

13-02

Opinion No. 13-02

Utah Ethics Opinion

Utah State Bar Ethics Advisory Opinion Committee

April 9, 2013

Issue

1. The requesting attorney seeks an opinion on several related matters, which the Committee has combined into three general areas of inquiry: (i) may an attorney pay a non-lawyer, directly or indirectly, for a referral; (ii) may an attorney enter into a joint marketing and/or cross-referral arrangement with a non-attorney; and (iii) may an attorney acquire an ownership or equity interest in, or making a loan to, a business, with the expectation of receiving referrals from the business.

Opinion

2. Subject to the exceptions outlined below, the opinions of the Committee regarding the stated issues are:

(i) The relevant Rules of Professional Conduct (the "Rules") expressly prohibit an attorney from giving anything of value to a person for a legal referral, and includes giving anything of value indirectly. Any compensation for a referral violates the Rules. Any agreement for reciprocal referrals violates the Utah Rules.

(ii) The relevant Rules do not expressly prohibit an attorney from engaging in joint advertising with a non-lawyer. However, due to the multitude of possible arrangements between the participants in any such joint advertising, the Committee does not and cannot give a general [opinion endorsing the use of joint advertising or referrals between an attorney and a non-lawyer because of the high probability of violating other Rules, including the prohibition of giving anything of value to a non-lawyer for a referral

(iii) The relevant Rules do not specifically prohibit an attorney from acquiring an ownership or equity interest in, or make a loan to, a business that is not a client with the expectation of receiving referrals from the business. The Rules specifically prohibit an attorney from entering into a business transaction with a client or knowingly acquiring an ownership, possessory, security or other pecuniary interest adverse to a client, without complying with specific

conditions. In any event, because of the multitude of possible arrangements between the participants in any such business arrangements, the Committee does not and cannot give a general opinion endorsing an attorney acquiring an ownership or equity interest in, or making a loan to, a business, with the expectation of receiving referrals from the business.

Background

3. The requesting lawyer explains that each question represents a practice that he believes is followed by lawyers in his practice area. Those questions, as combined by the Committee, which are stated in more detail hereafter, set forth the extent of the background relied upon by the Committee to provide the opinions and views expressed herein.

Analysis

4. *Issue No. 1:* The relevant Rules expressly prohibit an attorney from giving anything of value to a person for a legal referral, and includes giving anything of value indirectly. 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 reinforce this, stating that, subject to the exceptions discussed below, "[l]awyers are not permitted to pay others for channeling professional work." Utah R. Prof I Conduct 7.2, comment 5.

5. This committee has not previously defined the scope of the "thing of value" element. Other jurisdictions, however, have generally interpreted it broadly. A Connecticut judicial decision held that "it is improper for an attorney to pay non-lawyer employees a \$50 bonus for referring cases to the firm." *Rubenstein v. Statewide Grievance Comm.*, 2003 WL 21499265 (Conn. Super. Ct. 2003). Similarly, a Pennsylvania ethics opinion concluded that a lawyer may not give "gift certificates" in exchange for referrals, because gift certificates are a thing of value. Pa. Eth. Op. 2005-81.

6. Moreover, this Rule is not just limited to cash or a cash-equivalent. As noted, the Rule prohibits the exchange of "anything of value" for a legal referral. Utah R. Prof I Conduct 7.2(b). "Indirect or nonmonetary compensation for referrals is considered 'something of value'" and is generally covered by this rule. ABA/BNA Lawyer's Manual on Prof'l Conduct § 81: 706 (2005). In a recent decision, a South Carolina ethics opinion accordingly concluded that a "quid pro quo exchange" of legal services for legal referrals would violate this rule, because a lawyer's time and skill are a "thing of value." S.C. Adv. Op. 06-13.

