

The Supreme Court of Texas
Professional Ethics Committee

Opinion Number 543
April 2002

QUESTION PRESENTED

Under the Texas Disciplinary Rules of Professional Conduct, may a lawyer enter into an agreement as described below with a healthcare provider, for which the lawyer is its in-house counsel, to refer patients with personal injury claims to that lawyer?

STATEMENT OF FACTS

A lawyer is currently employed as general counsel (in-house counsel) by a healthcare provider and provides legal guidance and services to the healthcare provider and its affiliates. The lawyer also maintains a separate law firm, which is located in the same building with his employer. The lawyer is permitted to represent clients other than the healthcare provider or its affiliates and actively does so.

The lawyer and healthcare provider wish to enter into an agreement whereby the lawyer will provide legal services at low cost to the healthcare provider's patients who have personal injury claims as a result of automobile accidents and who are receiving treatment from the healthcare provider. The patient would be free to choose any other lawyer, if preferred. A separate agreement would be executed between the lawyer and the patient/client with full disclosure of past and present relationships between the lawyer and the healthcare provider and its affiliates. Written disclosures would be in bold print and discussed with each patient/client before entering into such an agreement.

Separate agreements between the patient/client and healthcare provider would be entered into concerning the payment of charges owed to the healthcare provider. Those charges would be paid to the healthcare provider at time of settlement or other resolution.

As part of the lawyer's compensation package, and in return for in-house legal services to the healthcare provider, the lawyer will continue to receive clerical and related support from the healthcare provider during the time that he or his firm is representing any healthcare provider patients.

Full disclosure of the existence of conflicts of interest or potential conflicts will be made in every case to the healthcare provider and the patient/client by the lawyer, who will request written waiver of conflicts from both in each instance. However, the healthcare provider will not agree to the lawyer handling disputes between the healthcare provider and the patient/client except those disputes regarding charges. In other words, disputes such as a malpractice claim by the patient/client against the healthcare provider would require the lawyer's withdrawal and nonparticipation.

DISCUSSION

Any time a lawyer enters or considers entering into a referral arrangement, the

lawyer is confronted with several provisions of the Texas Disciplinary Rules. The above described arrangement between the healthcare provider and its in-house counsel raises several ethical issues under Rule 7.03, Prohibited Solicitations & Payments; Rule 5.04, Professional Independence of a Lawyer; Rule 2.01, Advisor; and Rule 1.06, Conflict of Interest: General Rule.

***2** It is apparent from the foregoing Statement of Facts that the healthcare provider will be recommending the lawyer to its patients. Although the patient is free to choose another lawyer, the fact that the lawyer has agreed to provide low cost legal services is certainly an inducement for the patient to become a client of the lawyer. Rule 7.03(b) provides in pertinent part as follows:

"A lawyer shall not pay, give, or offer to pay or give anything of value to a person not licensed to practice law for soliciting prospective clients for, or referring clients or prospective clients to, any lawyer or firm"

The lawyer would violate said rule if the lawyer is giving "anything of value" to the healthcare provider. The lawyer is offering his legal services at lower cost to the healthcare provider's patients in exchange for a referral from the healthcare provider of that patient. Such an agreement gives the healthcare provider a competitive advantage over other healthcare providers who are not able to offer their patients a lawyer who will provide legal services at such low cost. Additional consideration that the healthcare provider is receiving under the proposed arrangement between it and the lawyer is that the healthcare provider will have greater assurance that any amount owed to it for its charges will be paid upon settlement or other resolution of the patient/client case.

Although the healthcare provider proposes that it will exercise no control over or involvement in the personal injury case, the lawyer is giving up an element of control by agreeing to withdraw from representing the patient/client in the event that there is a dispute between the healthcare provider and the patient/client other than a dispute over charges. This restriction is discussed in more detail below.

The Committee is of the opinion that, under the proposed arrangement, the lawyer is giving something of value to the healthcare provider who will be soliciting prospective clients or referring clients or prospective clients to the lawyer.

