OPINION NO. 184 ISSUED IN 2004 ABOUT A THIRD-PARTY REFERRAL ARRANGEMENT CONTINUES TO PROVIDE RELEVANT GUIDANCE

The economics of the practice of law is evolving in ways that naturally creates pressure on lawyers to seek new sources of revenue. The American Bar Association's Real Property, Trust & Estate Law Section website posted a feature article about the competition presented by technology. [i] The authors noted four primary trends impacting the business of practicing law:

- Direct consumer access to legal information and forms via the internet will translate into less market power for the legal industry.
- Clients increasingly have access to alternative sources for their legal needs, such as accounting firms, in-house lawyers, overseas legal research providers, and internet-based legal talent.
- Clients are disaggregating their legal needs, especially for complex litigation and due diligence, using technology for discovery and due diligence, thus reducing the legal hours required for those tasks.
- Clients, seeking lower and more predictable legal costs, are increasingly revolting against straight hourly billing.

While the nature of the competition and the kinds of options available to clients for reducing legal costs is changing with time, the pressure to operate a nimble law practice and to respond to competing trends with new ways to generate income is timeless – as are the associated ethics constraints on lawyers. An opinion issued by the Professional Ethics Commission fifteen years ago, under the then-applicable Maine Bar Rules, still offers relevant advice. In 2004, the Commission issued Opinion No. 184 to address one means a lawyer explored for generating referral fees to supplement hourly billing for services. The lawyer proposed entering a referral arrangement with an investment advisory firm whereby the lawyer would be an independent contractor paid for referring clients to the advisory firm. Each payment would be based on the value of the client's managed assets and would be made to the lawyer for as long as the client's assets remained under the advisory firm's management.

The Commission concluded that the proposed arrangement violated Maine Bar Rule 3.3(a), which prohibited a lawyer from charging or collecting an excessive fee, and Maine Bar Rule 3.4(f)(2), precluding a lawyer from acquiring a pecuniary interest adverse to a client that is unfair or unreasonable. The proposed arrangement was "plainly excessive," in the Commission's assessment. The lawyer would receive compensation having spent no time or effort on the client's behalf, and the arrangement required the lawyer to exercise no skill or judgment and to assume no responsibility for the quality of the asset management services. Furthermore, the referral fee, although paid by the advisory firm and not the client, was inherently unfair and unreasonable to the client. The arrangement creates an incentive for the lawyer to make recommendations that benefit the advisory firm and the lawyer, without due regard for the best interests of the client. The Commission found the motivations accompanying the referral deal to be "so adverse to the fiduciary relationship that is the foundation of the lawyer's responsibility to the client" that the arrangement was "fundamentally and objectively unfair and unreasonable."

The specific Maine Bar Rules language supporting the Commission's emphatic conclusion about such arrangements appears today in the Maine Rules of Professional Conduct. Rule 1.5(a) contains the same prohibition on agreeing to, charging, or collecting an unreasonable fee, with a somewhat expanded list of factors to be weighed in evaluating the fee arrangement. Rule 1.8(a)(1) prohibits a lawyer from knowingly acquiring an ownership, possessory, security, or other pecuniary interest adverse to a client unless the transaction and terms are fair and reasonable to the client, among other conditions.

Given that the prohibitions in the Maine Bar Rules upon which the Commission relied survived the adoption of the Maine Rules of Professional Conduct in 2009, lawyers currently embarking on the search for new revenue streams should note the unequivocal finding that the proposed third-party referral arrangement violated the ethics rules.

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[i] Horn, Dennis M. and Meislik, Ira, *How to Ride the Coming Tidal Wave of Technology and Competition*, ABA Real Property, Trust & Estate Law Section, Probate & Property Magazine, November/December 2018, https://www.americanbar.org/groups/real_property_trust_estate/publications/probate-property-magazine/2018/november-december-2018/how-ride-coming-tidal-wave-technology-and-competition/ (accessed July 13, 2019).