7. As noted, however, Rule 7.2 contains four exceptions

under which such an exchange may be permitted. Only two of these exceptions are applicable to the questions presented in this request: Rule 7.2(b)(1), which allows a lawyer to "pay the reasonable costs of advertisements or communications permitted by this rule"; and Rule 7.2(b)(2), which allows a lawyer to "pay the usual charges of a legal service plan or a lawyer referral service."

8. The scope of Rule 7.2(b)(1) exception for the payment of advertising or communications costs is addressed by the comment, which notes that a lawyer may pay for such things as "the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising." Utah R. Prof I Conduct 7.2, comment 5.

9. The scope of Rule 7.2(b)(2)'s exception for the "usual charges of a legal service plan or a lawyer referral service" is also addressed by the comment. The comment defines a "legal service plan" as "a prepaid or group legal service plan or a similar delivery system that assists prospective clients to secure legal representation, " and a "lawyer referral service" as "an organization that holds itself out to the public to provide referrals to lawyers with appropriate experience in the subject matter of the representation." Utah R. Prof I Conduct 7.2, committee 6. This Committee also addressed the "lawyer referral service" exception in Opinion 07-01, concluding that, "[a]t a minimum, " a "lawyer referral service be available to the public and . . . provide referrals to multiple lawyers and law firms, not to a single lawyer or a single law firm."

10. The requesting attorney specifically asks whether an attorney may: (1) hire a "marketer" and then pay the marketer a "fee or commission each time the marketer brings in a new client"; (2) hire a "marketer" who will "contact insurance agents, tow truck drivers, body shop owners, or employees and health care providers and request referrals to the attorney, if the marketer is paid a fixed salary rather than on a commission basis"; (3) "hire a marketer and pay the marketer with gift cards" each time the marketer brings in a case; or (4) pay a third party with either money or a gift card "for referring a new personal injury client."

11. As noted above, the answer to this question is plain: money or gift cards are "things of value" and, unless covered by an exception, cannot be given in exchange for a legal referral.

12. The next question is whether an exception applies. None of these scenarios implicate rule 7.2(b)(1)'s exception for reasonable advertising costs. The question, then, is whether these scenarios implicate rule 7.2(b) (2)'s exception for the "usual charges of a legal service plan or a

lawyer referral service." In our view, none of these scenarios qualifies as a legal service plan, because none involve "a prepaid or group legal service plan or a similar delivery system that assists prospective clients to secure legal representation." Utah R. Prof I Conduct 7.2, comment 6.

13. The question of whether these scenarios implicate a "lawyer referral service, " however, depends on specific facts that are not provided by the request. Again, to satisfy this exception, the so-called "marketer" must be part of a "service" that "holds itself out to the public to provide referrals to lawyers, " and this service must also "provide referrals to multiple lawyers and law firms, not to a single lawyer or a single law firm." Utah R. Prof I Conduct 7.2, comment 6; Opinion 07-01.

14. Here, it is not clear from the request whether the "marketer" is actually holding himself out to the public as a referral service for multiple lawyers or law firms. If he is, the lawyer may pay him "the usual charges" associated with that service. But if the "marketer" is instead privately employed by the lawyer, does not generally make his services available to the public, or funnels work exclusively to this lawyer or law firm, the marketer would not qualify as a "lawyer referral service." In such circumstances, exchanging anything of value with the marketer for a legal referral would violate the rule. Although Utah has not adopted all of the Comments provided in the Model Rules, MR Comment 5 is instructive:

"Moreover a lawyer may pay others for generating client leads, such as internet-based client leads, as long as the lead generator does not recommend the lawyer any payment....is consistent with Rule 1.5 and 5.4...and the lead generator's communications are consistent with Rule 7.1.... To comply with 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed the person's problems when determining which lawyer should receive the referral."

15. The request next asks whether an attorney may "hire a marketer/ paralegal, " "refuse to pay the marketer/paralegal for bringing in a new case, " but then "pay the marketer/paralegal for gathering the police report, medical records, translation services, etc?"