Comment 3 to Rule 7.03 states in pertinent part as follows:

"However, paying, giving, or offering to pay or give anything of value to persons not licensed to practice law who solicit prospective clients for lawyers has always been considered to be against the best interest of both the public and the legal profession. Such actions circumvent these Rules by having a non-lawyer do what a lawyer is ethically proscribed from doing. Accordingly, the practice is forbidden by Rule 7.03(b)."

A client is entitled to expect that a lawyer will exercise independent professional judgment and render candid advice. See Rule 2.01. In the case of a victim of a personal injury requiring medical care, the victim's condition after the injury and medical care reflects both the effects of the injury and the effects (good or bad) of the medical care. In such circumstances, the Committee is of the opinion that it would be impossible for an attorney to appropriately represent the patient/client without being able to address fully the possibility that the healthcare provider might have some legal responsibility for the condition of the patient/client after the injury.

***3** Thus an agreement that precludes representation of the patient/client adverse to the healthcare provider would constitute an impermissible restriction on the lawyer's exercise of independent professional judgment on behalf of his client, the injury victim. Such a restriction would be contrary to Rule 5.04(c), which provides:

"A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."

Furthermore, under the facts described above, the healthcare provider is the employer of the lawyer. By virtue of such relationship, the lawyer would owe certain duties and loyalties to his employer. Loyalty to the lawyer's employer is apparent in the proposed arrangement as reflected in the agreement that the lawyer must withdraw from further representing patient/clients in the event that there is any type of dispute between the healthcare provider and the patient/client other than a dispute over charges. The lawyer's loyalty to the employer would continue during the lawyer-client/patient relationship, and such loyalty would present improper interference with the exercise of the lawyer's professional judgment.

Explaining the rationale of the aboverule, Comment 4 to Rule 5.04 provides in pertinent part as follows:

"Because the lawyer-client relationship is a personal relationship in which the client generally must trust the lawyer to exercise appropriate professional judgment on the client's behalf, Rule 5.04(c) provides that a lawyer shall not permit improper interference with the exercise of the lawyer's professional judgment solely on behalf of the client. The lawyer's professional judgment should be exercised only for the benefit of the client free of compromising influences and loyalties."

Since the lawyer has a past, present, and continuing relationship with the healthcare provider, the lawyer's obligations to his employer and the lawyer's own interests as an employee of the healthcare provider would create a conflict of interest situation under Rule 1.06(b), which provides in pertinent part as follows:

"In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:

...

(2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests."

A conflict under Rule 1.06(b) does not preclude proposed representation if the lawyer is able to comply with Rule 1.06(c), which provides as follows:

"A lawyer may represent a client in the circumstances described in (b) if:

(1) the lawyer reasonably believes the representation of each client will not be materially affected; and

(2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any."

***4** The lawyer in the arrangement described herein would owe loyalty not only to the patient/client, but also to the healthcare provider. As such, the lawyer is serving "two masters," and it is the Committee's opinion that the lawyer employed by the healthcare provider could not meet the requirement of Rule 1.06(c)(1) that the lawyer reasonably believe that the representation of the patient/client would not be materially affected by the lawyer's responsibilities and interests arising from the lawyer's relationship with the healthcare provider. Accordingly, the lawyer's representation of the patient/client would also be prohibited by Rule 1.06 (b).

CONCLUSION

It is the opinion of the Committee that the arrangement described above would be prohibited by several rules of the Texas Disciplinary Rules of Professional

Conduct.

The lawyer would violate Rule 7.03 by accepting referrals from the healthcare provider under the stated circumstances.

The referral of the healthcare provider's patients to its in-house counsel creates a very serious potential that the existing employer/employee relationship between the healthcare provider and the lawyer will cause improper interference with the lawyer's exercise of independent professional judgment on behalf of patient/clients. Such an arrangement would violate Rule 2.01 and Rule 5.04(c).

Finally, such an arrangement would be prohibited by Rule 1.06(b) and (c) as an impermissible conflict of interest.

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