

Referral Fees

by Keith A. Call

A lawyer friend in California recently referred a nice piece of work to me. I know referral fees are prohibited, so I thought I would just say “thank you” with a movie gift card. It’s a good thing I started my research for this article before I did that! To my surprise, it turns out the Utah Ethics Advisory Opinion Committee (EAOC) has opined in no uncertain terms, “[M]oney or gift cards are ‘things of value’ and, unless covered by an exception, cannot be given in exchange for a legal referral.” Utah State Bar, Ethics Advisory Opinion Committee, Op. 13-02, ¶ 11 (2013).

The prohibitions and limitations on referral fees are found primarily in rules 1.5 and 7.2 of the Utah Rules of Professional Conduct. Rule 1.5(e) prohibits fee sharing among lawyers who are not in the same firm unless (1) “the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation”; (2) “the client agrees to the arrangement...in writing”; and (3) “the total fee is reasonable.” Utah R. Prof’l Conduct 1.5(e). “Joint responsibility” means that each lawyer individually assumes financial and ethical responsibility for the representation. *Id.* R. 1.5, cmt. [7]. Thus, you would only want to enter into a fee-sharing arrangement with someone you really trust.

Rule 7.2(b) provides, “A lawyer shall not give *anything of value* to a person for recommending the lawyer’s services...” *Id.* R. 7.2(b) (emphasis added.) The rule states four narrow exceptions: (1) “reasonable costs of advertisements”; (2) “the usual charges of a legal service plan or a lawyer referral service”; (3) purchase of a law practice; and (4) division of fees as permitted by rule 1.5(e). *Id.* The broad phrase “anything of value” is what prompted the EAOC to conclude I



cannot give my referring friend a movie gift card.

Some of you lawyers out there have gotten pretty creative with these rules.

One article goes so far as to describe the referral fee ban as a “subterranean competence test: if you can’t see a way round it, you’re not much of a lawyer.” Richard Moorhead, *After*

referral fees – Ethical personal injury practice? LAWYER WATCH, March 21, 2014, available at <http://lawyerwatch.wordpress.com/2014/03/21/after-referral-fees-ethical-personal-injury-practice/>.

For example, in about 2000, a lawyer-referral service tried to get around the referral fee ban by charging a referral fee to the clients, and then recommending that the lawyer discount his fee until the client’s referral fee was reimbursed. Unfortunately for the lawyer referral service (and its referral-receiving lawyers), the EAOC concluded this attempt fails the subterranean competence test. Utah State Bar, Ethics Advisory Opinion Committee, Op. 01-02, ¶ 9 (2001).

The scope of the referral fee ban is surprisingly broad. To help Utah lawyers avoid unpleasant surprises, the accompanying charts spell out some of the specific bans in place as well as conduct that has been ostensibly approved, in EAOC opinions. Of course, the list is not comprehensive, so please read the rules and EAOC opinions and seek individualized help and advice with your own creative ways to avoid the ban.

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PROHIBITED (OR PROBABLY PROHIBITED) CONDUCT	SOURCE
Paying referral fees to another lawyer (unless the standards of rule 1.5(e) are met)	EAOC Op. 121 (1993); EAOC 13-02
Payment of referral fee by client and having lawyer then discount fees until referral fee is reimbursed to client	EAOC Op. 01-02
Discounting fees to participants in a fund raising event for a charitable organization	EAOC Op. 01-02
Discounting a contingency fee charged to a personal injury client referred by accounting firm when client simultaneously enters into contingent fee agreement with referring accounting firm for provision of accounting services based on fee equal to the lawyer's discount	EAOC Op. 01-02
Discounting fees to clients referred by third party while at the same time promoting third party's practice	EAOC Op. 01-02
An arrangement by which a lawyer purchases the exclusive right to receive referrals from a referral organization; to be permissible, lawyer referral service must provide referrals to multiple lawyers and law firms	EAOC Op. 07-01
Giving non-lawyer employees a \$50 bonus for referring cases to the firm	EAOC Op. 13-02
Giving gift certificates or gift cards in exchange for referrals	EAOC Op. 13-02
Indirect or non-monetary compensation for referrals	EAOC Op. 13-02
Providing free legal services in exchange for referrals	EAOC Op. 13-02
Paying a hired marketer a fee or commission each time the marketer brings in a new client	EAOC Op. 13-02
Paying a marketer a fixed salary to contact insurance agents, tow truck drivers, body shop owners, or employees and health care providers to request referrals to the attorney	EACO Op. 13-02
Paying a hired marketer with gift cards each time the marketer brings in a new case	EAOC Op. 13-02
Non-exclusive, announced reciprocal referral agreements, including such agreements with lawyers or non-lawyers	EAOC Op. 13-02
Lawyer's payment of joint advertisements with non-attorney with expectation of future referrals by non-attorney	EAOC Op. 13-02
Paying a non-lawyer marketer based on a percentage of fees paid to the law firm by clients referred by the marketer	EAOC Op. 14-02

PERMITTED CONDUCT	SOURCE
Lawyers divide tasks and allocate fees in proportion to task division and meet requirements of rule 1.5(e)	EAOC Op. 121 (1993)
Lawyers assume "joint responsibility" for the work (fee need not be proportional to lawyers' actual work) and meet requirements of rule 1.5(e)	EAOC Op. 121 (1993)
Paying a fee to a referral organization so long as the fee is not calculated on a per-referral basis. ("If the referral organization consists entirely of lawyers, the payment of the referral fee must comply with the limitations imposed by rule 1.5(e).")	EAOC Op. 01-02
Payment of costs for print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising	EAOC Op. 13-02
Paying others to generate client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, the payment is consistent with rules 1.5 and 5.4, and the lead generator's communications are consistent with rule 7.1	EAOC Op. 13-02
Paying a marketer/paralegal for clerical and case preparation work such as gathering police reports, medical records, etc., under certain conditions	EAOC Op. 13-02
Accepting referrals from employees, so long as the lawyer does not give anything of value for the referral	EAOC Op. 13-02
Compensating employees, agents, and vendors for providing marketing or client-development related services, provided compensation is not based on referrals that come from the services	EAOC Op. 13-02