16. A lawyer may, of course, pay a non-lawyer employee for their clerical or case preparation work. See generally Utah R. Prof I Conduct 5.4. But if the lawyer's payments to the non-lawyer employee are explicitly or even implicitly conditioned on that employee providing legal referrals, those payments must comply with rule 7.2. Thus, a lawyer's paralegal could not be compensated for providing referrals,

because such paralegal would not qualify as a "lawyer referral service" that is "holding] itself out to the public" and funneling referrals to "multiple lawyers and law firms." See Utah R. Prof I Conduct 7.2, cmt. 6; Opinion 07-01. But nothing prohibits a lawyer from accepting a referral from an employee, so long as the lawyer does not give the employee anything of value for the referral.

17. The request also asks whether an attorney may agree to "pay marketing expenses for a third party referrer for a promise to refer an unspecified number of clients to the attorney, " agree to "pay marketing expenses for a third party referrer if the third party referrer does not promise to refer clients to the attorney but actually refers clients to the attorney, " or, "rather than paying for marketing expenses for the third party referrer, " agree to "purchase[] multiple ad placements in newspapers, television, radio or some other medium and give[] some of the ad placements to the third party referrer?"

18. As noted, rule 7.2(b)(1) allows the attorney to pay "the reasonable costs of advertisements or communications." Thus, a lawyer "may compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers." Utah R. Prof I Conduct 7.2, comment 5. But, as discussed above, this does not permit the lawyer to otherwise "pay others for channeling professional work." Utah R. Prof I Conduct, comment 5. A lawyer may therefore pay the third party's reasonable marketing expenses, but the lawyer could not compensate the third party any further based on any referrals that come from that advertising.

19. Utah's Rule 7.2 is slightly different from Model Rule 7.2 in that MR 7.2 1(b)(4) provides an additional exception for non-exclusive reciprocal referral agreements. In the Committee's view this difference does not render Utah's standard more permissive; if anything the absence of the exception makes Utah's standard stricter. MR 7.2(b)(4) provides this additional exception to not giving anything of value to a person for recommending the lawyer's services:

"Except a lawyer may....refer clients to another...professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients 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." MR 7.2(b)(4).

Hence, in jurisdictions governed by this MR a lawyer and chiropractor or Insurance agency may have a referral agreement provided that the agreement is not exclusive and any clients thus referred are informed of the agreement.

Under Utah's rule there is no safe harbor for nonexclusive, announced reciprocal referral agreements. Hence any non-disclosed referral agreements are things of value that violate Utah Rule 7.2

20. *Issue No. 2:* The request seeks an opinion on the propriety of joint marketing efforts and cross-referrals between an attorney and non-attorney, such as a chiropractor or insurance agent. Rules 7.1 through 7.3 do not expressly prohibit an attorney from engaging in joint advertising with a non-lawyer using shared or common advertising media, and then dividing the associated expenses. However, because even slight modifications in the format or substance of the advertising, the arrangement between the participants, the method of sharing the costs, possible inferences that can be drawn from the advertising, among other things, the Committee is unable to provide a general opinion regarding compliance with the Rules concerning the use of joint advertising by an attorney and non-lawyer. Accordingly, the Committee does not and cannot give an opinion endorsing the use of joint advertising between an attorney and a non-lawyer because of the high probability of violating Rules 7.1 through 7.3, including other Rules that do not directly relate to advertising.[1]

21. If an attorney were to attempt to engage in joint advertising with a non-lawyer, the attorney, among other things, must insure that any such advertising clearly discloses that the lawyer and non-lawyer are separate and distinct, and not engaged in a common business enterprise. The advertising must affirmatively disclose that there is no expressed or inferred endorsement of the participants. Additionally, the expense for the advertising must be shared or divided on some type of equitable basis directly related to the cost of the advertisement, and not in any manner based upon fees or income generated from the advertising, or an arrangement where the lawyer pays for all of the advertising with the expectation of future referrals by the non-attorney. There are other aspects of Rules 7.1 through 7.3, and 5.4, that may also apply to the joint advertising, depending on the media of the advertising, the information conveyed, the relationship of the parties, and the sharing of costs, among other things.

