LEGAL ETHICS OPINION 1751

REFERRAL SERVICE OPERATED THROUGH LOCAL BAR AND RECEIVING A PERCENTAGE OF ATTORNEY'S FEE RATHER THAN A FLAT FEE .

You have presented a hypothetical situation in which a local bar association operates a lawyer referral service. Both organizations are nonprofit. Lawyers who participate in the program pay a set fee once a year. Individuals referred to any attorney by the service pay a one-time fee which is used for expenses of the service. Recently, the referral service has operated with a deficit. Therefore, the local bar association has been re-evaluating the operation of the referral service. It is considering a "percentage fee" structure that would require participating attorneys to pay the service a specified percentage from funds collected from individuals referred to the participating attorney by the referral service.

Under the facts you have presented, you have asked the committee to opine as to whether the percentage fee system described is permissible in Virginia for a nonprofit organization. If such a system is permissible, you have asked the committee to address whether:

1. there are certain types of cases to which this structure should not be applied;
2. it is permissible to collect a percentage when the fee is a) contingent; b) flat; or c) hourly; and
3. there should be a maximum percentage or maximum dollar amount that can be collected.

The appropriate and controlling rules relative to your inquiry are:

RULE 5.4 **Professional Independence Of A Lawyer**

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased, disabled, or disappeared lawyer may pay to the estate or other representative of that lawyer that portion of the total compensation that fairly represents the services rendered by the deceased, disabled or disappeared lawyer; and

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

RULE 7.3 **Direct Contact With Prospective Clients And Recommendation Of Professional Employment**

(d) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure employment by a client, or as a reward for having made a recommendation resulting in employment by a client, except that the lawyer may pay for public communications permitted by Rule 7.1 and the usual and reasonable fees or dues charged by a lawyer referral service and any qualified legal services plan or contract of legal services insurance as authorized by law, provided that such communications of the service or plan are in accordance with the standards of this Rule or Rule 7.1, as appropriate.

The central issue raised by your inquiry is whether a lawyer referral service run by a local bar association can charge participating attorneys a percentage of the funds collected by the attorneys from their clients. Analysis of this issue involves the interplay between two competing concerns addressed in Virginia's Rules of Professional Conduct: increasing the availability of legal services versus preserving the independence of legal judgment.

The first of these concerns, that of fostering the access of the public to legal services, is reflected in Comment 7 to Rule 7.3, which states:

> The legal profession has developed lawyer referral systems designed to aid individuals who are able to pay fees but need assistance in locating lawyers competent to handle their particular problems. Use of a lawyer referral system enables a layman to avoid an uninformed selection of a lawyer because such a system makes possible the employment of competent lawyers who have indicated an interest in the subject matter involved. Lawyers should support the principle of lawyer referral systems and should encourage the evolution of other ethical plans which aid in the selection of qualified counsel.

A provision in the rules reflecting the spirit of that comment is Rule 7.3(d). While creating a general prohibition against attorneys paying others for solicitation of clients, that provision specifically carves out an exception for "the usual and reasonable fees or dues charged by a lawyer referral service." In interpreting Rule 7.3's identical predecessor (former Disciplinary Rule 2-103 [DR:2-103]), this committee has repeatedly confirmed the propriety of a lawyer referral service charging the participating attorneys a fee for receiving the referrals. *See*, LEOs 407 [LE Op. 407], 738 [LE Op. 738], 1348 [LE Op. 1348].

Competing with this principle is a second concern found in Virginia's Rules of Professional Conduct: preserving the independence of an attorney's judgment. A pertinent provision aimed at that preservation is Rule 5.4(a), which prohibits an attorney from sharing his fee with a nonlawyer, except in three enumerated instances that do not apply in the referral service context. Comment One to that rules states explicitly that the purpose of this prohibition is to "protect the lawyer's professional independence of judgment." In line with that purpose, this committee has previously prohibited fee-splitting with nonattorneys in a number of contexts. *See*, *e.g.*, LEOs 1329 [LE Op. 1329], (prohibiting an attorney from sharing portion of fee with a title agency for document preparation) 1438 [LE Op. 1438] (prohibiting a firm from sharing firm profits with an advertising agency.)

