

Re: Advisory Opinion 2003-03

Date: October 6, 2003

SUBJECT: Advertising and Referrals to Out of State Attorneys

Facts: An Arkansas attorney proposes to enter into a contract with an out of state law firm. The out of state firm will finance advertising by the Arkansas attorney in Arkansas media outlets. The advertising will make no reference to the out of state firm.

The Arkansas attorney will obtain clients, do the initial interview, gather information and evidence, and enter into an attorney-client contract with the client.

At that point the client will be referred to the out of state law firm. That law firm may refer the client to another out of state law firm. Representation to the client will be provided by the Arkansas attorney and by both the out of state firms. Any legal fees generated by the representation will be split among the firms.

Discussion:

1) The Arkansas Rules of Professional Conduct do not govern financing of legal advertising. An Arkansas law firm may pay for advertising from its own resources, may borrow from an individual, or may enter into an arrangement with financial institutions. Nothing prohibits the firm from obtaining financing from another law firm, within or outside the state.

2) Likewise, the Rules do not require any disclosure, in the media or to clients, of the financial resources for advertising. The out of state firm does not need to be mentioned in the advertising. Ark. R. Prof. Conduct 7.2(d) requires that advertisements shall disclose the geographic location of the law firm that will actually perform the services. Because not all cases will involve the out of state law firm, and since the Arkansas attorney will perform the initial services, it is not necessary to disclose the name or location of the out of state firm in any advertising.

3) Arkansas Rule of Professional Conduct 1.5(e) permits referral fees. With the consent of the client, and pursuant to the requirements of the rule, the Arkansas firm may associate the out of state firm or firms to serve the client. See Ark. Bar Association Opinion 92-01. We note that advisory opinions in South Carolina (1989), Pennsylvania (1994) and Utah (2000) have come to the same conclusion. See Daniel R. Alexander, Note, Referral Fees and Other Fee Arrangements Between Attorneys in Different States, 27 Journal of Legal Profession 123 (2003).

4) Because the out of state firms are not admitted to practice in Arkansas, this committee has been asked whether the Arkansas lawyer or the out of state firms risk violating Rule 5.5, which prohibits assisting in the unauthorized practice of law. We are unable to give a definitive answer to that question. First, the non-resident attorneys may seek admission pro hac vice, pursuant to Rule XIV of the Rules Governing Admission to Practice. Second, the Arkansas Supreme Court has proposed Admission to Practice by Motion. Third, the House of Delegates of the Arkansas Bar Association has recommended to the Supreme Court a revision of the rules. That proposal would permit a non-resident lawyer to provide legal services on a temporary basis in Arkansas.

5) We have been asked whether the Arkansas attorney would be engaged in the unauthorized practice of law in another state. For example, if the client were a resident of Tennessee, would the Arkansas attorney (or the other law firm) be violating the rules of Tennessee? We are unable to venture an answer to that question, which must be answered under the law of that jurisdiction and by appropriate authorities there.

6) We must add the following caveat to this proposal. The Arkansas attorney's loyalty must be to the client. For example, the client may refuse to consent to the association of the out of state law firm. Regardless of an underlying contractual relationship with the out of the state firm, the Arkansas attorney must adhere to the wishes of the client. Likewise, the Arkansas attorney must exercise independent professional judgment and render candid advice to the client. Rule 2.1. In some situations the independent judgment and advice may conclude that the outside law firm should not be associated.

Conclusion: The marketing and advertising scheme described above does not violate the Arkansas Rules of Professional Conduct. However, the arrangement between firms can not be allowed to diminish or weaken the primary obligation that the attorney owes to the client.

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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Reporter
Professional Ethics Committee