitation Agreement was void *ab initio* as violative of public policy. (fn4) Attorney B should, however, be aware of Rule 3.1, which reads, in part: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law." If there were a clear expression by the Utah Legislature or courts that lawyers' finders'-fee agreements were void as against public policy and unenforceable, Attorney B could be ethically restrained from pursuing a contract-based theory of recovery for Client under Rule 3.1. The Committee is not aware of any such expression, however.

However, even if there were such a Legislative or judicial expression that voided the Solicitation Agreement, Attorney B would not be ethically foreclosed from pursuing other legal action and theories on behalf of Client.

Conclusion: If there is no violation of Rule 3.1, Attorney B may undertake to represent Client who seeks monetary recovery under a "finder's fee" agreement with Attorney A.

Footnotes

1. Rule 8.4 provides as follows:

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do

so through the acts of another; . . . (d) Engage in conduct that is prejudicial to the administration of justice.

2. Rule 5.4(a) provides as follows:

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) An agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer; and

(3) A lawyer or law firm may include nonlawyer employees in compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

3. We do not address the extent to which any solicitation was inconsistent with Rule 7.3 of the Utah Rules of Professional Conduct.

4. *See, e.g., Peterson v. Anderson*, 745 P.2d 166 (Ariz. App. 1987) (fee-splitting arrangement between attorney licensed to practice in the state and attorney not licensed to practice in state, nor admitted pro hac vice was contrary to public policy and unenforceable); *but see Atkins v. Tinning*, 865 S.W.2d 533 (Tex. App. 1993) (although fee-splitting agreement might subject attorney to professional discipline, agreement itself was not invalid solely because it violated his professional duties.)

Rules Cited:

5.43.1