

Ohio
Formal and Informal Opinions

Opinion 92-1
Issued February 14, 1992

SYLLABUS: A bar association through its lawyer referral service assists the legal profession in fulfilling its duty to make legal counsel available to the public. Since Disciplinary Rule 2-103(C)(1) expressly allows a lawyer to request referrals from a lawyer referral service operated, sponsored, or approved by a bar association and to pay the fees incident thereto, it is not unethical for a bar association to require a lawyer to pay to the association a percentage of the legal fees earned from clients referred if needed to support this service to the public. The permissive language of Disciplinary Rule 2-103(C)(1) persuades the Board to view such payments as usual and reasonable fees or dues under Disciplinary Rule 2-103(B). However, such an arrangement is approved only when several conditions are met. The participating attorney must not raise rates to cover the amount paid to the service. The funds should be used to cover administrative costs of operating the service and for educating the public on the availability of legal services.

The requirement that a lawyer who accepts referrals must, if the client desires, submit any fee dispute to arbitration by the appropriate fee dispute committee of the bar association does not interfere with the attorney's independent professional judgment in behalf of the client, and in addition, this requirement promotes the spirit of Ethical Consideration 2-22.

The requirement that a lawyer accepting referrals from a bar association's lawyer referral service must co-counsel on referred matters only with other attorney members of the referral panel is improper because it allows persons other than the client to influence, direct or regulate an attorney's professional judgment in rendering legal services in violation of Disciplinary Rule 5-107(B) and interferes with an attorney's independent professional judgment in behalf of the client as prohibited by Disciplinary Rules 2-103 (C)(2)(b) and (D).

OPINION: Three related questions are addressed in this opinion.

1. May a bar association require a lawyer to pay to the bar association a percentage of the legal fee that the lawyer earns from a client referred by the bar association's lawyer referral service?
2. May a bar association require the lawyer accepting referrals from the bar association's lawyer referral service to submit, if the client desires, any fee dispute to arbitration by the appropriate fee dispute committee of the bar association?
3. May a bar association require the lawyer accepting referrals from the bar association's lawyer referral service to co-counsel on referred matters with only other attorney members of the referral panel?

Initially, the Board notes that the Code of Professional Responsibility governs "the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession." Therefore, the Code's primary concern is with the conduct of lawyers. Although the questions are phrased by the requester as to what the bar association may require of a lawyer, the questions are answered by a consideration of what the Code permits a lawyer to do.

QUESTION 1

Lawyers are encouraged to make legal services available to the public. See Code of Professional Responsibility, Canon 2, EC 2-1, 2-14, and 2-24. A bar association through its lawyer referral service provides a valuable contribution to society by assisting the legal profession in making legal services more accessible to the public. This common aspirational goal creates a special relationship between lawyers and bar associations.

The disciplinary rules governing the referral relationship between lawyers and bar associations are set forth below as exceptions to the Code's general prohibitions regarding referrals.

DR 2-103(B) 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 and reasonable fees or dues charged by any of the organizations listed in DR 2-103(D). [Organizations listed in DR 2-103(D) are as follows: (D)(1), a legal aid office or public defender office; (D)(2), a military legal assistance office; (D)(3), a lawyer referral service operated, sponsored, or approved by a bar association; (D)(4) any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries and which meets conditions set forth in the Code.] (Emphasis added).

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

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

DR 2-104(A) A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that:

(2) A lawyer may accept employment that results from his participation in activities designed to educate laymen to recognize legal problems, to make intelligent selection of counsel, or to utilize available legal services if such activities are conducted or sponsored by any of the offices or organizations enumerated in DR 2-103(D)(1) through (5) [sic] to the extent and under the conditions prescribed therein. (Emphasis added).

There is no guidance within Ohio's Code of Professional Responsibility as to meaning of "usual and reasonable fees or dues" as used in Disciplinary Rule 2-103(B). Nor, is there a description of what constitutes "fees incident thereto" as used in Disciplinary Rule 2-103(C)(1).

The American Bar Association has twice expressed the view that a bar association's referral panel may require members of a lawyer referral panel to help finance the service by either a flat charge or a percentage of fees collected. ABA, Committee on Professional Ethics and Grievances, Formal Op. 291 (1956), ABA, Committee on Ethics and Professional Responsibility, Informal Op. 1076 (1968). In both opinions it was stated that

the financing of the plan should be under the control of the association setting it up. Registrants may be required to contribute to the expense of operating it by a reasonable registration charge or by a reasonable percentage of fees collected by them. The latter arrangement would not, in the opinion of the Committee[s], constitute a violation of Canon 34 [Former Canon 34 stated that "no division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility."]

Id.