22. Regarding the obligations of the attorney to assure compliance by the non-lawyer with the Rules in a joint advertising arrangement, Comment 7 to Rule 7.2 is instructive. The Comment states that an attorney participating in a lawyer referral program or legal services plan must act reasonably to assure that the activities of the operators of the plan or service are compatible with the attorney's professional obligations. This same obligation can apply to the joint advertising by a lawyer and a non-lawyer. Rule 5.3 and Rule 8.4 prohibit a lawyer from directing others to do what the lawyer cannot ethically do

herself. Accordingly, if an attorney engages in joint advertising or cross-referrals with a non-lawyer, the attorney may not encourage, permit, allow, assist, participate or ratify, implicitly or otherwise, a violation of the Rules by the non-lawyer related to the advertising, and should take reasonable effort to assure that the non-lawyer's activities are compatible with the attorney's professional obligations.

23. Joint advertising can be misleading in several respects, and thereby violate Rule 7.1. For example, the proposed form of the advertising could imply that the attorney and non-lawyer have formed some type of partnership or other prohibited enterprise. *See e.g.* Rule 5.4(d) (regarding the practice of law in an enterprise with a non-lawyer); *see also* New Mexico Ethics Advisory Opinion Committee, Advisory Opinion 1993-1 (concluding that it would be misleading under Rule 7.1 for a network of professionals to advertise their members' services jointly, and that there is a substantial likelihood that the public would believe that there was joint business arrangement between the participants). Similarly, the advertising could imply an improper endorsement between the parties. *See* Committee on Professional Ethics of the Association of the Bar of the City of New York, Opinion 1987-1 (Feb. 23, 1987) (among other things, concluding that it was improper for a lawyer to let the lawyer's professional name enhance a non-lawyer's practice or to give any appearance that they were in business together). There is also a risk that the advertising could imply that the attorney is engaged in a field of practice that is false, depending upon the profession of the advertisers. *See also* Rule 7.4 (Communication of Field of Practice). Of course, any advertising must substantively comply with Rules 7.1, as well as Rule 7.2, regarding content.

24. Additionally, there is a potential for violation of Rule 7.2, which prohibits the giving value by a lawyer to a person who recommends the lawyer's services. Although there may not be a direct payment for such a recommendation in a joint advertisement relationship, the sharing of the associated costs under some circumstances could be construed as such. [2] Likewise, depending on the arrangement, there could be an improper sharing of fees prohibited by Rule 5.4 ("A lawyer or law firm shall not share legal fees with a nonlawyer....").

25. Although not addressed in your inquiry, there is also concern regarding the exclusivity of referrals between the participants in the joint advertising. In Utah Ethics Advisory Op. 07-01 this issue was addressed. The Opinion states that an arrangement that "contemplates the exclusive funneling of referrals to one lawyer or firm, is not permitted, as it violates Rule 7.2(b), which prohibits a lawyer from giving anything of value to a person for recommending the lawyer's services." If the joint

advertising arrangement also contemplates an exclusive referral system, there could be a violation of Rule 7.2(b). *See also* New York Committee on Professional Ethics, Op. No. 765, dated Jul 22, 2003, regarding discussion of reciprocal referral agreements.

26. The request also seeks an opinion on the propriety of paying a third party, such as towing company, for its list of customers and then send a letter to those customers presumably soliciting business. Obtaining the customer list from the third party by itself is not a violation of a Rule. *See e.g.* III. S. Bar Ass'n Opinion 97-01. However, the use of the customer list and contact with potential clients is governed by Rules 7.1 through 7.4. Since the request does not provide a specific description of the proposed contact between the lawyer and the prospective client, the Committee cannot opine as to the whether the proposed contact complies with the applicable Rules.

