Committee Opinion
October 19, 1992

LEGAL ETHICS OPINION 1488 FEES - DIVISION OF FEES: EXPRESSLY ASSUME RESPONSIBILITY.

You have presented a hypothetical situation in which an attorney has referred a case to another attorney. The referring attorney has not performed any of the work on the case.

You have asked the Committee to opine whether, under the facts of the inquiry, it is ethical for a referring attorney to receive a fee from an attorney to whom he referred a case, when the referring attorney has performed none of the work on the case.

The appropriate and controlling Disciplinary Rules related to your inquiry are DR:2-103(D) which states that a lawyer shall not compensate or give anything 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 under certain specified circumstances; and DR:2-105(D) which provides that a division of fees between lawyers who are not in the same firm may be made only if:

(1) The client consents to the employment of additional counsel;

(2) Both attorneys expressly assume responsibility to the client; and

(3) The terms of the division of the fee are disclosed to the client and the client consents thereto.

[emphasis added]

Although the Committee is aware that the term "referral fees" is in common usage to indicate compensation or a reward for one lawyer or law firm [" an individual or organization"] having directed a client to a second lawyer or law firm, the Committee is of the view that the use of the term "fees" in DR:2-105(D) is not synonymous with the reference in DR:2-103(D) to "compensat[ion]". The Committee views DR:2-103(D) as articulating the general prohibition against such payments being made to any individual or organization, while DR:2-105(D) addresses the more specific prohibition affecting the division of monies received by lawyers from clients.

In discussing a fee-splitting arrangement between interrelated law offices, the Committee has previously opined that such an arrangement would be violative of DR:2-105(D) absent the client's consent and the assumption of responsibility by both attorneys. See LE Op. 1380. [emphasis added]

The Committee believes that legal fees can only be earned by the performance and provision of legal services. Therefore, the Committee is of the opinion that the "assumption of responsibility" required before "a division of fees" can be made, as referenced in DR:2-105(D), mandates that legal services be provided by the referring

attorney in order for that individual to receive a portion of the [legal] fees. The Committee believes that the mere recommendation or referral of a case to another lawyer, with nothing further, "cannot be construed as performing a legal service or discharging responsibility in the case." Palmer v. Breyfogle, 535 P.2d 955, 967 (Kan. 1975); see also McFarland v. George, 316 S.W.2d 662, 671 (Mo. 1958); Fitzgibbon v. Carey, 688 P.2d 1367, 1374 (Or.App.1984); Iowa State Bar LE Op. 82-9 (May 17, 1982), ABA/BNA Law. Man. On Prof. Conduct 801:3609; Michigan Opinion CI-893 (March 12, 1983), ABA/BNA Law. Man. on Prof. Conduct 801:4860. Furthermore, the committee adopts the view that the legal services provided must be "meaningful," rather than merely the performance of ministerial or mechanical tasks.

In addition, where the assumption of responsibility as defined above has been undertaken, the Committee opines that the plain language of DR:2-105(D) does not require that the division of fees between attorneys of different firms be made in proportion to the services performed, so long as the client has consented to the terms of the fee division. See Pennsylvania Opinion 87-59 (October 1987), ABA/BNA Law. Man. on Prof. Conduct 901:7305.

Legal Ethics Committee Notes. – Rule 1.5(e) permits fee sharing between lawyers in different firms provided the client consents and the fee is reasonable. The referring attorney may charge a fee for referring a case to another lawyer without further participation in the client’s matter.