These ABA opinions precede the Model Code and provide limited guidance on the issue. Even so, they are often cited by ethics committees to support advice that payment to an approved lawyer referral service of a reasonable percentage of the fees earned is permissible if related to the expenses of the service and if the attorney does not raise rates to cover the amount paid to the service. Tennessee Sup.Ct, Bd. of Professional Responsibility, Formal Op. 88-F-115 (1988), Formal Op. 88-F-115(a) (1989), State Bar of Wisconsin, Formal

Op. E-88-8(1988), Kentucky Bar Ass'n, Op. E-288 (1984), State Bar of California, Formal Op. 1983-70 (1983), and Chicago Bar Ass'n, Op. 87-1 (undated) (The Chicago opinion did not raise the issue of an attorney raising rates to cover amounts paid to the service. The Chicago committee advised that "reasonable limits must be placed on percentages applicable to matters handled on a contingent fee basis.") An opinion issued by the Illinois Bar Association, Opinion 506 (1975), advising that such a payment to a referral service of fees earned from clients referred was an improper division of fees, has been suspended.

More recently, the ABA, in its Statement of Standards and Practices for a Lawyer Referral and Information Service (1985), has given continued approval to lawyer referral services requiring lawyers to pay to the service fees computed on a percentage basis or otherwise (Rule 8.1) but has expanded its guidelines as to the referral service's use of the proceeds to include support of activities or programs in the public interest (Rule 8.3).

The Board acknowledges that there are administrative costs of operating an efficient lawyer referral service. Since the bar association assists the legal profession in fulfilling its duty to make legal services available to the public, the bar has a professional interest in the ongoing success of a bar association's lawyer referral service. Therefore, it may be "usual and reasonable" within the meaning of Disciplinary Rule 2-103(B) for a bar association to require a lawyer to pay to the association a percentage of fees earned from clients referred, if needed to support this service to the public.

Nevertheless, there remains a concern whether payment to a bar association of a percentage of a legal fee that the lawyer earns from a client referred by the lawyer referral service constitutes an improper division of fees under the Code. For purposes of analysis the disciplinary rules governing the division of fees are set forth below.

DR 2-107(A) Division of fees by lawyers who are not in the same firm may be made only with the prior consent of the client and if all of the following apply:

- (1) The division is in proportion to the services performed by each lawyer or, if by written agreement with the client, all lawyers assume responsibility for the representation;
- (2) The terms of the division and the identity of all lawyers sharing in the fee are disclosed in writing to the client;
- (3) The total fee is reasonable.

[DR 2-107(B) and (C) omitted]

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 firm, partner, or associate may provide for the payment of money, over a reasonable period of time after his death, to his 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.

Neither rule cited above seems applicable to a bar association. Disciplinary Rule 2-107 by its language applies to division of fees by lawyers not in the same firm. As defined within the Definitions Section of the Code, "law firm includes a professional legal corporation or a legal clinic." Although most of its members are

lawyers, a bar association as an organization is not a lawyer, a law firm, a professional legal corporation, or a legal clinic. Further, the rule cannot be applied as it places conditions on the division of fees which a bar association could not undertake, for example, performing legal services for a client or assuming responsibility for representation of a client.

If, on the other hand, bar associations are viewed as non-lawyers, it would be improper under Disciplinary Rule 3-102 for a lawyer to divide a legal fee with a bar association, since they are not listed as an exception within the rule. However, this application of the rule to bar associations seems inconsistent with Disciplinary Rule 2-103(C) which permits lawyers to request referrals and to pay the fees incident thereto. Such application contradicts the Code's consistent encouragement to a lawyer to make legal services available to the public and to cooperate with a lawyer referral service operated, sponsored, or approved by a bar association. DR 2-103(B), 2-103(C)(1), 2-103(D), 2-104(A)(2), EC 2-1, 2-14, 2-24.

The policy behind fee-splitting is to prevent potential dangers to clients. These dangers can occur through improper referral based on financial motives rather than a client's best interest and through referrals that result in an attorney increasing the cost of legal services to the client in an effort to recoup the money paid to the referral service.

In Ohio there are no cases addressing the propriety of a bar association requiring a lawyer to pay it a percentage of legal fees earned from clients referred. A California Court of Appeal, affirming a summary judgment requiring plaintiffs to pay a bar association a one-third forwarding fee arising from legal business which originated with the bar association's lawyer reference service, did not find such arrangement to offend the public policy underlying the canons on fee-splitting and lay interposition. *Emmons, Williams, Mires & Leech v. State Bar of California*, 6 Cal. App. 3d 565, 573-75 86 Cal Rptr. 367 (Cal. Ct. App. 1970).

The *Emmons* court recited the dangers of discredited fee-splitting between a lawyer and a layman: the danger of competitive solicitation; the possibility of control by the lay person interested in his or her own profit rather than the client's fate; facilitation of the lay intermediary's tendency to select the most generous, not the most competent, attorney; and the presence of a party demanding allegiance the lawyer owes the client. *Id.* at 573-74. The court did not find these dangers or disadvantages to characterize the bar association's lawyer reference service. The court acknowledged that the bar association sought fulfillment of public and professional objectives, not individual profit and that it had a legitimate, non-profit interest in making legal services more readily available to the public. *Id.* at 574.

