

ETHICS ADVISORY OPINION

18-02

UPON THE REQUEST OF A MEMBER OF THE SOUTH CAROLINA BAR, THE ETHICS ADVISORY COMMITTEE HAS RENDERED THIS OPINION ON THE ETHICAL PROPRIETY OF THE INQUIRER'S CONTEMPLATED CONDUCT. THIS COMMITTEE HAS NO DISCIPLINARY AUTHORITY.

South Carolina Rules of Professional Conduct: 1.7, 7.1, 7.2

Factual Background:

Lawyer is licensed to practice law in South Carolina. Lawyer is considering doing commercials to promote his personal injury focused practice. A chiropractor would like to pay a portion of the costs for Lawyer's commercials in exchange for Lawyer referring qualified clients to his practice for treatment.

Question(s):

- (1) Would allowing the chiropractor to fund the advertising be allowed if done under the following conditions:
 - (a) it was in the client's best interest to receive chiropractic care considering the type of case and the client's condition;
 - (b) Lawyer discloses the nature of the relationship with the chiropractor to the client; and
 - (c) Lawyer makes clear it is only a recommendation as to a specific chiropractor for treatment, with the client free to seek such treatment elsewhere?
- (2) Are there any additional prerequisites that would make such an arrangement in compliance with the rules?

Summary:

- (1) Yes, Lawyer may accept financial assistance from the chiropractor to facilitate the dissemination of advertisements on behalf of the Lawyer, with an expectation of client referrals to the chiropractor for treatment, provided adequate disclosures are made.
- (2) In addition to disclosing the relationship, Lawyer should obtain informed consent, confirmed in writing, regarding the substantial risk that the existence of the relationship may materially limit Lawyer's ability to represent clients who obtain treatment with the chiropractor.

Discussion:

The ABA Model Rules of Professional Conduct include an express provision authorizing non-exclusive reciprocal referral agreements provided client notice of such an agreement between attorneys or between attorneys and other professionals. See ABA Model Rule 7.2(b)(4). The South Carolina Rules of Professional Conduct (RPC), however, contain no such express provision, and thus consideration of the inquiry under applicable rules in South Carolina requires a broader consideration and application of separate provisions of the RPC.

As a threshold matter, Rule 7.2(b) states that “A lawyer is responsible for the content of any advertisement or solicitation placed or disseminated by the lawyer and has a duty to review the advertisement or solicitation prior to its dissemination to reasonably ensure its compliance with the Rules of Professional Conduct.” As such, regardless of the source of funds used to purchase advertising, Lawyer is ultimately responsible for the form and content of any advertisement disseminated for Lawyer’s benefit.

Rule 7.2(e) generally prohibits Lawyer from having another lawyer not in the same firm pay, directly or indirectly, any part of the cost of an advertisement unless certain detailed disclosures are made regarding the relationship between the two lawyers. However, there is no equivalent restriction or obligation that would preclude a non-lawyer, such as the chiropractor identified in this inquiry or a relative of Lawyer, from paying for such advertisements.

Rule 7.2(c) states “A lawyer shall not give anything of value to a person for recommending the lawyer’s services except... (1) pay the reasonable costs of advertisements or communications permitted by this Rule.” This exception allows for paid recommendations in the form of endorsements and testimonials, provided such advertisements are otherwise compliant with Rule 7.1(d), which requires *inter alia* disclosure of when payments have been made in exchange for an endorsement. While addressing payments made by the Lawyer, this rule does not squarely address the opposite circumstance addressed in this inquiry, when Lawyer is *receiving* something “of value.”

The inquiry is silent as to the nature of advertisements to be paid for by the chiropractor. If the advertisements include an endorsement by the chiropractor, the contemplated referrals by Lawyer to the chiropractor may constitute “payment” to the chiropractor in exchange for that endorsement. As such, all advertisements paid for by the chiropractor that also feature an endorsement would have to disclose the existence of such “payment” to the chiropractor to be in compliance with Rule 7.1(d)(2), although that rule does not require explanation as to the form or nature of such “payment.”

The chiropractor’s payment for advertising creates a potential for a conflict of interest, however, which would occur when “there is a significant risk that the representation... will be materially limited by the lawyer’s responsibilities to... a third person or by a personal interest of the lawyer.” Rule 1.7(a)(2). See also Rule 2.1 (“In representing a client, a lawyer shall exercise independent professional judgment...”). This significant risk may arise in the initial consideration as to whether to refer a client for chiropractic care. As the inquiry correctly suggests, only those clients that Lawyer believes are in actual or potential need of such care should be referred to medical treatment with any chiropractor. Lawyer’s personal desire to generate referrals to the chiropractor to “reward” the investment in

advertising, or spur continued contribution towards future advertisements by Lawyer, should not influence that determination of whether to refer the client for treatment.

This Committee previously addressed an exclusive referral arrangement between a lawyer and a CPA, determining that such an exclusive arrangement would be improper. EAC Opinion # 99-07. Likewise, Lawyer under these circumstances should not refer clients needing treatment to the paying chiropractor exclusively, but instead should advise a client when another provider may be in the client's best interests.

The significant risk contemplated by Rule 1.7 would potentially arise again at the conclusion of many cases, as Lawyer might have a limited or reduced ability to negotiate reduction in a client's medical bills when a lien is asserted by this particular chiropractor. However, it is also conceivable that Lawyer may believe in good faith that his personal relationship with this chiropractor may facilitate, not impair, an ability to secure a reduction in a particular matter because of existing goodwill between the parties.

Thus, even when the lawyer believes earnestly that the contributions from the chiropractor towards advertisements would not materially limit the representation provided by Lawyer, either in initial referrals for treatment, at the end of representation with resolution of any resulting charges related to treatment, or at any point in between, the existence of the potential conflict of interest should be disclosed to clients. If the "lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation," Lawyer should obtain informed consent, confirmed in writing, before the client is referred to, or undergoes treatment by, this chiropractor. Rule 1.7(b).

"Informed consent" is defined as "agreement by a person to a proposed course of conduct after the lawyer has communicated reasonably adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Rule 1.0(g). The nature and extent of communications between Lawyer and a client, and the nature and extent of information shared during those communications, before a client can provide informed consent is highly variable and circumstance specific. Nevertheless, "reasonably adequate information" might include the reasons why chiropractic care is recommended under client's specific factual and legal circumstances. "Material risks" might include discussion as to the potential limited ability of Lawyer to negotiate reductions in medical bills because of his personal financial relationship with the chiropractor. Discussion regarding "reasonably available alternatives" might require communication regarding the availability of other medical providers beyond the recommended chiropractor. In general, Lawyer "shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Rule 1.4(b).