

LEGAL ETHICS OPINION 1374

THIRD PARTY PAYMENT OF FEES –
CONFLICT OF INTERESTS –
ADVERTISING AND SOLICITATION:
NONLAWYER ENTITY ARRANGING
FOR LEGAL SERVICES TO
EMPLOYEES UNDER EMPLOYEE
ASSISTANCE BENEFITS CONTRACT;
DISPLAY OF ATTORNEY'S
PROFESSIONAL CARD IN
NONLAWYER'S OFFICE.

You have indicated that a mental health therapist who holds an Employee Assistance Benefits Contract with a large employer, for the benefit of the company's employees, is committed to providing free legal counseling sessions to employees or their family members. To discharge that obligation, the therapist asks Attorney to accept direct referrals of clients/employees. Attorney will bill clients directly for the initial consultation and clients will seek reimbursement for Attorney fees from therapist as a benefit under the Contract. In addition, Attorney's professional card will be available in the therapist's office for purposes of furthering the client referrals.

You have requested that the Committee opine as to the propriety of the arrangement and, in particular, whether (1) the client's request for contractual reimbursement for legal consultation would violate the Attorney's ethical responsibility to preserve the client's secrets and confidences; (2) the payment of attorney fees would constitute fee-splitting with a nonlawyer since the payment is made from contract funds paid to therapist by employer; and (3) leaving Attorney's business cards in therapist's office constitutes improper solicitation of clients?

The primary disciplinary rules controlling the facts you describe are DR:5-106(A)(1) and (B) which require, respectively, that a lawyer shall not accept compensation for his legal services from one other than his client except with the consent of his client after full and adequate disclosure, and 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. Additional pertinent disciplinary rules include DR:2-103(D), which prohibits a lawyer from compensating a person or organization to recommend or secure his employment by a client; DR:4-101(B)(1), which prohibits a lawyer from knowingly revealing a confidence or secret of his client; and DR:3-102, which prohibits a lawyer from sharing legal fees with a nonlawyer. Further guidance is available in Ethical Considerations EC:5-21, EC:5-22 and EC:5-23, all of which emphasize the need for a lawyer's judgment to be impervious to influence by a third party who compensates a lawyer for the provision of services to his client.

In the Committee's opinion, the primary concern under the circumstances you describe is the absolute avoidance of any influence upon the Attorney by either the employer or the therapist. Regardless of the source of funds for payment of Attorney's fees, that client

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is the individual employee who consults Attorney for legal assistance, and Attorney owes to that client duties of zealous representation, the preservation of confidences and secrets, and independent professional judgment. (See LE Op. 609) Within that attorney-client relationship, loyalty to the client must not be compromised based upon any extraneous relationships.

In considering the propriety of a similar fact situation, the Committee has earlier opined that an attorney accepting compensation from a professional counselor service which refers clients to an attorney for legal advice would not be a per se ethical violation of the Code of Professional Responsibility. The Committee continues to be of the view that "[a] disclosure by an attorney to a professional counselor service of the purpose and length of time spent with a client on a particular problem without the express informed consent of the client would violate the provisions of DR:4-101." (See LE Op. 516) Under the facts you have provided, however, the client will be billed directly for the initial consultation and client will then seek reimbursement for Attorney fees from the therapist as a benefit under the Employee Assistance Benefits program. Since reimbursement to the client is a matter of the benefits available under a contractual arrangement between the employee and employer, the consequences of such arrangements involve legal determinations beyond the scope of the Committee. However, the Committee is of the opinion that since disclosure is to be made by the client for purposes of reimbursement, it clearly would not be tantamount to Attorney's disclosure of client's secrets or confidences and thus could not be violative of DR:4-101.

Similarly, the Committee opines that the arrangement described is not, by definition, violative of DR:3-102 since the client is receiving reimbursement after having paid Attorney directly. Thus, under the facts you have provided, the Committee observes that no monies pass between Attorney and therapist regardless of the basic source of the reimbursement funds. (Cf. LE Op. 609)

Finally, the Committee is of the opinion that prior LE Op. 682 is dispositive of the issue you raise regarding the propriety of distributing Attorney's business cards through therapist's office. The earlier opinion found that it is not improper for an attorney to give his business cards to a third-party for distribution so long as the business cards are not false, fraudulent, misleading or deceptive; the third-party distributing the cards makes no statement that is false, fraudulent, misleading or deceptive and does not initiate contact with the potential client under circumstances that might involve duress or intimidation; and the attorney does not compensate the third-party for distributing his business cards.

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