The question becomes: which of these two important principles should determine the outcome of the analysis of the central issue in this inquiry; that is, should the payment by attorneys of a percentage of their legal fees to the legal referral service be viewed under Rule 7.3(d) as a "usual and reasonable fee" of a legal referral service or as an impermissible fee-split with a nonattorney under Rule 5.4(a). A number of other states and the ABA have considered this issue. The ABA and most of those states have concluded that a percentage fee is permissible as the usual fee of a legal referral service. *See e.g.*, ABA Formal Ethics Op. (1956), ABA Informal Ethics Op. 1076 (1968), Kentucky Ethics Op. E-288 (1984), Ohio Ethics Op. 92-1, Arkansas Bar Op. 95-01, Alabama Ethics Op. 95-08; *but see*, Illinois Ethics Op. 506 (1975). Review of that body of opinions indicates a strong support by the various bars for increasing public access to legal services. While a lawyer referral service may indeed benefit the participating attorneys as a source of potential clients, the service also provides a simple means for members of the public unfamiliar with particular attorneys to identify legal counsel suited to their needs. One court reviewing the above-described tension between support for legal referral services and preserving the independence of legal judgement noted that, "[a] bar association [operating a referral service] seeks not individual profit but the fulfillment of public and professional objectives. It has legitimate, nonprofit interest in making legal services more readily available to the public." *Emmons, Williams, Mires, and Lech v. State Bar of California*, 6 Cal. App. 3d. 565, 574 (1970).

The *Emmons* court, in ruling that a percentage fee would be permissible in this context, highlighted that with a local bar association's referral service, there is "no risk of collision with the objectives of the [prohibition against] fee-splitting and lay interposition." *id*.

This committee finds the *Emmons* ' court's distinction between fee-splitting with a nonattorney as opposed to the fee charged by a nonprofit referral service to be a sound one. The concern in Comment One to Rule 5.4(a) is not triggered by the referral service in this inquiry; nothing about a lawyer referral program of the local bar association suggests that the participating attorney's independent judgment would be in jeopardy. Accordingly, this committee opines that the appropriate provision in the rules to apply to this lawyer referral service is Rule 7.3 rather than Rule 5.4. The language of Rule 7.3 does not prescribe the character of a referral service's fee beyond that it be "usual and reasonable." The committee sees no detail in the service outlined in this inquiry that would violate that standard. Therefore, the committee finds that the lawyer referral program of the local bar association may properly impose a percentage fee upon the participating attorneys.

Your inquiry also asks whether the use of a percentage fee would be inappropriate in particular kinds of cases, based on types of case or types of attorney/client fee arrangement. Resolution of that question should be based on the standard set by Rule 7.3 that the referral service's fee be "usual and reasonable." Without more detail, it is hard for this committee to make the factual determination entailed in applying that standard. However, this committee does opine that for any such fee to meet that standard, the attorneys must not pass on the service's fee to the clients as an addition to their usual fee in a sum that would exceed a reasonable fee charged to any client as such a practice would violate Rule 1.5(a)'s general requirement that all legal fees be reasonable.

Your inquiry also asks whether there are any other parameters, such as a maximum permissible percentage, that may be charged. As for a maximum percentage, Rule 7.3 provides no such bright line limit; the reasonableness of the fee charged would have to be determined on a totality of circumstances not available to this committee. The committee does note that a fee structure that covers no more than the expenses of administration of the service would likely be within the "reasonable" standard. As for other parameters, the committee declines to address parameters not specifically described in the inquiry.

To the limited extent that this opinion conflicts with LEO 1348 [LE Op. 1348], that opinion is, in pertinent part, superseded.

Committee Opinion
May 7, 2001