# New York State Bar Association

## Committee on Professional Ethics

Opinion 779 – 11/5/04

Topic: Paying a National Marketing Organization for Referrals

Digest: Improper for an attorney to pay money to a marketing organization in return for that organization providing the attorney with "leads" to potential clients.

Code: DR 2-103(B)

### QUESTION

May an attorney pay a marketing organization a fee in return for being furnished with a bundle of pre-screened client "leads," consisting of potential clients who may need representation in connection with their Federal income taxes?

### BACKGROUND

A marketing organization ("Marketer") advertises nationally, seeking customers to whom Marketer can provide certain federal income tax reduction services. Marketer obtains intake data from interested customers and screens the file to see if the customer is likely to qualify for various sorts of relief from the Internal Revenue Service. Marketer offers New York attorneys the opportunity to purchase bundles of 20 pre-screened customer "leads" in return for the attorney paying Marketer a one-time sign-up fee of $500 and a fee of $1400 for each bundle of 20 "leads." After an attorney buys a bundle of "leads," Marketer will seek to have the customer sign a Power of Attorney Form and a copy of the attorney's retainer agreement and will collect and transmit to the attorney the suggested partial fee of $1000 obtained from the customer. If the customer decides not to go forward, Marketer makes no refund of the $1400 fee paid by the attorney for the bundle of "leads." Attorneys may purchase as many bundles of "leads" as they wish. The attorney then represents the customer in dealings with the Internal Revenue Service and collects the balance of the agreed upon fee. May an attorney ethically participate in the proposed arrangement?

## OPINION

We note initially that the services in question may be performed by non-attorney CPAs and enrolled agents without those persons being considered to be engaged in the unauthorized practice of law. This Committee has recognized that there are a number of services that can be performed appropriately by both lawyers and non-lawyers, such as tax return preparation, N.Y. State 557 (1984), financial planning, N.Y. State 633 (1992) and legal research done for lawyers, N.Y. State 721 (1999) (outside research service required by an insurance company may be staffed by lawyers or non-lawyer personnel), but we have also consistently held that "when such services are performed by a lawyer who holds himself out as a lawyer, they constitute the practice of law and the lawyer, in performing them, is governed by the Code." N.Y. State 662 (1994) (quoting N.Y. State 557 [1984]). *See also* N.Y. State 636 (1992) (lawyer's operation of business selling standard will forms to public is not practice of law if forms are not individualized and advice is not rendered as to selection of form); ABA 297 (1961) (if activity is the practice of law when performed by lawyer, lawyer does not escape ethical requirements by "announcing he is to be regarded as a layman" for that particular purpose). So the services performed by the lawyer in the question presented constitute the practice of law and the lawyer would be governed by the Code in connection with these services.

We believe that the participation of an attorney in the arrangement proposed by Marketer is governed by DR 2-103(B):

> B. 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:
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> 1. A lawyer or law firm may refer clients to a nonlegal professional or nonlegal professional service firm pursuant to a contractual relationship with such nonlegal professional or nonlegal professional service firm to provide legal and other professional services on a systematic and continuing basis as permitted by DR 1-107, provided however that such referral shall not otherwise include any monetary or other tangible consideration or reward for such, or the sharing of legal fees; or
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> 2. 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.

The payment by an attorney of $500 and $1400 for a bundle of "leads" to prospective clients would violate DR 2-103(B) because neither of the exceptions in sub-paragraphs (1) or (2) applies. The payments would be compensation paid to Marketer "to recommend or obtain employment by a client," so it would be improper for an attorney to participate in the proposed transaction with Marketer. *See* N. Y. State 741 (2001) (lawyer may not participate in business network that requires reciprocal referrals) and the opin-

ions cited therein. N.Y. State 705 (1998) does not compel a different result; that opinion indicated that a tax reduction company, acting as an agent for a client, could engage a lawyer to represent the client and that the lawyer's fee could be a portion of the money paid by the client to the company, *provided* that the company's own fee was separate and distinguishable from the payment for the lawyer's services. N.Y. State 705 is not applicable because it did not involve a lawyer paying for referrals.

## CONCLUSION

It would be improper for an attorney to pay money to a marketing organization in return for that organization providing the attorney with "leads" to potential clients.

(28-04)