ILLINOIS STATE BAR ASSOCIATION

ISBA Advisory Opinion on Professional Conduct

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This Opinion was AFFIRMED by the Board of Governors in January 2010. Please see the 2010 Illinois Rules of Professional Conduct 5.4(a) and 7.2(b). This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.

Opinion No. 01-05
January, 2002

Topic: Professional Independence; Fee Splitting; Lawyer as Mediator

Digest: It is professionally improper for a lawyer providing mediation services in a "mediation firm" comprised entirely of lawyers to participate in an arrangement with nonlawyers whereby the "mediation firm" obtains referrals in return for the payment of fees by the "mediation firm" to the nonlawyers.

Ref.: Illinois Rules of Professional Conduct 5.4(a), 7.2(b)
ABA Model Rules of Professional Conduct 2.2, 5.7
ISBA Advisory Opinion Nos. 93-01; 94-02; 94-08; 99-02
In re Discipio, 163 Ill.2d 515, 645 N.E.2d 906 (1995)

FACTS

A law firm practicing in the State of Illinois as a professional service corporation (Law Firm) employs several attorneys who render both legal and mediation services. An accounting firm has approached the Law Firm and offered to refer mediation clients to the Law Firm in exchange for a 20% referral fee. The Law Firm intends to establish a second corporation (Mediation Firm) owned by some or all of the same shareholders who own the Law Firm. One or more of the attorneys of the Law Firm would also be employed by the Mediation Firm for the sole purpose of providing mediation services. Mediation

services referred by the accounting firm would be handled through the Mediation Firm by the attorney(s) employed by it.

The Mediation Firm would not have separate facilities or staff, but would operate its business out of the Law Firm's facilities and use the staff of the Law Firm through a contractual relationship between the Law Firm and the Mediation Firm. Attorneys of the Law Firm would continue to render other mediation services as employees of the Law Firm. The Mediation Firm would disclose to the mediation parties the relationship between the accounting firm and the Mediation Firm, as well as the relationship between the Mediation Firm and the Law Firm.

With respect to mediation services provided through the Mediation Firm, the parties would pay fees directly to the Mediation Firm. The Mediation Firm would pay the 20% referral fee to the accounting firm. The Mediation Firm would pay the Law Firm for the use of the Law Firm's facilities and services, in an amount designed to cover the Law Firm's costs, to be spelled out in the contract between the Law Firm and the Mediation Firm. The Mediation Firm would pay the lawyers employed by it, probably on a per-hour bases. Any remaining monies of the Mediation Firm would ultimately be distributed to its shareholders. In all likelihood the Law Firm will in some manner take into consideration the distributions made by the Mediation Firm to its employees and shareholders, at the time the Law Firm determines its compensation, discretionary bonuses or profit distributions.

QUESTIONS

1. Because it is not necessary to have a license to practice law in order to render mediation services, would mediation services rendered by a licensed attorney be considered a non-legal service?

2. If mediation is a non-legal service, may an attorney who is employed by the Law Firm and by the Mediation Firm render mediation services through the Mediation Firm and have the Mediation Firm pay referral fees to a nonlawyer for having clients referred to it for mediation services?

3. Would it make a difference if the mediation services were being rendered from the facilities owned by and using the staff of the Law Firm?

4. Would it make a difference if attorneys employed by the Law Firm (including the one(s) employed by and rendering services through the Mediation Firm) continue to render other mediation services through the Law Firm?

OPINION

The Committee recognizes that whether mediation is indeed the practice of law is a controversy that continues to be disputed. However, the relationship described in the factual scenario presented violates the prohibitions of Rules 5.4(a) and 7.2(b) of the Illinois Rules of Professional Conduct.

Under Rule 5.4(a), a lawyer is not permitted to share legal fees with a nonlawyer, except under narrow circumstances which are not applicable to the inquiry at hand.

Under Rule 7.2(b), a lawyer may not give anything of value to a nonlawyer as a result of the person's

recommendation of the lawyer's services, except for the reasonable cost of advertising as permitted under the Rules.

