Final

Rhode Island Supreme Court
ETHICS ADVISORY PANEL
Opinion No. 2000-05, Request No. 801
Issued June 14, 2000

Facts:

The inquiring attorney represents plaintiffs as cooperating counsel for the Rhode Island Affiliate of the American Civil Liberties Union (RI-ACLU), a not-for-profit corporation. The RI-ACLU receives requests for litigation assistance from individuals and organizations who believe their civil rights have been violated. If the RI-ACLU determines that it will sponsor and support a case, it provides the legal representation and pays for the costs of litigation at no cost to the litigants. The RI-ACLU seeks out private attorneys to serve as "cooperating counsel for the RI-ACLU" on behalf of clients. The cooperating attorneys, the clients, and the RI-ACLU enter into written retainer agreements. Under the retainer agreement, the clients agree "that any such court award of fees and/or costs shall be paid in full to the ACLU and the ACLU-RI, for them to distribute among counsel consistent with their own agreements." The RI-ACLU requires that a percentage of court-awarded attorneys' fees be retained by or paid to the RI-ACLU. The inquiring attorney currently represents plaintiffs in RI-ACLU-sponsored litigation who, having been successful on the merits of their claim, are entitled to an award of attorneys' fees.

Issue Presented:

The inquiring attorney asks whether it would be a violation of the Rules of Professional Conduct for him/her to distribute a percentage of the court-awarded attorneys' fees to the RI-ACLU.

Opinion:

It is ethically improper under both Rule 5.4(a) and Rule 7.2(c) for a lawyer who undertakes pro bono representation in RI-ACLU sponsored litigation to pay a percentage of court-awarded attorneys' fees to the RI-ACLU.

Reasoning:

There are two Rules of Professional Conduct that are pertinent to this discussion: Rule 5.4(a) which prohibits a lawyer from sharing legal fees with nonlawyers, and Rule 7.2(c) which prohibits a lawyer from paying a person for recommending the lawyer's services. Rule 5.4(a) states:

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of

> money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
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> (2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer; and
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> (3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

Rule 7.2(c) provides:

> (c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written communication permitted by this rule and may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.

In Formal Opinion 93-374, the ABA Standing Committee on Ethics and Professional Responsibility concluded that it is not ethically improper for a lawyer who undertakes pro bono representation at the request of a non-profit organization that sponsors such pro bono litigation to share with the organization court-awarded attorneys' fees resulting from the representation. The Committee concluded that the sharing of court-awarded fees in that context is neither a prohibited fee-sharing with a nonlawyer under ABA Model Rule 5.4(a), nor a prohibited payment for a referral under ABA Model Rule 7.2(c).

The limitations on fee-sharing imposed by Rule 5.4(a) are to protect the lawyer's professional independence of judgment. See Comment to Rule 5.4. The dangers of fee-splitting are competitive solicitation, potential control by the layperson interested in personal profit rather than the interests of the client, and the layperson's potential to select the attorney who pays the highest referral fee rather than the most competent attorney. R.I. Sup. Ct. Ethics Advisory Panel Op. 95-3 (1995). The ABA Committee reasoned that the sharing of court-awarded fees with sponsoring non-profit organizations does not present the threat of interference with a lawyer's independent judgment or financial incentive sufficient to invoke the prohibition of Model Rule 5.4(a). See ABA Standing Comm. On Ethics and Prof. Responsibility, Formal Op. 93-374 (1993). The Panel agrees that the dangers that Rule 5.4(a) aims to avoid are not likely to be

present in the context of the present inquiry. This factor, coupled with the RI-ACLU's legitimate interest in serving the public, leads the Panel to conclude that prohibitions against fee-sharing with nonlawyers ought not apply to the sharing of court-awarded fees in RI-ACLU sponsored pro bono litigation.

Nevertheless, the Panel is constrained to conclude that Rule 5.4(a) as written prohibits the inquiring attorney from sharing court-awarded fees with the RI-ACLU. See Mass. Bar Comm. On Prof. Ethics Op. 97-6 (1997) (law firm may not donate court-awarded fees in pro bono matter to non-profit organization that referred matter); Texas Prof. Ethics Comm. Op. 503 (1994) (cooperating attorney cannot ethically agree to share court-awarded fees in civil rights cases with non-profit public interest organization). Notwithstanding the public policy considerations that would justify an additional exception to Rule 5.4(a) which would permit fee-sharing in the situation presented in this inquiry, the Panel declines to interpret such an exception where the language of the rule is clear on its face. Aside from the three narrow exceptions that have no application to this inquiry, Rule 5.4(a) sets forth an absolute prohibition against fee-sharing with nonlawyers. Limited by the plain meaning of the language of Rule 5.4(a), the Panel is of the opinion that it is ethically improper for the inquiring attorney to share court-awarded fees in RI-ACLU sponsored pro bono litigation with the RI-ACLU.

The Panel is similarly limited by the plain meaning of the language of Rule 7.2(c). The rule prohibits lawyers from paying a person for recommending a lawyer's services except in two instances: the reasonable costs of permissible advertising, and the usual charges of a not-for-profit lawyer referral service or other legal service organization. The fees which the inquiring attorney proposes to pay to the RI-ACLU do not fall into either category. Therefore, the inquiring attorney's payment of a percentage of court-awarded attorneys' fees to the RI-ACLU also constitutes a prohibited referral fee under Rule 7.2(c).

The Panel recognizes that applying the prohibitions of Rule 5.4(a) and of Rule 7.2(c) in this context bears little, if any, relation to the underlying purposes of these two rules, or to the purpose of fee-shifting statutes which encourage the enforcement and advancement of civil liberties. See Geoffrey C. Hazard, Jr. And W. William Hodes, The Law of Lawyering, §5.4:201 at 801, n.2 (2nd ed. Supp. 1994). However, it is not within the jurisdiction of the Panel to create new exceptions to the Rules. The Panel therefore concludes that the inquiring attorney's payment of a percentage of court-awarded fees to the RI-ACLU in RI-ACLU sponsored pro bono litigation is both a prohibited fee-sharing with a nonlawyer under Rule 5.4(a), and a prohibited payment for a referral under Rule 7.2(c).