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1989-90/11

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Advisory Opinion #1989-90/11
LRIS Fee Sharing Arrangement
March 8, 1990

RULE REFERENCES:

*Rule 1.5(f)
*Rule 5.4(a)
*Rule 7.2(c)

SUBJECTS:

*Division of Fees
*Fees
*Lawyer Referral Services

CODE REFERENCES:

*DR2-107(A)(2)

ANNOTATIONS:

The Committee was unable to determine whether a lawyer may participate in a bar-sponsored lawyer referral service when the service imposes on the lawyer a charge based on a percentage of the fee the lawyer earns.

A division of fees between lawyers who are not in the same firm may be made only if: 1) The client consents after full disclosure; (2) The division is made in reasonable proportion; and 3) The total fee is reasonable. (Rule 1.5(f)).

A lawyer cannot share legal fees with a nonlawyer. (Rule 5.4(a)).

A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization. (Rule 7.2(c)).

FACTS:

The New Hampshire Bar Association operates the Lawyer Referral and Information Service ("LRIS") which refers a prospective client to a lawyer who has expressed a willingness to handle the type of case presented by the client. This service is funded in part by fixed fees assessed on both the client and the lawyer, and in part by an annual fixed fee paid by the lawyer.

The LRIS has raised its fees in the last few years; but the amounts received are insufficient to fully fund the program. Accordingly, the LRIS would like to impose a fee sharing arrangement on its attorneys.

QUESTION:

May the LRIS program ethically charge, and may a participating attorney ethically pay, a fee based on a percentage of the fee the attorney receives from the referred client?

RESPONSE:

The proposed practice appears to have attained widespread acceptance. According to the American Bar Association, at least 48 referral services nation-wide currently have charges based upon a percentage of the participating attorney's total fee. A California Court of Appeals has concluded that this type of fee-splitting practice does not present the same potential for abuse that led to the prohibition against fee splitting between lawyers and laymen. Emmons, William, Mires & Leech v. State Bar of California, 6 Cal.App.3d 565, 86 Cal.Rptr. 367, 372 (1972).

Moreover, at least fourteen other bar associations have considered the ethical issues and explicitly approved the arrangement. Most of these decisions were made under the old Code of Professional Responsibility, and some of the older opinions, such as the two American Bar Association opinions, were decided under the prior Canons. Of the more recent opinions, however, four were decided under, or made reference to, the current Rules of Professional Conduct. See Chicago Opinion 87-1 (undated); 3 BNA Law.Man.Prof.Conduct 404 (Conn 1987); D.C. Opinion 201 (4-18-89); Wisconsin Opinion E-87-7 (10-1-87).

Nearly three years age, the Delivery of Legal Services Committee asked the Ethics Committee to render an opinion on essentially the issues presented in this opinion. At that time however, this Committee "could not agree on an answer". NH Op 1986-7/11.

Then as now, the Committee discussed two issues regarding the proposal. While the end result remains the same, the focus of analysis has changed somewhat since the original decision. Accordingly, this opinion will revisit those issues.

A. Fee Splitting.

The last time the Committee faced this question, some members felt that the proposal would constitute fee splitting; NH Op 1986-7/11. Rule 1.5(f) governs fee splitting among lawyers:

A division of fees between lawyers who are not in the same firm may be made only if:

(1) the client consents to employment of the other lawyer after a full disclosure that a division of fees will be made;

(2) the division is made in reasonable proportion to the services performed or responsibility or risks assumed by each; and

(3) the total fee of the lawyers is reasonable.

If the LRIS were not considered a lawyer, then the proposal would violate Rule 5.4(a) which prohibits a lawyer from sharing legal fees with a nonlawyer.

The only opinion from another jurisdiction which prohibits the type of charge proposed here relies on the fee splitting prohibition:

Any fee charged by the lawyer referral service which might ultimately be collected by the lawyer who does the work would constitute a sharing or division of legal fees between the lawyer and the referral service. ...Unless the referral service assists the lawyer in the performance of legal services, therefore, it would be professionally improper for any portion of the legal fee to be shared by or divided between the lawyer and the referral service.

Opinion 506, 64 Ill.B.J. 256, 257 (Ill. 1975) citing DR 2-107(A)(2).

This Committee agrees that the LRIS neither performs services nor assumes risk sufficient to justify any significant splitting of the fee earned by the lawyer. Accordingly, if either Rule 1.5(f) or Rule 5.4(a) directly applied, the lawyer could not ethically pay the LRIS charge. Neither Rule 1.5(f) nor Rule 5.4(a), however, deals with payments of the charges of lawyer referral services. Rule 7.2(c), however, explicitly governs such payments:

A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay ... the usual charges of a not-for-profit lawyer referral service or other legal service organization.

