STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE

Opinion No. 11-06

I. INTRODUCTION

The Ethics Committee received a request for guidance on whether the Requesting Attorney's law firm may enter into an agreement with an out-of-state law firm that manages a pre-paid legal services referral service. Specifically, the Requesting Attorney asked whether such an arrangement is permitted by Rule 7.2 of the North Dakota Rules of Professional Conduct. The Requesting Attorney also solicited any recommendations or identification of any potential pitfalls of such an arrangement. Based upon the facts provided by the Requesting Attorney, the Committee concludes that the proposed arrangement would violate Rules 1.5(e) and Rule 7.2(d) of the North Dakota Rules of Professional Conduct.

II. FACTS

Requesting Attorney's law firm is negotiating with an out-of-state law firm that manages a pre-paid legal services referral service. Under the terms of the agreement, the Requesting Attorney's law firm would be the exclusive referral for all of the managing firm's North Dakota clients. The Requesting Attorney's law firm would have the exclusive authority to accept or decline a potential client and would set its own fees and enter into its own arrangements with the clients. In exchange for the referral, the Requesting Attorney's law firm would pay the managing firm a percentage of the fees collected from the referred clients.

The Committee has no information explaining the out-of-state law firm's management role or on the particulars of the pre-paid legal services referral service, including the continued involvement of the out-of-state law firm, the respective services to be performed by the Requesting Attorney and the out-of-state law firm, or the degree of responsibility for the representation remaining with the out-of-state law firm as opposed to the Requesting Attorney. Additionally, the Committee has no information on what statements or representations the out-of-state managing firm may make in referring a potential client to the Requesting Attorney's firm. Finally, the Committee does not know whether the pre-paid legal services referral service is for-profit or not-for-profit.

III. DISCUSSION

Pre-paid legal services and referral services may implicate several of the Rules of Professional Conduct including those related to the lawyer's obligation to exercise independent professional judgment on behalf of the client, to maintain client confidences, to avoid conflicts of interest, and to practice competently. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 355 (1987) ("Lawyer's Participation in For-Profit Prepaid Legal Service Plan"). Moreover, a lawyer's involvement in a pre-paid legal service or referral service must not involve false or misleading communications and must not constitute improper advertising, solicitation, or fee sharing. Id. See also N.D. State Bar Assoc. Ethics Comm. Op. 06-01 at 8 (drawing attention to Rules 7.1 through 7.5 regarding information about legal services). Resolution of the many ethical issues raised by pre-paid legal services plans will be dependent upon the factual circumstances. It is the individual lawyer's responsibility to assure compliance with the North Dakota Rules of Professional Conduct. Here, the Committee focuses on division of fees and advertising given the factual background provided by the Requesting Attorney,

a. Rule 1.5

In Opinion No. 00-11, the Committee considered a similar issue. That Opinion addressed a series of questions regarding a contractual, referral relationship proposed to the requesting attorney by what purported to be an out-of-state law firm. Under the proposed agreement, the out-of-state law firm would have referred clients to the requesting attorney. In turn, the out-of-state law firm would have received thirty-three percent (33%) of any contingent, or twenty percent (20%) of any hourly fees the requesting attorney would earn from any case referred. The Opinion began by noting that it is apparent that such an arrangement would implicate N.D.R. Prof. Conduct 1.5 regarding division of fees between lawyers who are not in the same firm. Rule 1.5 provides, in pertinent part:

> (e) A division of fee between lawyers who are not in the same firm may be made only if:
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> (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;
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> (2) after consultation, the client consents in writing to the participation of all the lawyers involved; and
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> (3) the total fee is reasonable.

The Committee concluded that the language of the proposed agreement failed to satisfy N.D.R. Prof. Conduct 1.5(e)(1) as the agreement did "not appear to require or even contemplate a division of fees in proportion to the services performed by each lawyer." N.D. State Bar Assoc. Ethics Comm. Op. 00-11 at 3. Moreover, the agreement did not include a written agreement whereby each lawyer assumed joint responsibility for the representation. Id.

The facts provided by the Requesting Attorney indicate that Requesting Attorney's firm would pay the out-of-state managing firm a percentage of the fees collected from the referred clients. The information provided indicates the percentage of fees is paid solely in exchange for the referral (a point to which the Committee returns below). In other words, there is no indication that the fee division is based upon the proportion of the respective services performed by the Requesting Attorney and the out-of-state managing firm. Nor is there any indication that the Requesting Attorney and the out-of-state managing firm assume joint responsibility for the representation.

