

**THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 616**

April 2012

QUESTIONS PRESENTED

Under the Texas Disciplinary Rules of Professional Conduct, may a law firm agree with a for-profit legal service contract company to provide legal services at discounted rates to persons who have contracted with the legal service contract company? May a law firm having such an agreement with a for-profit legal service contract company accept referral fees from lawyers to whom the law firm refers matters that initially come to the firm under the agreement with the company?

STATEMENT OF FACTS

A company owned by non-lawyers (“the Company”) is validly licensed as a for-profit legal service contract company by the Texas Department of Licensing and Regulation under chapter 953 of the Texas Occupations Code. The Company enters into contracts with individuals (“Contract Holders”) under which the Contract Holders will pay a monthly amount and in exchange the Contract Holders will be entitled to specified legal services to be provided by licensed Texas lawyers. These contracts frequently include provisions that, if a Contract Holder needs legal services with respect to certain types of matters beyond those specifically provided under the contract, the Contract Holder is entitled to receive additional legal services on these specified matters at a discount. Such contracts are frequently included in benefit packages made available to employees by employers under which the monthly payments for the employee Contract Holders are paid in whole or in part by the employer.

The Company enters into an agreement with a Texas law firm (the “Law Firm”) under which the Company will pay the Law Firm a set amount per month per Contract Holder and the Law Firm agrees to provide specified legal services to the Contract Holders with no additional payment. An essential feature of the Company’s business plan is that for each period the total of amounts received by the Company from the Contract Holders is expected to exceed the total of payments by the Company to the Law Firm and other law firms contracting with the Company. An additional feature of the agreement between the Company and the Law Firm is that the Law Firm will provide legal services beyond the specified services for fees to be paid by Contract Holders that are discounted 25% from the Law Firm’s standard rates for hourly and flat-fee cases.

The agreement between the Law Firm and the Company authorizes the Law Firm to refer some matters to lawyers outside the Law Firm (“Referral Lawyers”) who have agreed with the

Company to take these matters as referrals from the Law Firm at the agreed discount from the normal fees charged by the Referral Lawyers for these matters. The Company's contract with Contract Holders and the Company's agreement with the Law Firm further provides that some matters, including some contingent fee matters, may be referred to one of the Referral Lawyers without discount on fees normally charged by the Referral Lawyers. With respect to some or all matters referred to Referral Lawyers, the Law Firm proposes to charge Referral Lawyers a referral fee.

DISCUSSION

Rule 5.04 of the Texas Disciplinary Rules of Professional Conduct prohibits a lawyer or law firm from sharing or promising to share legal fees with a non-lawyer except in certain circumstances not relevant here. The initial question presented is whether the Law Firm's arrangement with the Company, involving as it does total payments on behalf of the Contract Holders to the Company that are expected to be more than total legal fees paid by the Company to the Law Firm, constitutes an impermissible sharing of legal fees by the Law Firm with a non-lawyer, namely the Company.

Comment 1 to Rule 5.04 states that "[t]he principal reasons for these limitations are to prevent solicitation by lay persons of clients for lawyers and to avoid encouraging or assisting nonlawyers in the practice of law." In the case of for-profit legal service contract companies licensed under chapter 953 of the Texas Occupations Code, such companies are specifically prohibited by section 953.154 from interfering with the lawyer-client relationship between a contracting lawyer and the client and from interfering with the contracting lawyer's independent exercise of professional judgment. Thus, so long as the Company complies with this provision of the Occupations Code, there should be no concern regarding interference by non-lawyers in a lawyer's practice of law. In this regard, it should be noted that Rule 5.04(c) expressly contemplates that a lawyer's fee may be paid by a person other than the client so long as the person paying is not permitted to interfere in the lawyer's exercise of professional judgment: "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." In the case of such payments for legal services by someone other than the client, Rule 1.08(e) requires safeguards with respect to client consent, lawyer independence, and protection of the client's confidential information, but there is no prohibition against such payments when subject to these safeguards.

The question remains as to whether this arrangement should be considered fee splitting in violation of Rule 5.04(a) based on the view that the arrangement encourages improper solicitation by the Company of clients for the Law Firm. In the opinion of the Committee this arrangement does not involve impermissible fee splitting because the payments made by or on behalf of Contract Holders to the Company do not constitute fees for legal services but are rather in the nature of insurance premiums paid to the Company, viewed as an insurer, to insure the risk that a particular Contract Holder would require specified legal services during the period covered

by the contract. The fact that for-profit contract legal services companies are specifically authorized and regulated under chapter 953 of the Texas Occupations Code further supports the conclusion that these arrangements do not implicate the concerns that underlie Rule 5.04's prohibition against sharing legal fees with non-lawyers.

The next question is whether the Law Firm's agreement with the Company involves an impermissible payment or other transfer to a non-lawyer for soliciting employment or referring clients in violation of Rule 7.03(b) or an impermissible payment or other transfer to a prospective client or other person in order to solicit employment in violation of Rule 7.03(c). Rule 7.03(b) provides that, with exceptions not applicable here, 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" Rule 7.03(c) provides that a lawyer "in order to solicit professional employment, shall not pay, give, advance, or offer to pay, give, or advance anything of value" to a prospective client or any other person, with limited exceptions for litigation expenses and certain other payments not involved here.

In the arrangement between the Law Firm and the Company considered in this opinion, there is no payment or other transfer of something of value by the Law Firm to the Company or the Contract Holders that would make Rules 7.03(b) and 7.03(c) applicable. Although a discount or price reduction is valuable to the person receiving the discount or price reduction, a discount or price reduction from standard rates for legal services does not in the Committee's view constitute a transfer of something of value within the meaning of Rules 7.03(b) and 7.03(c) that would be prohibited by these Rules. A contrary view would require the obviously unacceptable conclusion that Rules 7.03(b) and 7.03(c) prohibit price competition in the provision of legal services in Texas.

In these circumstances, any arrangement that is represented by a lawyer or law firm to provide for "discounted" fees must involve real reductions from fees that are themselves permissible under Rule 1.04. Any misrepresentation by a lawyer or law firm concerning reductions in legal fees would violate Rule 7.02(a) and 8.04(a)(3), which require truthfulness by a lawyer in his communications regarding his or his firm's qualifications or services. In other words, in any offer or agreement to "discount" a lawyer's fee, the stated discount must be genuine.

A different type of issue is presented in the case of referral fees proposed to be paid by Referral Lawyers to the Law Firm with respect to matters referred by the Law Firm. Rule 1.04(f) provides that a division of fees between lawyers not in the same firm is permitted only if several requirements are met, including the requirement of Rule 1.04(f)(1) that the division must be either in proportion to professional services performed by each lawyer or made between lawyers assuming joint responsibility for the representation. Because in the circumstances considered the Law Firm does not provide legal services with respect to the matters referred and does not take joint responsibility for the representations with the Referral Lawyers to whom the matters are referred, such referral fees are prohibited by Rule 1.04(f).

CONCLUSION

A law firm does not violate the Texas Disciplinary Rules of Professional Conduct by entering into an agreement with a for-profit legal service contract company to provide legal services at discounted rates to persons who have contracted with the company. The law firm would violate the Texas Disciplinary Rules of Professional Conduct if it received referral fees from lawyers outside the firm to whom the firm referred matters that came to the firm under the agreement with the legal service contract company.