



Committee on Professional Ethics

Opinion #338 - 4/25/74 (14-74)

Topic: Solicitation; referral
fee from another lawyer.

Digest: With narrow exceptions,
lawyer may not accept employ-
ment resulting from his
giving unsolicited advice
to a layman nor may a lawyer
accept referral fee from another
lawyer, where he has neither
assumed responsibility nor
performed any service.

Code: EC 2-3, 2-4, 2-21, 2-22
DR 2-103(A), 2-104(A)(1),
2-107(A)

QUESTIONS

1. May a lawyer who properly gives unsolicited advice to a layman as to his possible legal rights, thereafter accept employment to handle the matter?

2. May a lawyer, disqualified from accepting employment resulting from unsolicited advice, accept a "referral fee" from a lawyer whom he has recommended to handle the matter?

OPINION

1. Under special circumstances described in EC 2-3 and EC 2-4, a lawyer may properly volunteer advice to a layman to seek legal services. Such advice would, however, be "improper if motivated by a desire to obtain personal benefit, secure personal publicity, or cause litigation to be brought merely to harass or injure another". EC 2-3. Nor should a lawyer "contact a non-client, directly or indirectly, for the purpose of being retained to represent him for compensation". EC 2-3 and DR 2-103(A). N.Y. City 584 (1941).

Thus a lawyer who properly volunteers advice to a layman that he should obtain counsel or take legal action may not, under DR 2-103 and DR 2-104(A) accept employment resulting from that advice, unless the situation falls within certain narrow exceptions set forth in DR 2-104(A) and EC 2-4, as where the lawyer's unsolicited advice is given to "a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client".

2. The Code, like the former canons, forbids both the payment and the acceptance of referral fees in all situations where the referring lawyer has neither assumed any responsibility for the matter nor performed any service connected with it, and has done nothing more than to recommend another lawyer. DR 2-107(A) provides:

"DR 2-107 Division of Fees Among Lawyers.

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NEW YORK STATE BAR ASSOCIATION
Professional Ethics Committee Opinion

Opinion #338

-2-

"(A) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:

"(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 proportion to the services performed and responsibility assumed by each.

"(3) The total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they rendered the client."

EC 2-22 provides:

"Without the consent of his client, a lawyer should not associate in a particular matter another lawyer outside his firm. A fee may properly be divided between lawyers properly associated if the division is in proportion to the services performed and the responsibility assumed by each lawyer and if the total fee is reasonable."

See also, EC 2-21; N.Y. State 134 (1970); ABA 204 (1940); ABA 153 (1936).

Obviously, any sharing of a fee by two lawyers not practicing in the same firm presupposes that the client is represented by both lawyers. The prohibition against the payment of any "referral fee" by one lawyer to another or of any fee-sharing not based on the performance of service or assumption of responsibility applies even where the recommending lawyer would have been under no disability to handle the matter. ABA 265 (1945); ABA 204 (1940); ABA Inf. 1239 (1972); N.Y. City 854 (1961), N.Y. City 500 (1939); N.Y. City 127 (1929); N.Y. County 382 (1948). Such sharing would, however be improper in the situation here presented for the further reason that the referring lawyer cannot in any way profit from legal work which he would be disqualified from accepting. ABA Inf. 1088 (1968); N.Y. City 584 (1941).