This Board agrees that the dangers of fee splitting cited above do not characterize a referral service operated, sponsored, or approved by a bar association. The Board reaches this conclusion only when certain conditions are met. There must be an affirmative showing that participating lawyers do not raise their attorney fee rates to cover the amount paid to the referral service. Moreover, the funds generated must be used to cover the administrative costs of operating the service and for educating the public on the availability of legal services.

The Board acknowledges that a bar association through its lawyer referral service assists the legal profession in fulfilling its duty to make legal counsel available to the public. The Board advises that since Disciplinary Rule 2-103(C)(1) expressly allows a lawyer to request referrals from a lawyer referral service operated, sponsored, or approved by a bar association and to pay the fees incident thereto, it is not unethical for a bar association to require a lawyer to pay to the association a percentage of the legal fees earned from clients referred if needed to support this service to the public. The permissive language of Disciplinary Rule 2-103(C)(1) persuades the Board to view such payments as usual and reasonable fees or dues under Disciplinary Rule 2-103(B). However, since the Code disapproves of lawyers sharing legal fees with non-lawyers and restricts the division of fees among lawyers, it would assist the profession for bar associations to seek clarification as to its position through rule amendment.

QUESTIONS 2 AND 3

These two questions are discussed together, because both raise similar ethical concerns with regard to potential interference with a lawyer's professional judgment. Disciplinary Rule 5-107(B) requires that "[a] lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services." Ethical Considerations 5-21, 5-22, and 5-23 caution attorneys to avoid being influenced by others than clients. Disciplinary Rules 2-103(C)(2) and 2-103(D), set forth below, also require that there be no interference with professional judgment.

DR 2-103(C)(2) [A lawyer] 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 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 independent professional judgment on behalf of his client. (Emphasis added).

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 services or those of his partner or associate or any other lawyer affiliated with him or his firm except as permitted in DR 2-101(B). However, this does not prohibit a lawyer or his partner or associate or any other lawyer affiliated with him or his 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 services or those of his partner or associate or any other lawyer affiliated with him or his firm if there is no interference with the exercise of independent professional judgment in behalf of his client:...[a lawyer referral service operated, sponsored, or approved by a bar association is an organization listed in DR 2-103(D)(3). (Emphasis (added)).

The purpose of requiring a lawyer who accepts referrals to submit any fee dispute to arbitration by the appropriate fee dispute committee of the bar association, if the client desires, is to honor the client's wishes to mediate such a dispute. This is in keeping with the aspiration of Ethical Consideration 2-22 that "[a] lawyer should be zealous in his efforts to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject. He should not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client."

Although the attorney is required to proceed in a certain manner with regard to fee dispute, there is no attempt to influence how the attorney handles a legal matter in behalf of a client. Therefore, it is the opinion of the Board that the requirement that a lawyer who accepts referrals must, if the client desires, submit any fee dispute to arbitration by the appropriate fee dispute committee of the bar association does not interfere with the attorney's independent professional judgment in behalf of the client, and in addition, this requirement promotes the spirit of Ethical Consideration 2-22.

In contrast, the requirement that a lawyer accepting such referrals co-counsel only with other attorney members of the referral panel does interfere with the attorney's independent professional judgment in behalf of the client. This requirement forces the attorney to proceed in a certain manner with regard to a legal matter. It also makes the right of an attorney to participate in a bar association's referral service dependent upon an agreement to relinquish part of the attorney's independent professional judgment in behalf of his or her client.

This requirement has no foundation in advancing a client's interests nor does it promote the spirit of any ethical consideration. In fact, it attempts to require attorneys to do what Ethical Consideration 5-13 advises them not to do: "A lawyer should not maintain membership in or be influenced by any organization of employees that undertakes to prescribe, direct, or suggest when or how he should fulfill his professional

obligations to a person or organization that employs him as a lawyer." In addition, this requirement conflicts with the prohibitions of Disciplinary Rule 5-107(B), 2-103(C)(2)(b) and 2-103(D) regarding interference with a lawyer's independent professional judgment.

Therefore, it is the Board's opinion that the requirement that a lawyer accepting referrals from a bar association's lawyer referral service must co-counsel on referred matters with only other attorney members of the referral panel is improper. It is improper because it allows persons other than the client to influence, direct or regulate an attorney's professional judgment in rendering legal services in violation of Disciplinary Rule 5-107(B) and interferes with an attorney's independent professional judgment in behalf of the client as prohibited by Disciplinary Rules 2-103 (C)(2)(b) and 2-103(D).