

14-02

Opinion No. 14-02

Utah Ethics Opinion

Utah State Bar Ethics Advisory Opinion Committee

February 3, 2014

Issued January 14, 2014

ISSUE

1. Is an Agreement between a non-lawyer Marketer and a Law Firm where the Marketer conducts telephone marketing to solicit and refer clients to Law Firm in violation of the Rules of Professional Conduct where the payment to the Marketer matches a percentage of the fees paid to the Law Firm by the clients referred to the Law Firm by the Marketer?

2. If the Agreement is in violation of the Rules of Professional Conduct must the Attorney retained by Marketer to enforce the Agreement inform the appropriate professional authority pursuant to Rule 8.3(a)?

OPINION

3. The Agreement, which requires payment to the non-lawyer Marketer to be based on a percentage of the fees paid to the Law Firm by the clients referred to the Law Firm by the Marketer, violates Rule 7.2(b) and Rule 5.4 of the Rules of Professional Conduct.

4. The question of whether it should be apparent to the Attorney retained by Marketer to enforce the Agreement, that the Agreement violates Rule 7.2(b) and/or Rule 5.4 of the Rules of Professional Conduct, in a manner that triggers a duty to inform the appropriate professional authority under Rule 8.3(a), is a fact specific inquiry undertaken by the lawyer presented with a Rule 8.3(a) question. The Committee expresses no opinion as to whether these specific facts do in fact trigger any obligation of the Attorney under Rule 8.3(a).

FACTS

5. A Marketer has an agreement with a Law Firm to conduct telephone marketing to solicit and refer clients to the Law Firm. Marketer is paid by Law Firm, but Marketer receives payment which matches a percentage of the fees paid to the Law Firm by the clients who retain the Law

Firm and were referred to the Law Firm by the Marketer. If the Law Firm is not paid in full by the clients referred by the Marketer, Law Firm's payment to Marketer is reduced. An agency of another State requires the Law Firm to refund a substantial portion of fees paid to the Law Firm by residents of that State. Law Firms payments to the Marketer were reduced correspondingly.

6. Marketer then retains an Attorney to enforce payments - without reductions - under the agreement between the Law Firm and the Marketer.

ANALYSIS

7. Rule 7.2(b) states that: "A lawyer shall not give anything of value to a person for recommending the lawyer's services[.]" The comments to Rule 7.2 indicate that: "Lawyers are not permitted to pay others for channeling professional work." [Comment 5]. Here, the arrangement between a Law Firm and Marketer violates the plain language of Rule 7.2 (b) and it is not readily apparent from the facts of this matter that any exception to the plain language of Rule 7.2(b) is applicable.

8. The comments to Rule 7.2 recognize the limited exceptions to this prohibition and mimic the language of Rule 7.2(b)(2) in indicating that: "A lawyer may pay the usual charges of a legal service plan or a lawyer referral service. ... A lawyer referral service ... is an organization that holds itself out to the public to provide referrals to lawyers with appropriate experience in the subject matter of the representation." [Comment 6]. "At a minimum, Rule 7.2(b) requires that the lawyer referral service be available to the public and that it provide referrals to multiple lawyers and law firms, not to a single lawyer or a single law firm." [Opinion 07-01]. Here, there is no indication that the Marketer is in fact a "lawyer referral service." [1]

9. Further, the facts of this matter, as presented by the attorney requesting this opinion, indicate that if the Law Firm is not paid in full by the client referred by the Marketer, then the Law Firm's payment to the Marketer is reduced. Thus, there is no set percentage for payment to the Marketer, and the payment to the Marketer is therefore possibly calculated on a per-referral basis. This Committee has expressly held that: "[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." [Opinion 01-02]. Such an arrangement violates Rule 7.2(b).[2] Likely recognizing this issue, the requesting attorney also asks the Committee the following: "May Law Firm adjust payments to Marketer to reflect refunds to or shortfalls in payments by clients of Law Firm referred by Marketer?" [Request]. The Committee believes the answer to this question is no,

because doing so amounts to payment on a "per-referral basis." Regardless, because there are no facts indicating the Marketer in this instance is a "lawyer referral service," the payment structure is irrelevant to whether the Agreement at issue violates Rule 7.2(b), which as indicated above it does.

10. Rule 5.4 is also violated by this arrangement. Rule 5.4 indicates that: "A lawyer or law firm shall not share legal fees with a nonlawyer[.]" None of the exceptions to Rule 5.4 would apply to an Agreement to share fees between a Law Firm and a Marketer. The Rules of Professional Conduct contemplate that any law firm employing a "lawyer referral service" will pay only the "usual charges" associated therewith. *See* Rule 7.2(b)(2). An arrangement where if the Law Firm is not paid in full by the client referred by the Marketer, the Law Firm's payment to the Marketer is reduced does not appear to be a "usual charge."

11. The attorney requesting this opinion asked if the Agreement is in violation of the Rules of Professional Conduct must the Attorney retained by Marketer to enforce the Agreement inform the appropriate professional authority pursuant to Rule 8.3(a)? Rule 8.3(a) states: "A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate professional authority." Rule 8.3(a). "'Knowingly,' 'know' or 'knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." Rule 1.0(g).

12. Here, whether the Attorney retained by Marketer to enforce the Agreement would have actual knowledge that the violations of Rule 7.2(b) and 5.4 raises a substantial question as to members of the Law Firm's honesty, trustworthiness or fitness as a lawyer in other respects such that Attorney should likely inform the appropriate professional authority under Rule 8.3(a) is a fact specific inquiry that a lawyer presented with a question under Rule 8.3(a) must undertake. Because such an inquiry is so fact dependent the Committee chooses not to answer whether the Attorney had an obligation to inform the appropriate professional authority pursuant to Rule 8.3(a).

Notes:

[1] *See Richards v. SSM Health Care, Inc.*, 724 N.E.2d 975, 980 (III. App. 2000) (quoting Letter of Dennis Murphy, Chair, ABA Standing Committee on Lawyer Referral and Information Service, June 10, 1998, the standing committee on lawyer referral and information service has firmly held to the view that "percentage fee funding is a widely accepted method of supporting lawyer

referral programs.")

[2] At the time Opinion 01-02 was drafted, Rule 7.2(b) was found at Rule 7.2(c). Accordingly, references to Rule 7.2(c) found in Opinion 01-02 would apply to current Rule 7.2(b).
