NEW YORK STATE BAR ASSOCIATION

Committee on Professional Ethics

Opinion 727 – 2/4/00

Topic: Referral of personal injury matters by accounting firm in return for sharing of fees.

Digest: Attorney may not accept referral from accounting firm in return for agreement to share contingent fees with accounting firm on personal injury matter.

Code: DR 2-103(B), (D), 2-107, 3-102(A).

QUESTION

May an attorney accept referrals from an accounting firm in return for an agreement to share the attorney's contingent fee with the accounting firm?

FACTS

An attorney plans to enter into a relationship with an accounting firm whereby the accounting firm would send the attorney its personal injury referrals. The attorney would charge a contingency fee of not more than 25-27 percent, while the accounting firm would enter into its own, separate contingency fee agreement "in the range" of seven or eight percent in exchange for accounting services, including "financial planning and counseling with respect to the recovery." The client may not actually need or want financial planning services.

OPINION

We believe that the arrangement is prohibited by the New York Lawyer's Code of Professional Responsibility ("Code"). The proposal implicates two separate Disciplinary Rules, and violates each.

First, DR 2-103(B) provides that:

> [a] lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client, except that a lawyer may pay the usual and reasonable fees or dues charged by a qualified legal assistance organization or referral fees to another lawyer as permitted by DR 2-107.

As one commentator has noted, "[t]he phrase 'of value' covers a lot of territory." Roy Simon, *Simon's New York Code of Professional Responsibility Annotated* 84 (1999 ed.). *See, e.g.,* N.Y. State 698 (1998) (lawyer may not agree to arrangement whereby medical consultant would refer clients in personal injury cases and lawyer would retain consultant to assist in the representation); Nassau County 98-10 (1998) (lawyer may not agree to discount his fee to clients referred by real estate brokers, because doing so may "give an incentive to clients to utilize these brokers' services [thereby giving something of value to brokers] in exchange for the brokers' promotion of attorneys' legal services"); *see also* N.Y. State 659 (1994) (lawyer may include advertising material in an information package distributed by a car dealer; however, the car dealer may not discuss the advertisement with its customers and, if any payment is made to distribute the advertisement, it must be clear that the third party is neither endorsing nor recommending the use of the lawyer's services); N.Y. State 566 (1984) (law firm may not pay a fee to be listed under the category "Professional Services" in a real estate brokerage firm's brochure which recommends that home buyers secure the services of an experienced law firm and lists only the particular law firm as one that concentrates in that area of law); Nassau County 89-10 (a lawyer may not permit a relative who is a health care professional to send a letter to his patients announcing that the lawyer 's office is open and offering complementary consultations to the patients); Nassau County 87-43 (lawyer may not arrange for financial planners and insurance agents to distribute lawyer's promotional material).

By limiting the legal fee to less than the legal and customary maximum and permitting the balance to be made available to the accounting firm for its separate fee, the proposed arrangement involves compensation by the lawyer to the accounting firm in connection with the referral of the client. This conclusion is inescapable if the client has not sought any accounting services and may not even wish to receive any. Although the attempt to limit the two separate fees to the legal maximum is helpful in avoiding issues under DR 2-106(A)'s prohibition of excessive fees, *see* N.Y. State 572 (1985) (lawyer should reduce legal fee so that separate contingency fee of consultant, together with legal fee, will not be excessive), it does not address the violation of DR 2-103(B) posed by the proposed arrangement, under which the accounting firm is to receive a fee in connection with the referral of the client. Since the accounting services are not sought and may not be desired by the client, the accountant's separate fee

agreement appears to "serve as a pretext for avoidance of the prescriptions of" the Code. N.Y. State 698 (1997) (quoting N.Y. State 668 [1994]).

Second, the proposed arrangement violates DR 3-102(A)'s prohibition on fee splitting with non-lawyers. The accounting firm's fee, although entered into separately with the client, is for services not sought by the client and appears to constitute a portion of the contingency fee that would otherwise have been paid to the lawyer. As we recently noted in N.Y. State 705(1997), an arrangement in which a non-attorney company is "'signing up clients and passing them on to lawyers, with a fee skimmed off the top'" (internal citation omitted) constitutes unethical fee-splitting as well as improper solicitation.

CONCLUSION

For the reasons discussed, an attorney may not ethically enter into the proposed arrangement.

(2-99)