Accordingly, a clear majority of this Committee concludes that Rule 7.2(c), being the more specific rule, controls, at least in the first instance. See Section C, below.

B. Usual charges of a lawyer referral service.

The primary issue that divided this Committee, however, involves the interpretation of Rule 7.2(c)'s exception for "the usual charges" of a lawyer referral service. Some members would not consider the charges "usual" unless the LRIS fixed the charges at the time of the referral. These members felt that charge of uncertain amount, which would not be determined for an indefinite period of time, could not be termed "usual". Those who felt this way also observe that the proposed assessments did not constitute the "usual" method at the time of the adoption of the Rules of Professional Conduct.

Other members took a middle ground. While these members could not endorse fee splitting, they could consider a properly structured sliding scale as a "usual charge", including a sliding scale based on the amount of the fee generated.

Those remaining members who saw no absolute bar to the proposed funding mechanism took a broader view of the term "usual charges". These members felt that

percentage fee arrangements such as the one proposed here are quite "usual" as a means of funding lawyer referral services, and are found in numerous bar sponsored or bar approved lawyer referral services operating throughout the country.

Opinion 201 (D.C. 1989). As stated by the Connecticut Bar Association Committee on Professional Ethics:

"Usual charges" refer to fees that are openly promulgated and uniformly applied. Thus, so long as the usual charges of the referral service include a percentage of the fee paid to the lawyer, the arrangement is permitted. Rule 7.2(c).

Opinion 87-9 (Conn. 1987). Many of those who could endorse fee splitting, however, would require limits on the practice.

C. Restrictions on practice of charging percentage fees.

The inquiry offered a number of proposed restrictions that might be placed on the charges in order to make them acceptable. Since the Committee cannot issue an opinion on the primary question, however, we decline to discuss the restrictions.

The Committee observes that many of the opinions form other jurisdictions do place restrictions on the practice. Some members of the Committee wondered, however, how these opinions could read some of these restrictions into Rule 7.2(c), which does not contain any express limitations (except the not-for-profit requirement), unless one reads the restrictions of Rule 1.5(f) as an overlay on Rule 7.2(c).

CONCLUSION:

As the Committee stated in its earlier decision:

There is no clear answer to the question presented given the present state of the Rules. The Service may wish to seek clarification from the Supreme Court, or it may seek an amendment to the Rules.

NH Op 1986-7/11.

Opinions Approving Percentage Fees

ABA 1956, Formal Opinion 291

ABA 1968, Informal Opinion 1076

Arizona 1964, Opinion 151, Maru, Dig.B.A.Eth.Op. 5894

California 1983, Opinion 1983-70, Law.Man.Prof.Cond. 801:1605

Chicago 1976, Opinion 75-38, Maru, Dig.B.A.Eth.Op. 11018

Chicago 1987, Opinion 87-1, Law.Man.Prof.Cond. 901:3202

Connecticut 1987, Informal Opinion 87-9, Law.Man.Prof.Cond. 901:2055, 3 Law.Man.Prof.Cond. 423 (replaces prior opinion at 3 Law.Man.Prof.Cond. 404

District of Columbia 1989, Opinion 201, Law.Man.Prof.Cond. 901:2312, 5 Law.Man.Prof.Cond. 169

Kentucky 1984, Opinion E-288, Law.Man.Prof.Cond. 801:3910

Los Angeles 1965, Informal Opinion 1965-7, Maru, Dig.B.A.Eth.Op. 7814

Maryland 1980, Opinion 81-11, Law.Man.Prof.Cond. 801:4306

Maryland 1982, Opinion 82-35, Law.Man.Prof.Cond. 801:4317 (surcharge on all contingency fee cases)

Michigan 1965, Opinion 192, Maru, Dig.B.A.Eth.Op. 1366

New Jersey 1978, Opinion 393, Maru, Dig.B.A.Eth.Op. 12116

San Diego 1973, Opinion 1973-12, Maru, Dig.B.A.Eth.Op. 7950

Tennessee 1988, Formal Opinion 88-F-115, Law.Man.Prof.Cond. 901:8103, 4 Law.Man.Prof.Cond. 329

Wisconsin 1988, Opinion E-88-8, Law.Man.Prof.Cond. 9108

Opinions Disapproving Percentage Fees

Arizona 1964, Opinion 154, Maru, Dig.B.A.Eth.Op. 5894 (lawyer may not pay both an annual registration fee and a share of fees to lawyer referral plan)(see Arizona Opinion 151, above, approving a reasonable share of fees)

Illinios 1975, Opinion 506, Maru, Dig.B.A.Eth.Op. 10914 (but see Chicago 1975 opinion, above)