



Ohio Board of Professional Conduct

OPINION 2020-09

Issued August 7, 2020

Withdraws Adv. Op. 2002-1

Payment of an Annual Fee to a Real Estate Agency for Participation in Benefits Program

SYLLABUS: A law firm may not enter a business agreement to pay an annual fee to a real estate agency and offer discounted legal services to customers of the real estate agency in exchange for the real estate agency promoting the law firm as a service provider in a real estate benefits program.

This nonbinding advisory opinion is issued by the Ohio Board of Professional Conduct in response to a prospective or hypothetical question regarding the application of ethics rules applicable to Ohio judges and lawyers. The Ohio Board of Professional Conduct is solely responsible for the content of this advisory opinion, and the advice contained in this opinion does not reflect and should not be construed as reflecting the opinion of the Supreme Court of Ohio. Questions regarding this advisory opinion should be directed to the staff of the Ohio Board of Professional Conduct.



Ohio Board of Professional Conduct

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QUESTION PRESENTED:

May a law firm enter into a business agreement to pay an annual fee to a real estate agency and to offer discounted legal services to customers of the real estate agency in exchange for the real estate agency promoting the law firm as a service provider in a real estate benefits program?

APPLICABLE RULES: Prof. Cond.R. 1.7, 1.8, 2.1, 5.4, 7.1, 7.2

OPINION: A law firm has been approached by a real estate agency to enter into a business agreement to participate in a real estate benefits program. Under the agreement, the real estate agency would market and advertise the law firm as a service provider in its real estate benefits program. To become a service provider in the real estate benefits program, the law firm would agree to pay the real estate agency an annual fee and to offer a discount of certain legal services to customers of the real estate benefits program. It is anticipated that one or more law firms would participate as providers of legal

services. The company labels the agreement as a “strategic partnership agreement” between the real estate agency and the law firm.

The real estate benefits program is comprised of a concierge program, a relocation program, and an employee benefits program. The real estate agency promotes the service providers through a service provider directory, informational mailings, and live presentations. As a free service, potential or actual customers who contact the real estate agency or visit the agency’s website are given access to a printed or online service provider directory.

The proposed agreement between the real estate agency and the law firm does not obligate the law firm to use the services of the real estate agency, nor does it obligate the law firm to recommend law firm clients to the real estate agency. The law firm and other service providers must agree not to enter other programs that offer services at discounts to local companies as part of a benefits package.

Under the proposed agreement, the law firm would offer a \$100 attorney fee discount in real estate closings for customers in the concierge program. The law firm would offer a similar fee discount for real estate closings or a free initial consultation for other legal services to recipients of the employee benefits program.

Prohibition on Giving a Thing of Value & Misleading Communication About a Lawyer’s Services

Prof.Cond.R. 7.2(b) prohibits a lawyer from giving anything of value to a person for recommending the lawyer’s services. The rule provides certain exemptions for lawyers paying for reasonable costs of advertisements or communications, usual charges of a legal services plan, usual charges of a nonprofit or lawyer referral service registered with the Supreme Court of Ohio, and the purchase price of a law practice in accordance with Prof.Cond.R. 1.17. Although it appears as if the real estate agency and law firm are attempting to form a lawyer referral service through the “strategic partnership agreement,” it falls short of meeting the Gov. Bar R. XVI requirements to establish a legitimate lawyer referral service. As a result, the agreement proposed by the real estate agency does not fit into any of the exceptions to the prohibition found in Prof.Cond.R. 7.2(b). An agreement by a law firm to pay an annual fee to a real estate agency for promoting the law firm as a service provider in its real estate benefits program is the lawyer giving a thing of value to an organization so that it will include the law firm among recommended service providers. For the same reason, a law firm’s agreement to

reduce attorney fees for certain legal services to customers of the real estate benefits program in order to be included in a directory of recommended service providers is giving a thing of value in exchange for the recommendation. Any communication by the real estate agency characterizing the law firm's fees as "discount" or "special" would be misleading and a violation of Prof.Cond.R. 7.1. *Id.* at cmt. [4].