27. The foregoing is not intended to be an exhaustive list of the Rules that may effect or apply to joint advertising between an attorney and a non-lawyer. Those Rules were only discussed to demonstrate the point that an arrangement for joint advertising can lead to the violation of many Rules. Therefore, the Committee is reluctant to opine on the propriety of such an arrangement under the Rules.[3]

28. *Issue No. 3:* The request seeks an opinion on whether an attorney may acquire an ownership or equity interest in, or make a loan to, a business, such as an insurance agency or tow truck company, with the expectation of receiving referrals from the business. An expectation of referrals from a business owned by the attorney is not in violation of an expressed provision of any Rule. However, various Rules are implicated by the proposal, as discussed hereafter. Of course, nothing of value may be given directly or otherwise for any referrals, including an undisclosed mutual referral agreement, as discussed above. *See also* Rule 5.4(a) and 7.2(b); *see also* Utah Ethics Advisory Op. 07-01; New York Committee on Professional Ethics, Op. No. 765, dated Jul 22, 2003, regarding joint business enterprises and reciprocal referrals.

29. This issue was addressed in part in Utah Ethics Advisory Op. No. 98-08, dated September 11, 1998. The question posed in Opinion No. 98-08 was: "May a law firm wholly own an accounting-practice subsidiary that is staffed by employees other than the firm's lawyers and would perform services for the lawyer's clients and others?" The response: "Yes, although the law firm will be subject to the Utah Rules of Professional Conduct with respect to the provision of these law-related services in certain circumstances." The response was based upon the prior Rule 5.7 "Responsibilities Regarding Law-Related Services." Since that Opinion, Rule 5.7 has been amended

to provide:

Rule 5.7. Responsibilities Regarding Law-Related Services.

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph

(b), if the law-related services are provided:

(a)(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(a)(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to ensure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

30. Although we do not have specifics regarding the potential relationship between the attorney and the other business, it is possible that a client could believe that certain businesses, such as an insurance agency, just as accounting services, could be provided "in conjunction with and in substance related to" the legal services. *See also* Utah Ethics Advisory Op. No. 151 (The Rules apply to a lawyer acting as an appraiser, unless the lawyer makes clear to the client, in writing, that she is not providing legal services and that an attorney-client relationship is not established.). Accordingly, Rule 5.7 may apply in the subject circumstances and the attorney would be required to make clear the distinction in the services provided and/or otherwise keep the business ventures distinct.

31. There is clearly a possibility of a conflict under Rule 1.7, Conflict of Interest: Current Client, which provides:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict exists if:

(1) The representation of one client will be directly adverse to another client; or

(2) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

The interest that the attorney has in the other business could create a material limitation on the attorney's responsibilities to a client who is dealing with the other business, and, therefore, could create a conflict under Rule 1.7.

32. There is also the potential that having an ownership interest in a business with a client may lead to a violation of Rule 1.8(a). Rule 1.8(a) provides:

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(a)(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(a)(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(a)(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

Various ethical opinions have concluded that Rule 1.8(a), as well as Rule 1.7, are implicated when an attorney refers a client to an attorney-controlled business. *See e.g.* Ariz. Committee on the Rules of Professional Conduct, Op. 05-01 ("A lawyer may not refer a current client to such a program, however, unless the lawyer meets the 'heavy burden' of showing compliance with ER 1.7 and 1.8(a.)"); Arkansas Professional Ethics and Grievance Committee, Advisory Op. 98-01 ("the possibility of referral of legal clients to another business of the lawyer introduces an extraneous and potentially conflicting motive, which can threaten or interfere with the lawyer's independence of judgment."). The New Jersey Advisory Committee on Professional Ethics, Opinion 688, dated March 13, 2000, stated regarding referrals of clients to an attorney owned business:

Without barring the possibility of such a referral entirely, we conclude that a lawyer may only refer a legal client to a business the lawyer owns, operates, controls, or will profit from, if the lawyer has (1) disclosed to the client in writing, acknowledged by the client, the precise interest of the lawyer in the business, and that the same services may be obtained from other providers, and (2) advised the client, orally and in writing, of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent counsel of the client's choice as to whether utilization of the business in question is in the client's

interest.

