

ADVISORY OPINION 95-01

Date: June 1, 1995

SUBJECT: Sharing Fees with the Lawyer Referral Service

Since July 1, 1975 the Arkansas Bar Association has operated a Lawyer Referral Service. An attorney licensed in Arkansas, who is a member of the Association and who is a member of the Association and who is engaged in the full time private practice of law, may join the service upon payment of an annual fee of \$50 and upon promise to abide by the rules of the Service. The attorney is required to carry a specified amount of malpractice insurance. Upon an inquiry from a prospective client, the Bar Association directs the client to a member of the panel, upon a rotating basis, limited solely by the geographical area and any self-designated restrictions upon areas of practice. The attorney agrees to charge the client \$25 for a 30 minute initial interview. Subsequent to that interview, any fee arrangements are based entirely on contract negotiations between attorney and client.

The issue presented to this committee is whether the Arkansas Bar Association may, as a part of its regulations and corollary agreement with participating attorneys, require that a portion of the legal fee earned by the attorney be paid to the Lawyer Referral Service of the Arkansas Bar Association.

The governing language is found in two provisions of the Arkansas Rules of Professional Conduct, effective January 1, 1986. Rule 5.4(a) says that a lawyer shall not share legal fees with a non-lawyer, with certain narrow exceptions not applicable here. As the Comment points out, this restriction is to protect the lawyer's professional independence of judgment. A provision more on point is Rule 7.2(c): "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." Both of these provisions were adopted by the Supreme Court more than a decade after the Bar Association implemented the Lawyer Referral Service. These rules recognize that the dangers present when sharing a legal fee with a non-lawyer are not present when a lawyer pays the usual charges of a lawyer referral service.

However, these rules do not specifically address the issue of whether the usual charge can be a percentage of the fee earned. When the rules were adopted, the usual charge was an annual fee to the Bar Association.

At least one appellate decision discusses *Emmons v. State Bar of California*, 6 Cal. App. 3d 565, 86 Cal. Rptr. 367 (1970) concluded it was not improper for a local bar association to charge a panel attorney a one-third referral fee. Noting wide differences in motivation, technique and social impact, the court distinguished sharing a portion of a fee with a lawyer referral service and sharing a portion of a fee with a non-lawyer. The California court incidentally noted that although that particular local bar association had charged a one-third fee, a fee of 10 percent was more typical in the state.

As early as 1956, the American Bar Association issued Formal Opinion 291 indicating that the attorneys participating in a LRS panel could 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 same conclusion has been reached by the Connecticut Bar Association, Informal Opinion 87-9; District of Columbia Bar Opinion 201; Chicago, Illinois Opinion 87-1; Kentucky Bar Association Opinion E-284; Maine 93-133; Maryland Bar Opinion 82-35; Michigan Bar Association Opinion (1989) RI-32; Ohio Opinion 92-1; Tennessee State Bar Opinion 88-F-115; Wisconsin State Bar Formal Opinion E-88-8. One estimate is that approximately 40% of the referral services are funded in whole or in part by percentage charges. See Michael Franck, “Percentage Fee: Available and Ethical,” Lawyer Referral Network of the American Bar Association (Spring 1993).

Based on the above policies and opinions, we conclude that the Lawyer Referral Service of the Bar Association can require that a participating attorney pay, as a charge for the service, a percentage of the fees produced by the clients who have been directed to the attorney by the LRS. The increase in revenue produced for the Bar Association will help maintain this public service.

Even assuming that the charge paid to the LRS can be a percentage of the fee earned, other questions remain. Should the percentage be in addition to the annual fee or instead of the annual fee? What is a fair percentage to be assessed by the LRS? Should the percentage charge become applicable only after the fees exceed a minimum floor? Should there be a maximum amount in dollars that can be charged, either per client or per year?

Should an escalating scale be used so that the percentage to be charged changes as the fee changes? Are the charges that are produced to be used only by the Lawyer Referral Service, or can they be applied to the general purposes of the Bar Association?

This committee has not been asked to address these issues, which are left to the good judgment and discretion of the Lawyer Referral Service Committee. A brief survey of plans adopted by bar associations across the country reveals a variety of responses and approaches to such issues.

However, on one corollary point, the rules, or at least the policy of the rules, do seem clear. A lawyer should not be permitted to charge a higher fee simply because a percentage of it will be paid to the Arkansas Bar Association. Such an increase beyond a reasonable fee is inconsistent with the policy embodied in the rules on sharing fees between law firms. See Ark. R. Prof. Cond. 1.5(e). See also State Bar of California Formal Opinion 1983-70; New York State Bar Association 93-651.

NOTICE

“This is an opinion only of the Arkansas Bar Association which is a voluntary association of attorneys licensed to practice in the State of Arkansas, and reliance thereon is voluntary and relieves any Association member from liability for the content hereof. This opinion is intended to be the Association’s best interpretation of the Model Rules of Professional Conduct as promulgated by the Supreme Court of Arkansas as that code applies to the written facts presented to the Committee.”

By Howard W. Brill
Reporter for Professional Ethics
and Grievances Committee