

NEW YORK STATE BAR ASSOCIATION

Committee on Professional Ethics

Opinion 651 - 6/30/93 (4-93)

Topic: Legal referral service;
division of legal fees.

Digest: Legal referral service
operated, sponsored or
approved by bar association
may require participating
lawyers to remit to the
referral service a percentage
of the legal fees earned from
referrals.

Code: Canon 2 , DR 2-103 (B), 2-
103(C), 2-103 (C)(1), 2-103
(D)(3), 2-106, 2-107, EC 2-
1, 2-15; DR 3-102 (A).

QUESTIONS

- (1) May a bar association operating a legal referral service require lawyers who receive referrals from the service to pay, in addition to or in lieu of a fixed administration fee, a percentage of any fees in excess of \$500 earned from such referrals?
- (2) May the lawyer pass along such a cost to the client?

OPINION

As a general rule, the Code of Professional Responsibility prohibits a lawyer from providing any form of compensation to a person or organization either an an inducement for recommending that the lawyer be employed by a client, or as a reward for having made such a recommendation. DR 2-103(B). Similarly, the Code prohibits a lawyer from asking that a person or organization recommend or promote the use of his or her services (or those of the lawyer's partner, associate or other affiliated lawyer), except through permitted forms of advertising. DR 2-103(C).

An exception, however, permits lawyer referral services that are operated, sponsored or approved by bar associations to recommend the employment of lawyers to potential clients and to be compensation by the lawyer for that recommendation. See DR 2-103(B); DR 2-103(D)(3). Specifically, DR 2-103(C)(1) provides that:

[A] lawyer may request referrals from a lawyer referral service operated, sponsored or approved by a bar association and may pay its fees incident thereto.

Permitting lawyers to contribute to the administrative expenses of a nonprofit lawyer referral service is consistent with the spirit of Canon 2 ("A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available."). As EC 2-15 explains:

The legal profession has developed lawyer referral services designed to aid individuals who are able to pay fees but need assistance in locating lawyers competent to handle their particular problems. Use of a lawyer referral system enables an individual to avoid an uninformed selection of a lawyer because such a system makes possible the employment of competent lawyers who have indicated an interest in the subject matter involved. Lawyers should support the principle of lawyer referral systems and should encourage the evolution of other ethical plans which aid in the selection of qualified counsel.

See also EC 2-1.

The question presented here is whether the language of DR 2-103(C)(1), allowing payment of fees incident to referrals, permits a lawyer to pay a bar association legal referral service a percentage of the fees the lawyer receives from clients referred by the service, as opposed to a flat fee determined per annum, per month, per referral or on some other objective basis not related to actual fees received from particular clients. DR 2-107, which forbids any division of fees with unaffiliated lawyers who do not provide services or assume joint responsibility for the representation, and DR 3-102(A), which bars the division of fees with nonlawyers, would seem to prohibit the payment to the bar association lawyer referral service of a fee based on a percentage of the revenue generated by referrals. Stated differently, the question is whether the exception in DR 2-103(C)(1) permitting lawyers to request referrals from a bar association legal referral service and to pay "its fees incident thereto" supersedes, to that limited extent, the traditional prohibition against fee-splitting and permits the proposed division of fees.

We answer this question in the affirmative. The proposed arrangement does not implicate the valid concerns that led to the adoption of the fee-splitting prohibitions embodied in DR 2-107 and DR 3-102(A). As the court stated in *Emmons, Williams, Mires & Leech v. State Bar of California*, 86 Cal. Rptr. 367 (Ct. App. 1970) (dismissing a law firm's complaint that attacked as unethical fee-splitting a bar association lawyer referral service's claim to a one-third forwarding fee for referred cases):

There are wide differences – in motivation, technique and social impact – between the lawyer reference service of the bar association and the discreditable fee-splitting featured in the disciplinary decisions. Prohibited fee-splitting between lawyer and layman carries with it the danger of

competitive solicitation; poses the possibility of control by the lay person, interested in his own profit rather than the client's fate; facilitates the lay intermediary's tendency to select the most generous, not the most competent, attorney. . . . None of these dangers or disadvantages characterizes the San Joaquin County Bar Association's lawyer reference activity. The bar association seeks not individual profit but the fulfillment of public and professional objectives. It has a legitimate, nonprofit interest in making legal services more readily available to the public. When conducted within the framework conceived for such facilities, its reference service presents no risk of collision with the objectives of the canon on fee-splitting and lay interposition.

Id. at 372-73 (citations omitted).

In our view, it is entirely consistent with the letter and spirit of the Code to allow bar association legal referral services to defray their operating expenses by requiring each participating lawyer to pay a referral fee that is proportionate to the benefit that the lawyer receives by virtue of his or her participation in the service.

Every ethics opinion that has addressed this issue, beginning with ABA Formal Op. 291 (1956), has similarly concluded that bar association lawyer referral services may require lawyers to pay a percentage of the fees generated by referrals as a contribution to expenses. See ABA Informal Op. 1076 (1968); Connecticut Op. 87-9 (1987) indexed in ABA/BNA Lawyer's Manual on Professional Conduct at 901:2055; Kentucky Op. E-288 (1984) indexed in ABA/BNA Lawyer's Manual on Professional Conduct at 801:3910; New Jersey Op. 393 (1978) indexed in Maru's 1980 Supplement to Digest of Bar Association Ethics Opinions at 12116; Ohio Op. 92-1 (1992) indexed in ABA/BNA Lawyer's Manual on Professional Conduct at 1001:6855; Tennessee Formal Op. 88-F-115 (1988) and 88-F-115(a) (1989) indexed in ABA/BNA Lawyer's Manual on Professional Conduct at 901:8103; Wisconsin Op. E-88-8 (1988) indexed in ABA/BNA Lawyer's Manual on Professional Conduct at 901:9108. See also California Op. 1983-70 (1983) indexed in ABA/BNA Lawyer's Manual on Professional Conduct at 801:1605; Maryland Op. 82-35 (1982) indexed in ABA/BNA Lawyer's Manual on Professional Conduct at 801:4317; Chicago Op. 75-38 (1976) indexed in Maru's 1980 Supplement to Digest of Bar Association Ethics Opinions at 11018; Erie County Op. 89-17 (1989).¹