Prohibited Business Relationship

The formation of partnerships between lawyers and nonlawyers, when any of the activities include the practice of law, is prohibited. Prof.Cond.R. 5.4(b). The proposed "strategic partnership agreement" involves activities that consist of the practice of law, such as representing clients participating in the concierge program in real estate closings. The Board has interpreted Prof.Cond.R. 5.4(b) to apply not only to partnerships formed in accordance with state law, but also to business relationships and associations between lawyers and nonlawyers. Adv. Op. 2019-10. Although there is no joint ownership of a business here or an agreement to share profits or losses, the "strategic partnership agreement" is a business agreement that involves the practice of law and is prohibited under Prof.Cond.R. 5.4(b).

Conflicts of Interest

Prof.Cond.R. 1.7(a)(2) prohibits a lawyer from accepting employment if there is a substantial risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's own personal interests. A law firm that pays a real estate agency for promoting the services of the law firm as a recommended service provider has a business interest that may materially limit the lawyer's independent judgment. The law firm may perceive subtle pressure to perform legal services for clients in a manner that pleases the real estate agency to avoid any risk of being excluded as a service provider in the future.

Prof.Cond.R. 1.8(a) is also implicated by the factual scenario. Division (a) provides that a lawyer shall not enter into a business transaction with a client or acquire a pecuniary interest adverse to a client unless certain conditions are met. The Board finds that the business relationship between the lawyer and the real estate agency involves a lawyer's pecuniary interest potentially adverse to a client. The client expects the lawyer to exercise independent professional judgment free of compromise. Prof.Cond.R. 2.1. However, the lawyer's pecuniary interest in the business relationship with the real estate

agency is to receive as many client referrals as possible so as to make enough money from the referrals to cover or exceed the annual membership fee paid by the law firm to the real estate agency. The lawyer's interest in maintaining an appropriate number of referrals from the real estate agency to cover the costs of the annual fee has the potential to impact the lawyer's independent professional judgment. The lawyer may again feel pressure to provide services for clients in a manner that ultimately pleases the real estate agency to avoid any risk of being excluded as a service provider in the future. Furthermore, the terms can never be fair and reasonable to the client as the overriding purpose of the business relationship is to secure business for the lawyer and real estate agency via promotion of and participation in these special programs. See Adv. Op. 2019-10. The client has no ability to participate in any negotiation of the terms of the "strategic business partnership" such as the amount of the annual fee paid for participation or how clients will be directed to the legal services providers. Absent in the description of the program is any consideration of client needs or any attempt to match those needs with particular skill sets of the legal services providers.

Client Consent

The Board is of the opinion that full disclosure and client consent are not permissible in this situation. While Prof.Cond.R. 1.7(b) and 1.8(a) provide for written informed client consent to ameliorate otherwise impermissible conflicts, Prof.Cond.R. 2.1, 5.4(b) and 7.2(b) do not. Because of the joint application of these rules to the issues raised, the full disclosure and consent exceptions applicable to only some of the above referenced rules do not apply.

CONCLUSION: A lawyer may not enter into a "strategic partnership agreement" with a real estate agency for several reasons. First, the partnership agreement as described above violates the advertising rules prohibiting a lawyer from giving anything of value to another in exchange for recommending the lawyer's services and raises concerns about the misleading nature of the proposed communications regarding the lawyer's services. Additionally, the partnership agreement is prohibited, regardless of the legal partnership status under state law, because at least one of the proposed activities of the "strategic partnership agreement" consists of the practice of law. The final consideration remains the conflicts of interest present which are unable to be ameliorated by informed written client consent. A lawyer's ability to maintain independent professional judgment is compromised when a lawyer is involved in a "strategic partnership agreement" as

described above. Thus, a law firm may not enter a business agreement to pay an annual fee to a real estate agency and offer discounted legal services to customers of the real estate agency in exchange for the real estate agency promoting the law firm as a service provider in a real estate benefits program.