

Utah Ethics Opinions

1993.

121. USB EAOE Opinion No. 121

Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 121

Approved August 26, 1993

Issue: May a lawyer pay another lawyer a fee for referring a case?

Opinion: A lawyer may not pay referral fees to another lawyer, unless the referral arrangement meets the standards of Rule 1.5(e) for dividing fees and is otherwise consistent with the Utah Rules of Professional Conduct.

Analysis: The Utah Rules of Professional Conduct permit lawyers to divide fees, subject to the following three conditions: (1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation; (2) the client is advised of and does not object to the participation of all the lawyers involved; and (3) the total fee is reasonable.¹

The first condition expressly contemplates two different kinds of arrangements among lawyers dividing fees. Under one kind of arrangement, the lawyers divide the tasks to be performed for the client and allocate the fee in proportion to the task division. Under the other kind of arrangement, the fee need not be proportional to the lawyers' actual work for the client. Instead, each lawyer must, in writing, assume joint responsibility for the representation, regardless of the work either performs. In either case, the client must be told about the arrangement, must not object, and must be charged a total fee that is reasonable.

Lawyers contemplating a joint-responsibility arrangement must realize that each lawyer's responsibility is significant. The lawyer receiving a referral fee under a joint-responsibility arrangement cannot simply "hand off" the client to the receiving lawyer. The comment to Utah's Rule 1.5(e) specifies that each lawyer must assume responsibility "for the representation as a whole." The comment further specifies that this joint responsibility entails the obligations of Rule 5.1 for the matter in question. Rule 5.1 spells out the responsibilities of a partner or a supervisory lawyer for another lawyer. Partners must make reasonable efforts to ensure that there are measures in effect

that give reasonable assurance that lawyers in the firm conform to the Rules of Professional Conduct.

Thus, a referring and receiving lawyer must work out arrangements that give reasonable assurance that neither will violate the Rules of Professional Conduct in the matter in question. Partners are responsible for each others' violations of the Rules if they order the violations, knowingly ratify them, or knowingly fail to take reasonable, potentially effective remedial action.² Under these circumstances, therefore, both referring and receiving lawyers would be responsible for each others' ethical violations. Rule 5.1(c) governs ethical responsibility and potential disciplinary liability for each others' conduct only; the comment to 5.1 specifies that potential civil or criminal liability are matters of law beyond the scope of the Rules.

Fee splitting with a joint-responsibility arrangement was not permitted under former Utah ethical rules. The Utah Code of Professional Responsibility³ permitted lawyers to divide fees only if the division was in proportion to the services performed and the responsibility assumed by each lawyer. The code comparison following Rule 1.5 in the Utah Rules of Professional Conduct indicates that joint-responsibility arrangements are a new feature of the Utah Rules.

Thus, under the Utah Rules of Professional Conduct, lawyers may pay referral fees that are not proportional to the services rendered by each lawyer. They must, however, assume joint responsibility for the representation that conforms to Rule 1.5, Rule 5.1, and the other Rules of Professional Conduct. In addition, the client must be informed of and not object to the referral arrangement, and the overall fee must be reasonable.

Footnotes

1. Utah Rules of Professional Conduct 1.5(e).
2. Rules of Professional Conduct 5.1(e).
3. This was superseded on January 1, 1988, by the Rules of Professional Conduct.

Rule Cited:

1. 5(e)