

Opinion No. 1 of 2004

Editor's Note: The opinions of the Legal Ethics Committee of the Indiana State Bar Association are issued solely for the education of those requesting opinions and the general public. The Committee's opinions are based solely upon hypothetical facts related to the Committee. The opinions are advisory only. The opinions have no force of law.

An attorney, referred to as "Attorney A" for purposes of this opinion, has submitted an inquiry to the Committee regarding certain activities that the attorney proposes to enter into in the "financial services area."

Submitted facts

The Bank is a publicly traded for-profit company. The Bank has multiple branches in separate communities in Indiana. In each community the Bank employs one law firm to provide legal services. The Bank has requested that each law firm participate in a promotional program directed toward a particular group of customers (those of a certain age and older). The Bank's proposal provides these customers seeking legal services from the respective law firm listed by the Bank will receive a 10 percent discount on estate planning services. Each of the Bank's law firms will be the only law firm listed in its respective community in a promotional brochure for these customers explaining this benefit as part of the package of benefits for these customers. The Bank's proposal provides that each law firm will receive marketing through the Bank's brochure at no cost. To encourage the customer's use of the respective law firm's services, the law firms would provide a 10 percent discount off its standard fee for every member of this group that seeks estate planning services. The program provides the Bank the ability to offer its customers the opportunity to receive quality legal services at a reduced price, and such will be

one more reason that customers should choose the Bank over its competition.

Submitted questions

1. Does the Bank's promotional program constitute a lawyer referral service which would prohibit the respective law firms to participate in such program under Rule 7.3(e) of the Indiana Rules of Professional Conduct?
2. Do the respective law firms who participate in the Bank's promotional program violate Rule 7.3(f) of the Indiana Rules of Professional Conduct?
3. Does the respective law firm's participation in the Bank's promotional program violate any other Rules of Professional Conduct?

Analysis

A. Question 1: Rule 7.3(e)

Rule 7.3(e) provides, "A lawyer shall not accept referrals from any lawyer referral service unless such service falls within subparts 1-4 of this Rule 7.3(e). A lawyer or his partner or associates or any other lawyer affiliated with him or his firm may be recommended, employed or paid by, or may cooperate with, one of the following offices or organizations that promote the use of his services or those of his partner or associates or any other lawyer affiliated with him or his firm, if there is no interference with the exercise of independent professional judgment on behalf of his client:

"(1) A legal office or public defender office:

"(A) operated or sponsored on a not-for-profit basis by a law school accredited by the American Bar Association Section on Legal Education & Admissions to the Bar;

"(B) operated or sponsored on a not-for-profit basis by a bona fide

non-profit community organization;

"(C) operated or sponsored on a not-for-profit basis by a governmental agency; and

"(D) operated, sponsored, or approved in writing by the Indiana State Bar Association, the Indiana Trial Lawyers Association, the Indiana Defense Lawyers Association, any bona fide county or city bar association within the state of Indiana, or any other bar association whose lawyer referral service has been sanctioned for operation in Indiana by the Indiana Supreme Court Disciplinary Commission.

"(2) A military legal assistance office

"(3) A lawyer referral service operated, sponsored, or approved by any organization listed in Rule 7.3(e)(1)(D)

"(4) Any other non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, but only if the following conditions were met;

"(A) The primary purposes of such organization do not include the rendition of legal services;

"(B) The recommending, furnishing, or paying for legal services to its members is incidental and reasonably related to the primary purpose of such organization;

"(C) Such organization does not derive a financial benefit from the rendition of legal services by the lawyer; and

"(D) The member or beneficiary for whom the legal services are rendered, and not such organization, is recognized as the client of the lawyer in the matter."

Attorney A asks whether the Bank's program constitutes a lawyer referral service under 7.3(e).

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Although the term “lawyer referral service” is not explicitly defined in Indiana law, in Opinion No. 1996-3, the Committee previously distinguished a lawyer referral service from an advertising medium. The Opinion dealt with a newspaper’s voicemail system that would offer a short monologue on a legal topic and announce the sponsoring law

firm. At the end of the message, the listener could obtain a free consultation with the sponsoring law firm. Sponsoring firms were chosen by the newspaper based on annual volume of advertisements. In the Opinion, the Committee stated that the info-line was an advertising medium. The newspaper did not recommend the law firm; instead, major advertising law firms were made sponsors of the info-line as a result of payments to the newspaper, possibly leading to a free consultation. The Committee opined that the arrangement was acceptable under 7.3(f) because the law firm paid for the advertisement permissible under 7.1.

