

## COMMITTEE ON PROFESSIONAL ETHICS

Opinion 825 – 7/15/08

Topic: Third-party payors; clients referred by, and legal services paid for by, Employee Assistance Program.

Digest: There is no ethical bar to lawyer providing legal services by telephone to client referred to the lawyer, and paid for by, an Employee Assistance Program, nor to accepting ancillary private retention by such clients.

Code: DR 2-103(A), (D), (F)(4); 4-101; 5-101; 5-103; 5-105; 5-105(E); 5-107(A), (B); 5-108; 5-108(A)(2); 6-101. EC 2-34, 8-3.

### QUESTIONS

1. May a lawyer ethically provide legal services via telephone consultation with clients referred by an Employee Assistance Program that pays the lawyer for those services?
2. May the lawyer ethically accept private retention from such employees when their matters cannot be resolved via telephone, and additional legal work not covered by the EAP is required?

### OPINION

3. The evolution of programs intended to make relatively inexpensive legal services available to underserved populations has long been encouraged by the bar.<sup>1</sup> Employee Assistance Programs (EAPs) are employee benefit programs offered by some employers, often in conjunction with a health insurance plan. EAPs are intended to help employees deal with personal problems that might adversely impact their work performance or health. Some EAPs include free or reduced-price legal services offered by one or more lawyers or law firms with which the EAP contracts for this purpose. While employees may be referred to an EAP provider by the employer's human resources department, the employer generally does not otherwise know who is using the program unless there are

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<sup>1</sup> See EC 2-34 and EC 8-3, encouraging lawyers to provide services to persons of limited means.

extenuating circumstances and the proper release forms have been signed.

4. The primary ethical question is one of third-party referral and payment, and provided the Code is in all other respects fully honored, we believe that the proposed arrangement is ethically permissible. A number of the most salient considerations are outlined below.

5. First, while third-party payment for legal services is common, the lawyer receiving such payment must comply with DR 5-107(A) and (B), by making full disclosure to the client and obtaining the client's consent to the arrangement, and ensuring that the employer-payor does not direct or regulate the lawyer's professional judgment or compromise the lawyer's duty to maintain confidences.<sup>2</sup>

6. Second, to the extent the lawyer offers anything of value in exchange for the referral of EAP clients to the lawyer, DR 2-103(F) may be applicable. DR 2-103(F)(4) sets forth the circumstances under which a lawyer may "be recommended, employed or paid by, or may cooperate with," a "bona fide organization which recommends, furnishes or pays for legal services to its members or beneficiaries." As long as the EAP has procedures to provide appropriate relief for employees who assert that representation by counsel furnished by the EAP would be "unethical, improper or inadequate under the circumstances of the matter involved," most EAPs will meet those requirements.<sup>3</sup>

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<sup>2</sup> Cf. N.Y. State 721 (1999) (lawyer may agree to insurance company's requirement that lawyer use a legal research service as long as, *inter alia*, this does not lead to inadequate representation or constrain the lawyer's professional judgment on behalf of the client).

<sup>3</sup> DR 2-103(F)(4)(d). We do not decide in this opinion whether a discount offered by the lawyer to the employer, as the person paying fees for representation of another, would constitute giving something of value to obtain employment by the client, but we merely observe that the requirements of DR 2-103(F)(4) may apply to EAPs. DR 2-103(D) states that "[a] lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment," with certain enumerated exceptions. DR 2-103(F)(4) provides one such exception:

A lawyer or the lawyer's partner or associate or any other affiliated lawyer may be recommended, employed or paid by, or may cooperate with one of the following offices or organizations which promote the use of the lawyer's services or those of a partner or associate or any other affiliated lawyer, or request one of the following offices or organizations to recommend or promote the use of the lawyer's services or those of the lawyer's partners or associate, or any other affiliated lawyer as a private practitioner, if there is no interference with the exercise of independent professional judgment on behalf of the client:

...

Any bona fide organization which recommends, furnishes, or pays for legal services to its members or beneficiaries provided the following conditions are satisfied:

7. Third, the fact that these clients are served by telephone consultations does not limit the lawyer's obligations with respect to conflicts of interest. All of the duties imposed by DR 5-101 (personal interests), DR 5-105 (concurrent representation), DR 5-108 (former client conflicts), and DR 5-102 (lawyer as witness) must be fulfilled. Also, DR 5-105(E) requires that the lawyer keep records sufficient to identify conflicts with respect to these clients.

8. Fourth, the lawyer's duties in respect of client confidences and secrets, as defined in DR 4-101 and DR 5-108(A)(2), must be honored, notwithstanding the brevity of the interaction with these EAP clients.

9. Fifth, the rules on in-person solicitation of work set forth in DR 2-103(A) do not bar in-person or telephone solicitation of existing or former clients, but the lawyer may not seek such work if the particular employee has made known a desire not to be so solicited.<sup>4</sup>

10. Sixth, under DR 6-101, the lawyer must provide competent representation in these matters. A determination that the complexity of a problem is such that a

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- a. Neither the lawyer, nor the lawyer's partner, nor associate, nor any other affiliated lawyer nor any non-lawyer, shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate or affiliated lawyer.
  - b. Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization.
  - c. The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter.
  - d. The legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved by the organization for the particular matter involved would be unethical, improper or inadequate under the circumstances of the matter involved; and the plan provides an appropriate procedure for seeking such relief.
  - e. The lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court or other legal requirements that govern its legal service operations.
  - f. Such organization has filed with the appropriate disciplinary authority, to the extent required by such authority, at least annually a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel and financial results of its legal service activities or, if it has failed to do so, the lawyer does not know or have cause to know of such failure.

<sup>4</sup> DR 2-103(A)(2)(b).

telephone consultation will be insufficient must be communicated to the client. As we opined in N.Y. State 664 (1994), “[c]ompetent representation in a particular [telephone consultation] may require” a great deal more than merely providing general legal advice. Any limitation on the scope of the advice offered must be disclosed.

11. Finally, although we do not opine on issues of law, we note that New York’s engagement-letter rules, found at 22 NYCRR Part 1215, may require the lawyer to set forth the scope of the engagement and the billing arrangement (among other things) in an engagement letter to, or retainer agreement with, the employer. Those rules also may require a separate letter to, or retainer agreement with, the employee-client for any matters undertaken that are to be paid for by the employee-client if the fees from that separate engagement are expected to amount to \$3,000 or more.

12. We assume in respect of the second question that the EAP has no objection to the lawyer accepting private retention from its referred clients. If that is correct, and the lawyer does not improperly seek to be paid separately for work covered by the EAP, we see no reason under the Code why the lawyer may not accept such work.<sup>5</sup>

## **CONCLUSION**

13. Subject to the conditions described above respecting compliance with all relevant Code provisions, the two questions are answered in the affirmative.

(1-08)

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<sup>5</sup> Cf. N.Y. State 810 (2007) (outlining circumstances in which *public* officer or government-employed lawyer, and private contractors working for county legal services office, may represent those encountered through a legal services program).