

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OFFICE OF SECRETARY

OPINION 95-6

Issued June 2, 1995

[Withdrawn- by Board on October 10, 1997 due to amended DR 2-103 and 3-102, eff. July 1, 1996.]

SYLLABUS: It is improper for an attorney to pay a non-profit organization other than a bar association a percentage of the legal fee earned from a referred client.

OPINION: Organizations that provide services to the public sometimes establish a network of referral attorneys to provide legal services to individuals that contact the organization for assistance. This opinion addresses an attorney's participation as a referral attorney for a non-profit organization other than a bar association. The question relates to the propriety of an attorney agreeing to divide legal fees with the organization.

Is it proper for an attorney to pay a non-profit organization other than a bar association a percentage of the legal fee earned from a referred client?

Recommendations of professional employment are regulated by DR 2-103 of the Ohio Code of Professional Responsibility. Under DR 2-103 (C) a lawyer may request referrals from certain persons or organizations--bar association referral services and organizations identified in DR 2-103 (D).

DR 2-103 (C) A lawyer shall not request a person or organization to recommend or promote the use of his [her] services or those of his [her] partner or associate, or any other lawyer affiliated with him [her] or his [her] firm, as a private practitioner, except that:

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

(2) He [she] may cooperate with the legal service activities of any of the offices or organizations enumerated in DR 2-103 (D) (1) through (4) and may perform legal services for those to whom he [she] was recommended by it to do such work if:

(a) The person to whom the recommendation is made is a member or beneficiary of such office or organization; and

(b) The lawyer remains free to exercise his [her] independent professional judgment on behalf of his [her] client.

Under DR 2-103 (B) a lawyer may pay usual and reasonable fees to organizations listed in DR 2-103 (D).

DR 2-103 (B) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his [her] employment by a client, or as a reward for having made a recommendation resulting in his [her] employment by a client, except that he [she] may pay the usual and reasonable fees or dues charged by any of the organizations listed in DR 2-103 (D).

Set forth in DR 2-103 (D) are the organizations from which an attorney may receive referrals and pay usual and reasonable fees.

DR 2-103 (D) A lawyer shall not knowingly assist a person or organization that furnishes or pays for legal services to others to promote the use of his [her] services or those of his [her] partner or associate or any other lawyer affiliated with him [her] or his [her] firm except as permitted in DR 2-101 (B). **However, this does not prohibit a lawyer or his [her] partner or associate or any other lawyer affiliated with him [her] or his [her] firm from being recommended, employed or paid by, or cooperating with, assisting and providing legal services for, one of the following offices or organizations that promote the use of his [her] services or those of his [her] partner or associate or any other lawyer affiliated with him [her] or his [her] firm if there is no interference with the exercise of independent professional judgment in behalf of his [her] client.** [Emphasis added].

(1) A legal aid office or public defender office:

(a) Operated or sponsored by a duly accredited law school.

(b) Operated or sponsored by a bona fide non-profit community organization.

(c) Operated or sponsored by a governmental agency.

(d) Operated, sponsored, or approved by a bar association.

(2) A military legal assistance office.

(3) A lawyer referral service operated, sponsored, or approved by a bar association.

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

(a) Such organization, including any affiliate, is organized and operated that no profit is derived by it from the rendition of legal services by lawyers, and that, if the organization is organized for profit, the legal services are not rendered by lawyers employed, directed, supervised or selected by it except in connection with matters where such organization bears ultimate liability of its member or beneficiary.

[(b) through (e) omitted.]

(f) The lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court and other legal requirements that govern its legal service operations.

(g) Such organization has filed with the Supreme Court of Ohio on or before January 1 of each year a report with respect to its legal service plan, if any, 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.

