

17-05

Opinion No. 17-05

Utah Ethics Opinion

Utah State Bar Ethics Advisory Opinion Committee

September 27, 2017

ISSUE

What are the ethical implications of a referral service with the following features:

1. Potential clients contract with the service to receive specific legal services at fixed rates.
2. The potential client then selects a lawyer from a list of lawyers who have contracted with the service. The lawyer can then review the case and decide whether to accept it.
3. If the lawyer accepts the case, the service, which has been given access to the lawyer's operating and trust accounts, deposits the client's fixed fee into the lawyer's trust account and withdraws an agreed-upon referral fee, which varies based on the type of service the potential client has requested, from the lawyer's operating account.

OPINION

The service described above violates Rule 5.4's prohibition on splitting fees with a non-lawyer. It also violates Rule 7.2's restrictions on payment for recommending a lawyer's services and it may violate a number of other Rules related to client confidentiality, lawyer independence, and safekeeping of client property, depending on facts not presented.

ANALYSIS

Rule 5.4

Rule 5.4(a) provides that "[a] lawyer or law firm shall not share legal fees with a nonlawyer" subject to enumerated exceptions that do not apply here. In the scenario presented to the Committee, the client pays a flat fee for legal services which is split between the lawyer and the non-lawyer referral service. None of the exceptions to the prohibition on sharing fees with a non-lawyer apply. Therefore, the fee splitting arrangement violates Rule 5.4 on its face.[1]

Rule 7.2

Rule 7.2(f) similarly provides that "[a] lawyer shall not

give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising permitted by these Rules and may pay the usual charges of a lawyer referral service or other legal service plan." It does not appear that the portion of the fee paid to the referral service in the situation described above is the "reasonable cost of advertising." Comment 5 to Rule 7.2 describes the type of advertising fees that are permissible, "including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements and group advertising." All of these examples are flat rates tied to specific advertising services. They do not vary based on the type of service the lawyer advertises or eventually provides. Contrarily, the referral fee described in the request is not a flat rate based on the reasonable cost of posting the lawyer's name and information on the service's web site, printing an advertisement, creating a television commercial, or a similar service. Rather, it is a portion of the fee that the lawyer receives, it varies based on the type of service provided, and it is not reasonably tied to the actual cost of advertising. There is no reasonable basis for the referral fee to change simply because the service eventually provided varies. Presumably the cost to advertise the creation of a will is no different than the cost to advertise the handling of an uncontested divorce or any other type of lawyer service. That the referral fee varies based on the type of service provided also prevents any analysis of whether it is reasonable as compared to the normal cost of advertising because the fee changes based on factors unrelated to the actual cost of advertising. Accordingly, the fee described is not the "reasonable cost of advertising."

Rule 1.15

Rule 1.15 governs a lawyer's retention of client property, including client funds. Comment 1 states that a "lawyer should hold property of others with the care required of a professional fiduciary." The situation described in the request raises serious concerns about a lawyer's ability to comply with Rule 1.15 where a third-party referral service has direct access to client funds in the lawyer's trust account. The request is not clear about whether the service can *withdraw* funds from the trust account. If so, that would be a plain violation of the lawyer's duty to safekeep client property. However, there are concerns even if the service can only deposit funds. Depositing funds likely requires the service to have the trust account number and other information. The lawyer presumably does not exercise control over how the service stores or protects that information. A data breach or similar event at the service, therefore, may expose client funds to serious risk. It is

difficult to see how a lawyer can protect client funds "with the care required of a professional fiduciary" when trust fund account information is provided to a third party over which the lawyer has no control.

Other Rules Implicated

The request also implicates a number of other Rules which may apply depending on additional details not provided. The examples listed in this section are not exhaustive, and other Rules may be at issue depending on additional information that has not been provided. Notably, many other jurisdictions have considered similar referral arrangements and found them to violate some or all of the Rules discussed in this opinion. *See* South Carolina Ethics Advisory Opinion 16-06; Pa. Bar Ass'n Comm. On Legal Ethics & Prof'l Responsibility, Formal Op. 2016-200; Ohio Supreme Court Ethics Op. 2016-3; New York State Bar Association Committee on Professional Ethics Op. 1132; New Jersey ACPE Joint Opinion 732, CAA Joint Opinion 44, UPL Joint Opinion 54.

Rule 5.4(c) provides that "A lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." It does not appear from the request that the referral service exercises any direct influence over the lawyer's independent judgment. However, the situation presented may result in indirect influence over the lawyer's judgment. Because the referral service, not the lawyer, sets the flat rate paid by the client before the lawyer has reviewed the case, the lawyer's independence may be impeded if the case turns out to be more complicated or require more work than initially believed, or if the amount of the fee interferes with the lawyer's professional judgment as to how much time to spend on the matter.

The third-party's setting of the fee in advance may also impact the lawyer's ability to comply with Rule 1.16(d), which requires a lawyer to "refund[] any advance payment of fee or expense that has not been earned or incurred" at the conclusion of the representation. This may be difficult where the referral service has taken a portion of the fee.

Rule 1.2(c) raises concerns. That Rule permits a lawyer to "limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." This may be difficult or impossible to accomplish when the initial task of describing the representation and setting the fee is delegated to a third-party referral service.

Rule 1.6(a) is also relevant. "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)." In the situation described in the request, the third-party referral service knows, at least, of the fact of representation, the general nature of the representation, and the fee arrangement. Depending on the nature of the service, additional information may be disclosed, such as if the client requests a refund and the service demands information about the case to evaluate the refund request.

The arrangement may also run afoul of Rule 7.1, which prohibits false or misleading statements about a lawyer's services. Where the third-party service controls the advertising and initial contact with the client, it may be difficult for the lawyer to ensure compliance with this Rule.

Finally, the arrangement also implicates Rules 1.7 and 1.8 because the lawyer appears to review at least some details about the client's case before being retained. This may prevent the lawyer from performing a thorough conflict check before receiving substantive client information.

CONCLUSION

The referral service described in the request violates Rule 5.4 as impermissible fee sharing, violates Rule 7.2 as paying for a recommendation of services beyond the reasonable costs of advertising, Rule 1.15 regarding safekeeping of property, and implicates the additional Rules described above, which it may violate depending on information not provided in the request.

Notes:

[1] It is irrelevant that the referral service takes its portion of the fee from the lawyer in a separate transaction after depositing the full fee into the lawyer's trust account. The facts are clear that the referral fee is a portion of the total fee charged to the client that varies based on the type of service rendered. The service cannot convert this into a separate "marketing fee" simply by splitting payment into two transactions.