The Committee views the program presented in the Submitted Facts as a referral service as discussed in Opinion 1996-3. Under the Submitted Facts, the Bank’s proposal constitutes a lawyer referral service. Unlike the arrangement in Opinion No. 1996-3, the Bank here is recommending Attorney A to perform estate planning services for its customers, including Attorney A’s services, at a discount, as part of the Bank’s benefits package. The Bank is not presenting an impartial advertisement based on money received from the attorney. The Bank’s recommendation is based on its existing attorney/client relationship with Attorney A. If a Bank customer expresses a need for legal services, the Bank will present a brochure containing only the name of Attorney A, who represents the Bank. Additionally, Attorney A will provide more than a free consultation to the customer – he will provide legal services at a discounted rate to encourage customers to choose the Bank over its competitors. Opinion 1996-3 involves a situation without the relationships established here.

All lawyer referral services are subject to Rule 7.3(e), and the

Bank’s proposal is not permitted under the Rule. As a for-profit organization, the Bank is not an acceptable organization under Rule 7.3(e) to provide referrals and fits under none of the Rule’s exceptions.

B. Question 2: Rule 7.3(f)

Rule 7.3(f) states “A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client, except that he may pay for public communication permitted by Rule 7.1 and the usual and reasonable fees or dues charged by a lawyer referral service falling within the provisions of Rule 7.3(e).”

The Committee views the 10 percent discount off Attorney A’s standard fee for estate planning services as a thing “of value” as stated in Rule 7.3(f) and thus prohibited. The discounted services can be considered compensation to the Bank for the recommendation of Attorney A because, as stated in the Submitted Facts, the discounted legal services would make the Bank more attractive to prospective customers, leading to more revenue for the Bank.¹

C. Question 3: other Rules of Professional Conduct

The Submitted Facts raise concerns under other Rules, including whether the arrangement would reasonably affect the lawyer’s independent professional judgment and whether a conflict exists and can be resolved.

Concerns with conflict and independent judgment are raised in these Submitted Facts. Rule 5.4(c) states that a lawyer shall not permit a person who recommends him to another to direct or regulate the

lawyer's professional judgment in rendering services. Rule 1.7(b) provides:

"A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

"(1) the lawyer reasonably believes the representation will not be adversely affected; and

"(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved."

Here, the Committee believes that Attorney A's existing representation of the Bank would severely affect the lawyer's ability to exercise independent, professional judgment by creating a conflict of representing the Bank and its customers and a conflict between Attorney A's own financial interests and those of his Bank customer clients. In representing the customer, the lawyer would surely be influenced by pressure from the Bank to advise referred clients according to the Bank's interests; failure to do so could result in removal from the referral list and even loss of the Bank as a client for Attorney A. The interests of Attorney A and/or the Bank would adversely affect the lawyer's representation of the customers, thus prohibiting the relationship. Disclosure and consent in this situation seems unrealistic in light of the lawyer's business and financial interests. Regardless if the client learns of the conflict and consents to the representation, the lawyer's financial interest will prevent his independent representation of the client.²

Conclusion

For the reasons above, the Committee's opinion in response to the questions posed by the hypothetical violates Rule 7.3 (e) and (f). Additional Rules prohibiting the scenario are Rules 1.7(b) and 5.4 (c), because of the inherent conflict and influence on the independent, professional judgment of Attorney A providing services to the Bank's customers.

1. Other jurisdictions' handling of this issue may be helpful in understanding the hypothetical under consideration; *see* Board of Commissioners on Grievances and Discipline for the Supreme Court of Ohio, Opinion No. 2002-1 (found that it was improper for a law firm to enter a business agreement to pay an annual fee to a real estate agency in exchange for the agency's promotion of the law firm as a service provider in a real estate benefits program; the annual fee was "the giving of a thing of value to an organization to recommend or secure a lawyer's employment" and "... the firm's agreement to reduce attorney fees for certain legal services to customers of the real estate benefits program is the giving of a thing of value."); The Ohio Board in Opinion No. 88-012 (prohibited an attorney "from providing a free consultation to a surviving spouse or surviving children as part of a funeral package offered by a funeral director[,] finding that the free consultation was compensation to the funeral director for the recommendation of the lawyer because the free legal services added to the value of the funeral package); New Jersey Supreme Court Advisory Committee on Professional Ethics, Opinion No. 555 (found that a lawyer could not participate as a listed attorney at a 25 percent discount in an organization soliciting membership, for a fee, from the public through direct marketing programs; a lawyer gives something of value when he "offers his services at a discount to the members of an organization which uses such offer to solicit payments for membership in that organization.").
2. For an additional discussion of Rules 5.4(c) and 1.7(b) by the Committee, *see* Opinion No. 2001-1.