The second question posed is whether the lawyer may pass along this cost to the client. A few ethics committees and one court have opined that lawyers who pay a percentage of the fees they receive to their bar association lawyer referral service must not to any extent pass along the cost of the referral to the client by increasing their hourly rate or the contingent fee percentage, or by other means. According to these authorities, passing along the cost of the referral would be inconsistent with the public interest principles underlying the Code's endorsement of bar association lawyer referral

¹ A lone opinion to the contrary, Illinois Op. 506 (1975), was suspended by the Illinois State Bar Association in 1976, only months after its release.

services. See California Op. 1983-70; Ohio Op. 92-1; Tennessee Op. 88-F-115. See generally *Emmons, Williams, Mires & Leech v. State Bar of California*, 86 Cal. Rptr. at 373. In contrast, Wisconsin Op. E-88-8 suggests that lawyers may increase legal fees charged to referred clients to account for the fee charged by the bar association lawyer referral service, but only if the clients are "informed fully of the arrangements prior to commencement of representation and the clients consent." Other opinions are silent on this issue. See ABA Informal Op. 1076; New Jersey Op. 393; Maryland Op. 82-35; Chicago op. 75-38; Erie County Op. 89-17.

In our view, imposing restrictions on the method, if any, by which the lawyer participating in a bar association lawyer referral service recoups the cost of the referral fees he or she pays has no basis in the Code. The only applicable limitation is DR 2-106, which generally prohibits a lawyer from entering into an agreement for, charging or collecting an illegal or excessive fee. See Kentucky Op. E-288. Provided that the total fee charged to any client does not violate the strictures of DR 2-106, the Code does not prohibit a lawyer from passing along the cost of referrals to his or her clients, whether by taking that cost into account when setting rates for legal services to all clients, or by adding the referral fee to the amount charged to the client who has been referred by the bar association lawyer referral service. The referral service is, of course, free to regulate such practices as a condition of a lawyer's participation, and thereby limit the extent to which referral fees may be passed along to clients. If the referral service permits its fee to be charged through to clients, it should make sure that the potential clients who contact the service are advised that the service is not without charge to them. See DR 2-101(A); see also DR 1-102(A)(4).

CONCLUSION

For the foregoing reasons, the Committee answers the questions presented in the affirmative.

DISSENT

Two members of the Committee dissent from that portion of the opinion that may be interpreted to permit lawyers to increase legal fees charged to referred clients to account for the fee charged by the bar association lawyer referral service. It is their view that permitting lawyers to increase their fees in these circumstances to *any extent* would contravene the public policy favoring greater availability of legal services and the spirit of Canon 2 (see e.g., DR 2-103(B); DR 2-103(C); DR 2-103(D)(3); EC 2-15) and in addition creates an appearance of impropriety in violation of Canon 9. See also EC 9-2 and EC 9-6. Moreover, this would be a violation even in the absence of the express terms of a Disciplinary Rule. As stated in the Code's Preliminary Statement:

No codification of principles can expressly cover all situations that may

arise. Accordingly, conduct that does not appear to violate the express terms of any Disciplinary Rule nevertheless may be found by an enforcing agency to be the subject of discipline on the basis of a general principle illustrated by a Disciplinary Rule or on the basis of an accepted common law principle applicable to lawyers.

This Committee has had a long history² of applying the "appearance of impropriety" proscription of Canon 9 which should not be abandoned or ignored. See *Matter of Kelly*, 23 N.Y.2d 368, 376 (1969); *Cardinale v. Golinello*, 43 N.Y.2d 288, 296 (1977); *Greene v. Greene*, 47 N.Y.2d 447, 451 (1979); *People v. Shinkle*, 51 N.Y.2d 417, 421 (1980); *Thompson U.S. Inc. v. Gossell*, 181 A.D.2d 558, 559, 581 N.Y.S.2d 764, 765 (1st Dept. 1992); *Rose Ocko Foundation. Inc. v. Liebovitz*, 155 A.D.2d 426, 427, 547 N.Y.S.2d 89, 90 (2d Dept. 1989), applying the "appearance of impropriety" rule. The result reached by the dissenters is in accord with Kentucky Op. E-288 (1984); Ohio Op. 92-1 (1992); Tennessee Op. 88-F-115 (1988). *Contra*, Wisconsin Op. E-88-8 (1988). It appears unseemly to permit a lawyer to charge a higher fee for *identical* services performed for a client obtained through a lawyer referral service than for a client who "walked in from the street."

² See, e.g., N.Y. State 65(a) (1970); N.Y. State 132 (1970); N.Y. State 181 (1971); N.Y. State 214 (1971); N.Y. State 300 (1973); N.Y. State 308 (1973); N.Y. State 326 (1974); N.Y. State 367 (1974); N.Y. State 374 (1975); N.Y. State 431 (1976); N.Y. State 497 (1978); N.Y. State 514 (1979); N.Y. State 534 (1981); N.Y. State 548 (1983); N.Y. State 561 (1984); N.Y. State 582 (1987); N.Y. State 596 (1988); N.Y. State 603 (1989); N.Y. State 632 (1992).