

The Supreme Court of Texas
Professional Ethics Committee

Opinion Number 547
January 2003

QUESTION PRESENTED

Is it permissible under the Texas Disciplinary Rules of Professional Conduct for a law firm to enter into an arrangement with a group of medical professionals pursuant to which the group would fund the law firm's television advertising with the expectation (but not the obligation) that the law firm would refer clients to the medical group?

STATEMENT OF FACTS

A group of medical professionals (chiropractors and orthopedic surgeons) proposes to fund a law firm's television advertising, either by making payments directly to the law firm to use solely for such advertising, or to pay the costs of such advertising directly to the television stations. In the proposed arrangement, the advertisements would identify the medical group and expressly note that the group had paid for, in whole or in part, the advertisements. Two types of advertisements are proposed. The first would be targeted at persons with potential workers' compensation claims. The second would be targeted at persons with other personal injury claims, such as those injured in automobile accidents or in other circumstances involving possible third party negligence. It is assumed that these advertisements would meet the requirements of Rule 7.04 on advertisements in the public media.

In connection with representing persons who respond to the proposed advertisements, the law firm and the medical group expect that the law firm would refer its new clients to the medical group if such new clients needed any medical services. Although the parties to the proposed arrangement would have this expectation, there would be no formal agreement requiring the law firm to make such referrals. The law firm would disclose the advertising arrangement between the law firm and the medical group in its advertisements and, presumably, at the time of any such referral.

DISCUSSION

As a threshold matter, even though the law firm would have no contractual obligation to refer clients to the medical group, it is clear that the proposed arrangement has a material quid pro quo element. For its part, the medical group must surely consider its payments for the law firm's advertisements a legitimate business expense, and not a gift. It is apparent that the medical group intends to pay the law firm, in effect, for referrals of potential patients. Similarly, the law firm must surely understand that it is not intended to be the beneficiary of a gift from the medical group and that unless the law firm refers some of its new clients to the medical group, the advertising arrangement will not continue very long. Thus, the law firm has a financial incentive to refer clients it develops through the advertising arrangement to the medical group. This circumstance raises several issues under the Texas Disciplinary Rules of Professional Conduct (the "Rules").

A lawyer's obligation to provide independent advice to a client is an essential element of a lawyer's relationship with the client that is reinforced by Rule 2.01, which provides:

"In advising or otherwise representing a client, a lawyer shall exercise independent professional judgment and render candid advice."

Comment 4 to Rule 2.01 recognizes that a lawyer is sometimes called upon to make recommendations to a client about matters not strictly involving legal questions in connection with discharging the lawyer's

overall professional responsibilities:

"Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation."

In making any such recommendation, the lawyer would be expected to exercise independent professional judgment. In the circumstances presented here, it is unclear whether any client could reasonably expect to receive that independent professional judgment when the law firm has a financial incentive to refer clients to the medical group that has funded the law firm's advertising.

For similar reasons, Rule 1.06, which deals with conflicts of interest, is also relevant to the proposed advertising arrangement. Rule 1.06(b)(2) provides in relevant part:

"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."

Before accepting or continuing a representation that involves a conflict of interest under Rule 1.06(b), supra, the lawyer must satisfy the requirements of 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."

Under this Rule, the law firm must reasonably determine that the arrangement with the medical group would not materially affect the law firm's representation of the client and, if it makes such a determination, obtain the informed consent of each affected or potentially affected client. Comment 4 to Rule 1.06 cautions that loyalty to a client is impaired in any situation where a lawyer may not be able to consider, recommend or carry out an appropriate course of action for a client because of the lawyer's own interests.

Since, in the circumstances presented, the law firm would have a financial incentive to refer clients to the medical group, the law firm would be tempted to advise the client to choose the medical group instead of some other medical provider, even if the other medical provider might be more appropriate for the client under the circumstances existing at the time. In addition, if the law firm referred a client to the medical group, and if the medical group participated in the prosecution of the client's personal injury claim (e.g., as a witness), the advertising arrangement between the law firm and the medical group could adversely affect the client's claim. Given this risk, which would be potentially present in all representations for clients for whom the medical group provided medical services upon the law firm's recommendation, the Committee believes that it would not be possible for the law firm to reasonably conclude that it could recommend to its clients the medical group that is paying for the law firm's advertising. Hence the law firm could never meet the requirements of Rule 1.06(c)(1) with respect to the conflict of interest involved in the law firm's recommendation of the medical group to the law firm's clients. Because such recommendations are an essential part of the proposed arrangement, the proposed arrangement is not permitted under the Rules.

The Committee notes that the proposed arrangement might also be deemed to constitute a violation of Sections 102.001 et seq. of the Texas Occupations Code because of the receipt by the law firm of something of value in exchange for the law firm's recommendation of the medical group to the law firm's clients. However, since the Committee does not have authority to deal with questions of statutory interpretation, no opinion is expressed as to whether the proposed arrangement might constitute a violation of such provisions.

CONCLUSION

The proposed arrangement creates an unacceptable conflict of interest for the law firm participating in the arrangement and hence the arrangement is not permitted under the Texas Disciplinary Rules of Professional Conduct.
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