

Re: Advisory Opinion 2003-01
Date: February 18, 2003

SUBJECT: Compensation from Trust Company to Attorney for Trust Services Provided to Client

Facts: A trust company has approached an attorney and proposed that they enter into an "Independent Contractor Agreement". Under the terms of the agreement, the attorney will provide "sales referral services to assist the trust company in selling its trust and investment products and services." It is envisioned that the attorney will refer his clients to the trust company for trust services. Under the terms of the agreement the attorney will be compensated by the trust company. The amount of compensation will be based on the value of the client's estate or the complexity and nature of services to be rendered by the trust company to the client or for the benefit of the client.

Analysis: It is important to clarify what issues and Rules of Professional Conduct are not implicated in this proposal. First, the lawyer is not sharing legal fees with a non-lawyer. Rule 5.4. Second, the lawyer is not providing law related services through an entity controlled by the attorney. See Model Rule 5.7, as discussed in our Advisory Opinion 98-01. Third, the lawyer is not giving a fee to a person in return for referring a prospective client. See Rule 7.2(c). Fourth, an attorney's fee is not divided as a result of a referral of the client to another lawyer. See Rule 1.5(e).

The rules that are most applicable are Rule 1.7(b) and 1.8(a). The attorney is proposing or suggesting that the client enter into a business transaction, not with the client as clearly contemplated and governed by Rule 1.8(a), but with a third party. However, as a reward, the third party will compensate the attorney. In effect, the trust company will give a kickback to the attorney in the compensation.

Arkansas Rule 1.7(b) prohibits conflicts between the interests of the client and the personal interests of the attorney. The interests of the client are paramount to the interests of the attorney. Notably, the 6th Comment to that Rule states: "A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest."

Rule 1.8(a) governs business relations between attorneys and clients:

“(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:

(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 to the client in a matter which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.”

Comment 1 provides:

“As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment. Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.”

The Restatement of the Law Governing Lawyers (2000) states that: “A lawyer may not participate in a business or financial transaction with a client...unless:

- (1) the client has adequate information about the terms of the transaction and the risks presented by the lawyer's involvement in it;
- (2) the terms and circumstances of the transaction are fair and reasonable to the client; and
- (3) the client consents to the lawyer's role in the transaction under the limitations and conditions provided in § 122 after being encouraged, and given a reasonable opportunity, to seek independent legal advice concerning the transaction.

Section 126. As the comment states, the lawyer's legal skill and training, when combined with the trust that the client places and is encouraged to place in the attorney, create the possibility of overreaching by the attorney. Because of the general fiduciary requirement of fair dealing with a client, the transaction must be fair from the perspective of an objective observer. A client has a special trust in, and is frequently dependent upon, the independent judgment of the lawyer, which is to be exercised in the client's best interest. The possibility of referral of legal clients to a business from which the lawyer will profit introduces an extraneous and potentially conflicting motive, which can threaten or interfere with the lawyer's independence of judgment.

We note that the recent addition to Rule 1.8(a) by the American Bar Association requires the attorney to notify the client in writing of the desirability of seeking independent legal advice, and further require the client to give “informed consent, confirmed in writing” to the essential terms of the transaction and to the lawyer's role. That rule, while not yet adopted in Arkansas, does provide valuable guidance and protection to the attorney. We would advise that written notice and consent be followed in some appropriate way.

Your ethical requirement, when suggesting to your client the desirability of trust services, is to inform them that a variety of businesses offer such plans and the client is free to compare and select the most appropriate provider. Further, you must inform the client that, although you will not be providing legal services, you will benefit financially. The client must understand that you will not have an attorney-client relationship with the client in regard to the trust service.

Such disclosure and consent is necessary to avoid the “appearance of impropriety.” The Supreme Court has described the appearance of impropriety concept as “a rock upon which are built the rules

guiding lawyers in their moral and ethical conduct”, and likewise it should guide this committee in interpreting the rules of professional conduct. Burnette v. Morgan, 303 Ark. 150, 156, 794 S.W. 2d 145, 148 (1990).

Conclusion:

At a minimum, the client is to be informed that the trust services are available from a variety of providers, that the attorney will receive compensation from this particular trust company, and that the client is under no obligation to employ this particular trust company. It goes without saying that the attorney must make a full disclosure and must truthfully answer any inquiries, including those concerning the relationship of the attorney and the trust company.

NOTICE

"This is an opinion only of the Arkansas Bar Association which is a voluntary association of attorneys licensed to practice in the State of Arkansas, and reliance thereon is voluntary and relieves any Association member from liability for the content hereof. This opinion is intended to be the Association's best interpretation of the Model Rules of Professional Conduct as promulgated by the Supreme Court of Arkansas as that code applies to the written facts presented to the Committee."

ARKANSAS BAR ASSOCIATION

By: _____
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