

STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE

OPINION NO. 00-11

December 6, 2000

Facts

The attorney requesting the opinion has received what appears to be a form letter from what purports to be an out of state law firm. The letter proposes a contractual relationship between the out of state firm and the attorney requesting the opinion for the referral of cases that come to the out of state firm via the internet. Under the proposed agreement the out of state firm is to receive thirty three and _ percent (33%) of any contingent, or twenty percent(20%) of any hourly, fees the North Dakota attorney would earn from any case referred. A proposed form for such contract is attached to the letter sent to the attorney requesting the opinion. The proposed agreement provides, among other things, that:

- a. the North Dakota "[a]ttorney shall obtain the client's prior written consent to this fee arrangement;
- b. the out of state firm and the North Dakota attorney "agree to comply with any and all applicable legal and ethical laws or rules: (i) relating to the payment of referral fees to a licensed entity, (ii) related to fee splitting among lawyers, and (iii) as may be necessary or desirable to ensure the enforceability of this agreement";
- c. the North Dakota "[a]ttorney maintains sole discretion in making all professional decisions concerning the

Referred Matter”;

- d. the North Dakota attorney shall “maintain the highest and best possible ethical and professional standards”;
- e. the North Dakota attorney is not, and shall not be deemed in any way to be the out of state firm’s agent; and the out of state firm will not be involved in negotiating any agreement between the North Dakota attorney and a client;
- f. the out of state firm shall not be deemed the North Dakota attorney’s agent, and the North Dakota attorney shall indemnify and hold harmless the out of state firm for any claims arising out of the referred matter;
- g. the proposed form “contains the entire agreement” between the out of state firm and the North Dakota attorney; and
- h. the proposed agreement “shall be interpreted, enforced and governed by the laws of the State of California”.

The attorney requesting the opinion asks for this committee to issue an advisory opinion addressing the following issues:

- 1. If they are a law firm, may I contract with the out of state firm to receive referrals under the terms it proposes?
- 2. Is the Committee’s conclusion in response to issue # 1 changed if no lawyer in the out of state firm is licensed to practice law in North Dakota?
- 3. If the out of state firm is not a law firm, may I contract with the out of state firm to receive referrals under the terms it proposes?
- 4. What additional ethical concerns are raised by the arrangement proposed by the out of state firm?

Discussion

1. If they are a law firm, may I contract with the out of state firm to receive referrals under the terms it proposes?

Rule 1.5(e) N.D.R. Prof. Conduct provides as follows:

“(e) A division of fee between lawyers who are not in the same firm may be made only if:

(1) The division of fee is in proportion to the services performed by each lawyer or each lawyer, by written agreement, assumes joint responsibility for the representation;

(2) After consultation, the client does not object to the participation of all the lawyers involved; and

(3) The total fee is reasonable.”

It is apparent that the proposed agreement would involve a division of fees such that Rule 1.5(e) N.D.R. Prof. Conduct is applicable.

The proposed agreement does not appear to require or even contemplate a division of fees in proportion to the services performed by each lawyer. Therefore, in order for the arrangement to be appropriate under subparagraph (1) “each lawyer, by written agreement, must assume joint responsibility for the representation.”

A thorough review of the proposed agreement does not reveal any language which requires or even contemplates that the out of state firm assumes joint responsibility for the representation, either active or otherwise. Furthermore, there does not appear

to be any language providing for joint financial responsibility on the part of the out of state firm. Rather, the apparent intent of the agreement as drafted is to ultimately insulate the out of state firm from any financial responsibility. For these reasons, it is the Committee's conclusion that the requirement set forth in Rule 1.5(e)(1) N.D.R. Prof. Conduct is not satisfied by the current language of the proposed agreement.

2. Is the Committee's conclusion in response to issue # 1 changed if no lawyer in the out of state firm is licensed to practice law in North Dakota?

Because the Committee has concluded that the requirement set forth in Rule 1.5(e)(1) N.D.R. Prof. Conduct is not satisfied by the current language of the proposed agreement, the Committee's conclusion in response to issue # 1 is not changed if no lawyer in the out of state firm is licensed to practice law in North Dakota.

3. If the out of state firm is not a law firm, may I contract with the out of state firm to receive referrals under the terms it proposes?

RULE 5.4 N.D.R. Prof. Conduct provides, in relevant part, that, unless certain exceptions apply:

"(a) A lawyer or law firm shall not share legal fees with a nonlawyer, ..."

None of the exceptions set forth in (a) are applicable.

SBAND Ethics Committee Opinion 96-13(October 31, 1996)

provides a fairly comprehensive discussion of what may or may not constitute the impermissible sharing of legal fees. The Committee finds the rationale for that opinion to be controlling as concerns this issue. The Committee in that instance concluded that the resolution of the issue of whether there was impermissible fee sharing essentially turned on the question of whether the payments constituted referral fees or were regular firm expenses. Among other things, Ethics Committee Opinion 96-13 provides that "[t]he prohibition of sharing fees with nonlawyers forbids the payment of referral fees to nonlawyers."

See, also, SBAND Ethics Committee Opinion 93-01(February 9, 1993).

Just as the Committee concluded in Ethics Committee Opinion 96-13, the Committee concludes here that the payments outlined in the facts do not represent mere firm expenses. Rather, if the out of state firm is not a law firm they would appear to be fee-sharing referral payments to nonlawyers and would, therefore, be impermissible.

4. What additional ethical concerns are raised by the arrangement proposed by the out of state firm?

In view of the aforementioned conclusions that it would be inappropriate under any of the proffered scenarios for the attorney requesting the opinion to enter into the arrangement as

currently proposed, the Committee declines to address additional ethical concerns. It is not the Committee's role to fashion any method by which certain actions can be modified so as to render them permissible.

CONCLUSION

For the reasons stated, the Committee concludes as follows:

1. If they are a law firm, you may not contract with the out-of-state firm to receive referrals under the terms proposed.
2. The Committee's conclusion in response to issue # 1 is not changed if no lawyer in the out-of-state firm is licensed to practice law in North Dakota.
3. If the out-of-state firm is not a law firm, you may not contract with the out-of-state firm to receive referrals under the terms proposed.

This opinion is provided pursuant to Rule 1.2(B) of the North Dakota Rules for Lawyer Discipline. This Rule states:

A lawyer who acts with good faith and reasonable reliance on a written opinion or advisory letter of the ethics committee of the association is not subject to sanction for violation of the North Dakota Rules of Professional Conduct as to the conduct that is the subject of the opinion or advisory letter.

This opinion was drafted by Dann Greenwood and was approved by the unanimous vote of the Committee on December 6, 2000.

Mark Hansen, Chair