Absent the presence of one of the two basis for fee divisions provided, the arrangement between the Requesting Attorney and the out-of-state-managing firm does not satisfy Rule 1.5(e)(1).[1]

b. Rule 7.2

The Requesting Attorney specifically requested whether such an arrangement is permitted by Rule 7.2 of the North Dakota Rules of Professional Conduct. This rule addresses advertising and marketing of legal services and provides, in pertinent part:

> (d) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may
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> (1) pay the reasonable costs of advertisements or communications permitted by this Rule;
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> (2) pay the usual charges of a not-for-profit lawyer referral service or legal service organization; and
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> (3) pay for a law practice in accordance with Rule 1.17.

N.D.R. Prof. Conduct 7.2. Further guidance can be found in the comments to the rule:

> A lawyer is allowed to pay for advertising permitted by this Rule and for the purchase of a law practice in accordance with the provisions of Rule 1.17, but otherwise is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Likewise, a lawyer may participate in not-for-profit lawyer referral programs and pay the usual fees charged by such programs. Paragraph (c) does not prohibit paying regular compensation to an assistant, such as a secretary, to prepare communications permitted by this Rule.

[1] Any arrangement satisfying Rule 1.5(e)(1) must also satisfy the remainder of 1.5(e) regarding written consent by the client to the participation of all of the lawyers involved and the reasonableness of the total fee.

N.D.R. Prof. Conduct 7.2 cmt. 5. This Committee has previously concluded, in Opinion 06-01, that "[p]ayment of fees to a third party in order to receive referrals falls squarely within the prohibition of Rule 7.2(d)." N.D. State Bar Assoc. Ethics Comm. Op. 08-06 at 5. Therefore, such an arrangement will only be allowed if it falls under one of the exceptions to Rule 7.2(d). Id.

Rule 7.2(d)(1) permits a lawyer to pay "the reasonable costs of advertisements" permitted under the rule. The Committee's concern is that the payment arrangement outlined by the Requesting Attorney does not qualify as advertising. Here, the arrangement provides that the out-of-state managing firm be paid a percentage of the Requesting Attorney's fees in exchange for a referral. "This is the essence of a referral service - a third party is paid for channeling prospective clients to a lawyer." N.D. State Bar Assoc. Ethics Comm. Op. 08-06 at 3. Thus, the arrangement outlined by the Requesting Attorney is not simply advertising but is instead giving value for recommending a firm's services to a select group of individuals.

A second exception allows a lawyer to pay the "usual charges of a not-for-profit lawyer referral service or legal service organization." The Committee does not know if the pre-paid legal services referral service is not-for-profit or for-profit. Previous Opinions have addressed this distinction as relevant to satisfaction of Rule 7.2. In Opinion 06-01, the conclusion was that participation in a lawyer referral service that was operated by a non-profit corporation was permissible under Rule 7.2(d) so long as all of the entities constituting the lawyer referral service operated as a not-for-profit complied with all other rules of professional conduct. N.D. State Bar Assoc. Ethics Comm. Op. 08-06 at 2 (citing N.D. State Bar Assoc. Ethics Comm. Op. 06-01). On the other hand, the Committee concluded that lawyers are prohibited from paying a for-profit lawyer referral service.

Regardless of whether the pre-paid legal services referral service is not-for-profit or for-profit, the payment arrangement outlined by the Requesting Attorney does not appear to be one for the usual charges of a not-for-profit lawyer referral service or legal service organization as the Requesting Attorney's firm would pay the out-of-state managing firm a percentage of the fees collected from the referred clients. This does not constitute usual charges but instead constitutes giving something of value for recommending a lawyer's services or payment for "channeling professional work."

IV. CONCLUSION

The Committee concludes that the proposed arrangement violates Rules 1.5(e) and Rule 7.2(d) of the North Dakota Rules of Professional Conduct.

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

> 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.

N.D.R. Lawyer Discipl. 1.2(B).

This Opinion was drafted by Lori H. Conroy and unanimously approved by the Committee on January 11, 2012.

By ______________________________
Dann Greenwood, Chair