

Alabama
Formal and Informal Opinions

Ethics Opinion
RO-95-08
Mobile Bar Association

QUESTION:

"The Mobile Bar Association requests an ethics opinion regarding the implementation of percentage fees in its Lawyer Referral and Information Service program. Our program has been in operation since 1979.

The goal of the Mobile Bar Association Lawyer Referral and Information Service is to increase the number of clients served by the program, improve the assistance provided, protect consumers from private firms promoting themselves to the public as lawyer referral without the proper public service component and facilitate client access to appropriate legal services. Although the lawyer referral services are considered to provide a benefit to its attorney members, the primary purpose is public service. Without lawyer referral, thousands of people would be without an agency to turn to for legal assistance. Lawyers, already perceived as expensive and inaccessible, would be even further removed from the public they are supposed to service. The lawyer referral service reaches out to bridge the gap between attorneys and the public. By providing a valued service, the bar enhances its image as a public spirited organization, concerned about the community in which it exists.

In order to provide a high quality standard of service to the public and the attorney LRS members, the Mobile Bar Association wishes to refine its program from a shoebox style program and bring it into the computer age. That, of course, takes funding. This funding can be realized by implementing a percentage fee program. Ethics opinions across the United States have consistently held that a percentage program is a legitimate way for a lawyer referral service to generate income when the funds are used to defray the cost of operating the service. Rule IX of the Model Supreme Court Rules Governing Lawyer Referral and Information Services (see attached) states:

'A qualified service may, in addition to any referral fee, charge a fee calculated as a percentage of legal fees earned by any lawyer panelist to whom the service has referenced a matter. The income from any such percentage fee shall be used only to pay the reasonable operating expenses of the service and to fund public service activities of the service or its sponsoring organization, including the delivery of pro bono legal services.'

The ABA's Survey of Lawyer Referral Services also reports that nearly half of all bar-sponsored services and all of the services that are self-supporting have a percentage fee program.

The percentage fee structure requires that participating attorneys remit a portion of their fee from a LRIS referral to the service - this could be a flat percentage fee (e.g. charging attorneys 10% to 15% of all fees received) or a sliding scale (e.g. charging 5% of the first \$ 1,000 received and 10% of all fees thereafter), depending upon the decision of the local LRS governing body. The ABA has issued an ethics opinion (see attached) upholding such fees as ethical under the ABA's Model Rules of Professional Conduct.

The Mobile Bar Association Lawyer Referral and Information Service's operating rules and procedures are patterned after the ABA's Model Supreme Court Rules Governing Lawyer Referral and Information Service. Mobile's LRS program is supported and operated by the Mobile Bar Association under its Executive Committee, with the immediate supervision of operation provided by the MBA's standing committee on LRIS, currently chaired by Daniel L. McCleave. Attorney Panel members are required to furnish proof of malpractice insurance; certify that he or she is competent to handle the matters listed; and submit a waiver of the confidentiality of the grievance process, so that the LRS may check with the grievance committee as to whether the attorney has been the subject of any complaints or disciplinary action. The proposed basic fee structure of the MBA program would be: yearly registration fee (between \$ 80 and \$ 130) payable to LRS; initial consultation fee (between \$ 15 and \$ 25) payable to the attorney; and the percentage fee payable to

LRS. Increased revenue from the percentage fee will eventually allow LRS to be completely self-supporting as well as provide necessary funds to computerize, expand public relations activities (including written brochures), increase advertising in the Yellow Pages and enhancing the Pro Bono Program."

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ANSWER:

A percentage fee program is an ethically permissible way to generate funds for a lawyer referral service, as long as the income generated thereby is used to defray the costs of operating the service or to support other public service programs.

DISCUSSION:

As cited in your opinion request, the American Bar Association, in Informal Opinion 1076, dated October 8, 1968, addressed an inquiry as to whether members of a lawyer referral plan could assist in the financing of that service, either by a flat fee or by a sliding scale charge based on the fees derived by the panel members from the cases referred to them. The ABA replied that such an arrangement, if under the control of the association setting it up, would be permissible under then Canon 34. This opinion referred also to Formal Opinion 291 of the ABA dated August 1, 1956, wherein it was determined that a bar association could require members of a lawyer referral panel to help finance that program either by a flat charge or a percentage of fees collected.

This opinion is consistent also with the ABA's Model Supreme Court Rules Governing Lawyer Referral and Information Service referenced in your opinion request. As stated in this Model Rule, as well as ABA opinions and opinions of other jurisdiction, supervision and control over such a program by your local bar association is the primary requirement and essential element of such a program. This would appear to be the underlying foundation for the Model Rule and the opinions which allow the operation of such a service and its funding on a percentage of fees basis.

Based on the facts recited in your opinion request to the effect that the Mobile Bar Association Lawyer Referral and Information Service is supported and operated by the Mobile Bar Association under its Executive Committee, with immediate supervision of operation provided by the Mobile Bar Association Standing Committee on Lawyer Referral and Information Service, the appropriate safeguards appear to already be in place and operational. The requirement that participating members of the referral service furnish proof of malpractice insurance, certify that they are competent to handle the matters listed, and submit a waiver of confidentiality of the grievance process so as to allow a background check concerning any possible prior disciplinary history of the participating members further buttresses the reliability and accountability of such a program.

In a recent ABA PAR report dated August 1, 1995, addressing the Alabama State Bar Lawyer Referral Service program, the following language is found:

"Implementation of a percentage program for all referred cases is inherently fair, since attorneys are only required to remit fees to the service when they have obtained a fee generating case.

The PAR consultants further suggest that the ASB LRS set a minimum 'threshold' amount, and exempt fees below that amount from the percentage due to the Service; for all fees above the threshold, the percentage on the full fee should be assessed."

The report continues:

"Management of a percentage fee program must include procedures that track each referral, regularly follow up on case status, and survey the client as well as the attorney to determine what fees have been paid."

The report further recommends that all members be required to report the amount of fees received through retained referred cases, and that sufficient staff and resources be dedicated to a follow-up procedure which would insure that accurate and timely reporting of relevant referral information be maintained by the referral service, and be required of the members participating in such a program or plan. In order to allow such a process to effectively function, it would be essential that all attorneys who participate in such a program strictly comply with the requirements of the reporting procedures implemented by your committee to insure validity, accountability and reliability. The PAR report even suggests that the ASB LRS promulgate and enforce a rule requiring the suspension and ultimate removal of any attorney who fails to timely respond to case status inquiries.

Copies of this report will be available to the members of your committee upon request. You are encouraged to disseminate this information to all who are a part of the committee itself, as well as each attorney who would participate in such a plan.