Rule 1.8(a) would also apply to the relationship between the attorney and the agency or other business, depending on the arrangement and ownership interest.

33. It is also possible that the supervisory responsibilities of an attorney provided in Rules 5.1 and 5.3 may apply. Those Rules provide in essence that the lawyer is responsible for the ethical conduct or misconduct of non-lawyers, as well as lawyers, whom the lawyer directs or controls in the context of offering legal services. Clearly, an attorney is held to the same ethical standards of a lawyer when performing non-legal services. See Utah Ethics Advisory Op. 5 (attorney selling life insurance is held to the ethical standards of an attorney in both professions); Utah Ethics Advisory Op. 17 (lawyer engaged in a real estate business is held to the ethical standards of a lawyer in both occupations); Utah Ethics Advisory Op. 30 (attorney who is president of a title company must comply with the ethical rules of a lawyer in both occupations); Utah Ethics Advisory Op. 108 (attorney who is a licensed CPA may so indicate on letterhead but must be alert to protect the attorney-client privilege). If the legal services and insurance services (or other business services) are not distinguished, the attorney would also have the obligations contained in Rule 5.1 and 5.3 regarding the employees of the agency.

34. Finally, as discussed above, Utah Ethics Advisory Op. 07-01 addressed the impropriety of an exclusive referral arrangement between the attorney and the business, which could result in a violation of Rule 7.2 1(b).

35. The foregoing does not purport to discuss all of the Rules that could have an effect on an attorney who has an ownership interest in a business, and anticipates referrals. Other Rules could become applicable based upon the circumstances.

Notes:

[1] The Connecticut Professional Ethics Committee, Informal Opinion 97-12, dated June 4, 1997, reached the conclusion that joint advertising by a family law attorney and a family counselor was permissible. The Connecticut Committee was considering a proposed newspaper (advertisement in a box format that depicted the name and logo of the lawyer's office in one corner and the name and logo of the counseling center in the other. A phone number to call for information or an appointment was printed between the logos. The advertisement was titled at the top in bold capital letters "Attorney Therapist Divorce Mediation." The text of the advertisement stated that the lawyer and counselor had formed an interdisciplinary team

approach to divorce mediation with the team consisting of a mental health professional and an attorney. The Connecticut Committee determined that the advertisement did not violate any ethical rules including those concerning false or misleading advertising, or imply that the lawyer and counselor are practicing in the form of partnership or any business form prohibited by the Rules of Professional Conduct. The Committee also concluded that the lawyer or non-lawyer is allowed to pay for all or part of the advertising expense under Rule 7.2(a). The Committee did caution that the lawyer cannot make payments to the non-lawyer for generating or referring business to the lawyer, either directly or indirectly, and that any payments made to the non-lawyer are clearly identified as for advertising only. See also Connecticut Professional Ethics Committee, Informal Opinion 95-25, dated July 6, 1995, regarding misrepresentations in joint advertising.

[2] In the Committee's view, the exception contained in Rule 7.2 permitting the payment by an attorney to a third party for reasonable costs for advertising may not apply to the payment for joint advertising, and, therefore, is not a safe harbor for joint advertising.

[3] For opinions regarding joint advertising between lawyers, see Michigan Committee on Professional Ethics, Op. RI-200, dated March 29, 1994 (The lawyers [who are not members of the same firm] may use joint advertising, as long as the advertising clearly delineates the relationship between the firms by disclosing that the independent lawyers do not operate as one firm."); Utah Ethics Advisory Op. 00-07, dated June 2, 2000 (same).