In Opinion 92-1, this Board narrowly advised that attorneys may pay bar association referral services a percentage of legal fees earned from clients referred. The linchpin of the opinion was the language of DR 2-103 (C) (1). The rule specifically permits an attorney to pay a bar association referral service "its fees incident thereto." Taking into consideration the role of the bar association in assisting the legal profession

to make legal services available to the public and reading the permissive language in DR 2-103 (C) (1) in harmony with DR 2-103 (B), this Board viewed percentages of legal fees paid to bar association referral services as "usual and reasonable fees." See Ohio SupCt, Bd of Comm'rs on Griev & Disc, Op. 92-1 (1992).

Outside the context of a bar association referral service, there is no basis within the rules for permitting a lawyer to pay a referral source a percentage of legal fees earned from client referred. In fact, to pay other organizations a percentage of a legal fee earned from a client referred would violate several disciplinary rules, DR 2-103 (B), 3-102 (B), and possibly DR 2-104 (D) (4) (a).

Under DR 2-103 (B), the payment to an organization, other than a bar association, of a percentage of a legal fee earned from a client referred would not be a "usual and reasonable" fee. An amount based upon a percentage of a legal fee earned from a client is not a "reasonable" amount because it has no nexus with the organization's costs, if any, of making the referral. Such percentage amount is not "usual" because it contravenes the Code's prohibition against sharing fees with non-lawyers.

Under DR 3-102, a lawyer is prohibited from sharing legal fees with a non-lawyer.

DR 3-102 (A) A lawyer or law firm shall not share legal fees with a non-lawyer, except that:

- (1) An agreement by a lawyer with his [her] firm, partner, or associate may provide for the payment of money, over a reasonable period of time after his [her] death, to his [her] estate or to one or more specified persons.
- (2) A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer.
- 3) A lawyer or law firm may include non-lawyer employees in a retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

None of the exceptions within DR 3-102 (A) permits the sharing of fees with a referral source. The prohibition on fee-splitting with non-lawyers protects clients. It discourages referrals based on financial motives rather than a

client's best interest and it decreases the likelihood that legal fees will increase to compensate for the money paid to the referral organization.

The payment of a percentage fee to a non-profit organization might also violate DR 2-103 (D) (4) (a). The requirement of DR 2-103 (D) (4) (a) is that "[s]uch organization, including any affiliate, is so organized and operated that no profit is derived by it from the rendition of legal services by lawyers, and that, if the organization is organized for profit, the legal services are not rendered by lawyers employed, directed, supervised or selected by it except in connection with matters where such organization bears ultimate liability of its member or beneficiary."

As to other authorities, the State Bar of Texas advises that a lawyer may not share legal fees awarded in a civil rights case with a non-profit public interest organization that refers cases to a lawyer as a cooperating attorney. See State Bar of Texas, Op. 503 (1994). The Standing Committee on Ethics and Professional Responsibility of the American Bar Association advises that "neither the Model Rules nor the Model Code prohibits lawyers from participating in a legal services program sponsored by a bona fide nonprofit corporation that merely supplies an inquirer with the names of attorneys who have volunteered to be available to assist a class of persons who may be in need of legal assistance." ABA, Informal Op. 85-1512 (1985). A factual basis of that opinion was that the organization would not share in any portion of the fee received by the referral attorney. Id.

For the reasons stated above, the Board considers the sharing of a percentage of a legal fee with a DR 2-103 (D) organization, other than a bar association, as a prohibited compensation under DR 2-103 (B) rather than as a usual and reasonable fee. The Board also views the sharing of a percentage of a legal fee with a DR 2-103 (D) organization, other than a bar association, as an improper division of a fee with a non-lawyer under DR 3-102 (A). In addition, the sharing of a percentage of a legal fee with a DR 2-103 (D) organization, other than a bar association, might violate DR 2-103 (D) (4) (a) if the organization is non-profit but derives profit from the rendering of legal services. In conclusion, the Board advises that it is improper for an attorney to pay a non-profit organization other than a bar association a percentage of the legal fee earned from a referred client.

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.