

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 91-19

Issued August 16, 1991

[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

[Not current-subsequent rule amendments to DR 2-103, eff. Jul. 1, 1996.]

SYLLABUS: It is improper for a lawyer providing pro-bono legal services to a non-profit social service agency to make periodic voluntary contributions to the agency while receiving client referrals from the agency which result in both pro-bono and fee generating work. The periodic voluntary contributions give the appearance of and could be considered as giving compensation or value in return for referrals which result in both pro-bono and fee generating cases for the attorney in violation of DR 2-103(B). Such conduct also creates an appearance of impropriety under Canon 9.

This opinion does not address referrals from organizations described within DR 2-103 (D) (1) through (4) of the Code of Professional Responsibility. This opinion does not disapprove of attorneys maintaining ongoing professional relationships with social service agencies or in volunteering their time in pro-bono legal work or in serving the disadvantaged. See EC 2-24.

OPINION: The question presented is whether it is proper for an attorney to receive referrals resulting in both pro-bono and fee generating cases from a non-profit tax exempt social service agency funded solely by the private sector through gifts and foundations when the attorney provides pro-bono legal services to the agency and makes annual contributions to the agency.

According to the facts presented, the agency is a non-profit, tax exempt agency funded solely by the private sector through gifts and foundations. The agency provides a pregnancy-parenting counseling service which includes a broad range of services including pregnancy testing, counseling, coordination with other public and private social service agencies, material assistance and educational services. It is not a membership organization and does not charge clients for its services. The agency is not a legal referral agency, but does make occasional referrals to several attorneys when a pregnant client chooses to place a child for adoption and prefers to do so through private placement. The attorneys receiving referrals are neither officers nor members of the Board of the agency.

The non-profit social service agency is not an organization identified within DR 2-103 (D) (1) through (4) of the Code of Professional Responsibility (Code) for which the Code makes some exceptions with regard to recommendations of professional employment. The excepted organizations, listed in DR 2-103(D) (1) through (4), are a legal aid office or public defender office; a military legal assistance office; a lawyer referral service operated, sponsored, or approved by a bar association; or a bona fide organization meeting the conditions described within DR 2-103 (D) (4) (a) through (g) of the Code. This opinion does not address situations involving these excepted organizations. See Ohio Sup.Ct, Op. 91-17 (1991) which addresses referrals from excepted organizations identified by the Code.

Disciplinary Rule 2-103 (B) of the Code provides that "[a] lawyer shall not compensate or give any thing of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client, except that he may pay the usual fees or dues charged by any of the organizations listed in DR 2-103 (D)." Ethical Consideration 2-8 acknowledges that selection of a lawyer by a layman is often the result of advice and recommendation of third parties, and asserts that a layman is best served by a recommendation that is disinterested and informed. Ethical Consideration 2-8 also cautions that in order for a recommendation to be disinterested, a lawyer should not seek to influence another to recommend his employment, nor should a lawyer compensate another for recommending the lawyer. Canon 9 of the Code requires that "[a] lawyer should avoid even the appearance of professional impropriety." Disciplinary Rule 5-101 (A) requires that, except with consent after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of the client will be or reasonably may be affected by his financial, business, property, or personal interests.

Disciplinary Rule 2-103 (B) regulates solicitation through intermediaries--third parties interposed between a lawyer and the client or potential client. Behind this rule lies a broad concern that a lawyer will circumvent a disciplinary rule through the actions of another by improper solicitation of legal business through third parties. Such circumvention of a disciplinary rule is specifically prohibited by DR 2-102 (A) (2). A more specific concern is the potential for an intermediary to control a lawyer's professional representation of a client and in essence, to regulate and control the delivery of legal services. Annotated Code of Professional

Responsibility 85, 86 (1979). Thus, under DR 2-103 (B), the intermediary arrangement is improper when the intermediary receives from the attorney compensation or something of value to recommend or secure his employment or as a reward for having made a recommendation which results in employment. There is an exception within DR 2-103 (B) which allows attorneys to pay reasonable fees or dues charged by certain types of organizations identified in DR 2-103 (D); however, this exception is not applicable to this opinion because the agency is not one of the organizations identified by the Code.

Several states have addressed related issues. With regard to accepting referrals from a lay intermediary, one state ethics committee has stated that a mediation and counseling service may refer clients to a law firm provided the firm does not pay a referral fee, the fees paid for the legal service come from the client, and the lawyers exercise independent professional judgment. Virginia State Bar, Op. 512 (1983). Another state ethics committee has advised that a law firm may accept clients referred by a lay intermediary only if the firm takes no part in the solicitation, the firm's name is not used in the solicitation, the activities of the lay intermediary do not constitute unauthorized practice of law, and the intermediary does not control the relationship between that attorney and client. State Bar of Arizona, Op. 83-19 (1983). Another state advises that an attorney may accept referrals from a church to furnish free legal services to those who cannot afford to pay for it provided the attorney does not pay or give anything of value to the church for the referral, the attorney makes no request to anyone to recommend or promote the use of his services, the attorney recognizes the church is not the client, the church does not interfere with the exercise of the attorney's independent professional judgment, the church asks the client if he/she has a choice of counsel, and the attorney accepts only those clients who are unable to pay. Kansas Bar Ass'n, Op. 81-32 (1981).

With regard to what would be considered something of value, one state has opined that a lawyer may not draft free wills for clients referred by a savings and loan association because the lawyer would in effect be giving something of value to another person for recommending the lawyer. Nebraska State Bar Ass'n, Op. 81-12 (undated). Another ethics committee has advised that a lawyer's voluntary periodic contributions to an organization which refers its clients to the lawyer violates the intent of prohibition on solicitation. Illinois State Bar Ass'n, Op. 827(1983).

The opinion of this Board is that it is improper for a lawyer providing pro-bono legal services to a non-profit social service agency to make periodic voluntary contributions to the agency while receiving client referrals from the agency which result in both pro-bono and fee generating work. The periodic voluntary contributions give the appearance of and could be considered as giving compensation or value in return for referrals which result in both pro-bono and fee generating cases for the attorney in violation of DR 2-103 (B). Such conduct also creates an appearance of impropriety under Canon 9. The conduct also raises a question under DR 5-101 (A) of whether the lawyer's exercise of professional judgment on behalf of the client will be or reasonably may be affected by his own financial, business, property, or personal interests.

This opinion applies to agencies which are not excepted from the Code's DR 2-103 restrictions regarding recommendations of professional employment. This opinion does not disapprove of attorneys maintaining ongoing professional relationships with social service agencies or in volunteering their time in pro-bono legal work or in serving the disadvantaged. See EC 2-24.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.