



ISBA Professional Conduct Advisory Opinion

Opinion No. 15-04
September 2015

Subject: Division of Fees; Referral Fees and Arrangements

Digest: A lawyer may share court-awarded legal fees with a nonprofit organization that referred the matter to the lawyer. However, in the absence of court-awarded fees, the lawyer may not share fees with the organization, and may not pay a referral fee to the organization except as may be permitted under Rule 7.2(b)(2).

References: Illinois Rules of Professional Conduct, 5.4(a)(4) and 7.2(b)(2)

ABA Model Rule 5.4(a)(4)

ABA Formal Op. 93-374

FACTS

An employment law firm provides pro bono services to various nonprofit organizations, including domestic violence shelters; health clinics; community-based worker advocacy organizations; community education centers; housing organizations. On occasion, those organizations refer their constituents to the law firm for consultation on employment matters. In those instances, the firm represents the individual and not the organization. The legal advice the firm provides to the individual client is independent of any relationship the firm may have with the organization.

Several employment law statutes, such as the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ("FLSA"), the Illinois Minimum Wage Law, 820 ILCS 10511 *et seq.* ("IMWL"), the Illinois Wage Payment and Collection Act, 820 ILCS 115/1 *et seq.* ("IWPCA"), provide for attorney fee shifting in the event the plaintiff-employee prevails. In such cases, attorneys' fees are generally awarded following trial through a fee petition filed with and approved by a court or, in the event of a settlement, the settlement, includes payment of the plaintiffs' attorneys' fees and costs, is submitted to a court for approval of its fairness.

The law firm would like to provide a referring organization with a reasonable referral fee to support its work in the community if it is permissible under the Rules of Professional Conduct.

QUESTION

May a lawyer pay a referral fee to a non-profit organization that refers a client to the law firm? If so, may such referral fee be in the form of a percentage of the total attorneys' fees recovered by the firm in the case, assuming the recovered attorneys' fees have been awarded pursuant to a fee petition approved by a court or pursuant to a settlement approved by a court?

ANALYSIS

Although the inquirer does not expressly so state, we have assumed, based on the inquirer's description of the facts, that the relevant nonprofit organizations do not provide legal services and do not qualify as "not-for-profit lawyer referral services" under Rule 7.2 of the Illinois Rules of Professional Conduct ("RPC"). For the reasons discussed below, the lawyer may share *court-awarded* legal fees with the nonprofit organizations under RPC 5.4(a)(4), but, in the absence of court-awarded fees, the lawyer may not share other legal fees with the nonprofit organization and may not pay a referral fee to the organization.

In 2010, the Illinois Supreme Court added RPC 5.4(a)(4), which expressly permits a lawyer to share court-awarded legal fees with a nonprofit organization that has referred a matter to the lawyer:

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

* * *

(4) a lawyer may share *court-awarded legal fees* with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.
[Emphasis added.]

RPC 5.4(a)(4) is identical to ABA Model Rule 5.4(a)(4). The ABA Rule codified ABA Formal Opinion 93-374 (1993). That opinion concluded that, even though the ABA rules in effect at that time barred a lawyer from sharing fees with non-lawyers, it nonetheless was "not ethically improper for a lawyer who undertakes a pro bono litigation representation at the request of a nonprofit organization that sponsors such pro bono litigation to share, or agree in advance to share, with the organization court-awarded fees resulting from the representation." Op. 93-374 at 1.

RPC 5.4(a)(4) does not restrict the amount of the legal fees that a lawyer may share with the nonprofit organization. Accordingly, the lawyer may share any percentage of its court-awarded legal fees, including all such fees, with the referring nonprofit organization.

However, the rule is not without limitation. RPC 5.4(a)(4), like its ABA equivalent, limits fee sharing to *court-awarded* legal fees. The importance of that limitation is discussed in ABA Op. 93-374. As the ABA explained, court-awarded fees "means both that it does not come from the client, and thus present a risk of burdening the client with excessive fees; and that it results from the successful pursuit of some type of litigation that is recognized as serving a public purpose,

and that is intended to be encouraged by such fee awards.” *Id.* at 3. Further, because “a court has reviewed the fee and determined that it is reasonable, the interest in prohibiting unreasonable fees is satisfied without application of the prophylactic rule against payment for referrals.” *Id.* at 10. Because fee sharing under RPC 5.4(a)(4) is expressly limited to *court-awarded* fees, a lawyer may not share with the nonprofit organization any other fees that the lawyer receives, including any fees that client pays to the lawyer out of his or her own pocket.

In the absence of court-awarded fees, the lawyer also may not pay a “referral fee” to the nonprofit organization, even if the source of the fee is not derived from legal fees paid by the client. RPC 7.2(b)(2) governs the payment of referral fees, and provides as follows:

(b) A lawyer shall not give anything of value to a person for recommending the lawyer’s services except that a lawyer may

* * *

(2) pay the usual charges of a legal service plan or a *not-for-profit lawyer referral service*; [Emphasis added.]

Comment [6] to RPC 7.2 describes a lawyer referral service:

A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by laypersons to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit lawyer referral service.

Assuming none of the nonprofit organizations that are the subject of the inquiry qualifies as a not-for profit lawyer referral service under RPC 7.2(b)(2), the lawyer may not pay a referral fee to the nonprofit organization (except to the extent fee sharing is permitted under Rule 5.4(a)(4)).

CONCLUSION

A lawyer is permitted under RPC 5.4(a)(4) to share any percentage, including all, of any court-awarded legal fees with a nonprofit organization that referred the matter to the lawyer. However, in the absence of court-awarded fees, the lawyer may not share legal fees with the nonprofit organization and may not pay a referral fee unless the nonprofit organization also qualifies as a not-for-profit lawyer referral service under RPC 7.2(b).

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