The compensation of nonlawyers, such as the accounting firm identified in the inquiry, in a referral context has been previously addressed by this Committee as well as by the Illinois Supreme Court. Both the Court and this Committee have found that the payment of fees for referrals is improper under both Illinois law and the Rules of Professional Conduct.

In In re Discipio, 163 Ill.2d 515, 645 N.E.2d 906 (1995), the Illinois Supreme Court held that a lawyer's fee sharing arrangement with a nonlawyer violated Rule 3-102(a) of the then-applicable Code of Professional Responsibility. The lawyer in that case shared contingent fees with a disbarred lawyer for worker's compensation client referrals made by the nonlawyer. The Court found that this arrangement violated the fee-sharing prohibitions of the Code because the lawyer split the resulting fee with the nonlawyer if the claim proved successful.

Moreover, in ISBA Opinion No. 99-02, this Committee stated that it would violate Rules 5.4(a) and 7.2(b) for a lawyer to pay a nonlawyer authorized to represent claimants in cases before the Social Security Administration a referral fee for his/her involvement in the lawyer's representation of such claimants before the Social Security Administration. Likewise, in ISBA Opinion No. 94-08, this Committee found that it would be professionally improper for a lawyer who receives property assessment matters from a nonlawyer "tax representative" to pay the nonlawyer a referral fee.

With respect to the inquiry presented, the Committee believes the creation of the "Mediation Firm," which is comprised entirely of lawyers, to be a sham designed to circumvent the applicable Rules of Professional Conduct. Thus, the Committee believes it would be professionally improper for the "Mediation Firm," to pay a referral fee to the accounting firm, a nonlawyer. The fact that the "Mediation Firm," rather than the Law Firm, would have the referral relationship with the nonlawyer accounting firm does not render Rules 5.4(a) and 7.2(b) inapplicable. There would still be lawyers sharing legal fees with a nonlawyer, and giving something of value to a person for recommending the lawyer's services, in violation of both of these Rules.

While it is true that it is not necessary to have a law license in order to provide mediation services, it is unclear whether mediation services rendered by a licensed attorney are non-legal services. On the one hand, this Committee's ISBA Opinion No. 94-02 adopted the Black's Law Dictionary definition of the "practice of law" as "the rendition of services requiring the knowledge and the application of legal principles and technique to serve the interests of another with his consent . . . . An attorney engages in the 'practice of law' by . . . counseling clients in legal matters." Accordingly, when an attorney uses his or her legal knowledge and skills to perform a service, the attorney is performing legal services. Thus, it could be argued that when mediation is performed by an attorney, he or she is performing a legal service. Likewise, Rule 5.7 of the ABA Model Rules of Professional Conduct defines "law-related service" as services which might reasonably be performed in conjunction with or in relation to legal services, but are not prohibited as the unauthorized practice of law when conducted by a non-lawyer.

On the other hand, mediation has been argued to be a mere facilitation, which does not involve law, but rather, it involves communication and other skills. Indeed, Rule 2.2 of the ABA Model Rules of Professional Conduct addresses the applicability of the Model Rules when the attorney is acting in the role of intermediary. Although the application of Rule 2.2 appears on the surface to apply to attorney-

mediators, the comments to Rule 2.2 specifically state its inapplicability to attorneys acting as arbitrator or mediator when the mediating parties are not clients of the attorney. As the comment to Rule 2.2 concludes by directing attorneys acting in the role of mediator to apply the Code of Ethics for Arbitration, it appears that this conclusion supports the view that attorney-mediators are not practicing law.

Although the Committee does not render an opinion as to whether mediation is the practice of law, the Committee believes that the proposed referral arrangement would still be professionally improper regardless of whether the mediation services were being rendered from the facilities owned by and using the staff of the Law Firm. The physical facilities are not relevant to the inquiry, as the Committee recognized in ISBA Opinion No. 93-01 that an attorney is no longer prohibited or restricted by the Rules from engaging in another profession or business, even from the same office.

Likewise, for the reasons set forth in this Opinion, the Committee believes that the proposed referral arrangement would still violate Rules 5.4(a) and 7.2(b) even if attorneys employed by the Law Firm (including the one(s) employed by and rendering services through the Mediation Firm) continued to render other mediation services through the Law Firm.