

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-264
Issued: November 1982

This opinion was decided under the Code of Professional Responsibility, which was in effect from 1971 to 1990. Lawyers should consult the current version of the Rules of Professional Conduct and Comments, SCR 3.130 (available at <http://www.kybar.org>), before relying on this opinion.

Question 1: May a lawyer receive compensation from one other than his client for services rendered to the client?

Answer 1: Qualified yes.

Question 2: May a lawyer receive compensation from a lay person or lay organization other than a client for merely referring the client to that person or organization?

Answer 2: Qualified no.

References: Canon 5; DR 5-107; Canon 9; KBA E-69; KBA E-101; SCR 3.475; ABA Opinion 237; ABA Opinion 332; ABA Opinion 333

OPINION

A question has arisen about whether an attorney may ethically participate in a plan sponsored by a bank to promote its Individual Retirement Accounts. The bank has proposed to pay attorneys a percentage of the amounts deposited in IRA accounts by clients referred by the attorneys. The bank has termed these payments "a commission or professional consulting fee.

There are two questions to be considered:

1. May a lawyer receive compensation from one other than his client for services rendered to the client?
2. May a lawyer receive compensation from a lay person or lay organization other than his client for merely referring his client to that person or organization?

Lawyers must exercise independent professional judgment on behalf of their clients. (Canon 5.) Lawyers must avoid even the appearance of professional impropriety. (Canon 9.)

DR 5-107 states:

- (A) Except with the consent of his client after full disclosure, a lawyer shall not:

- (1) Accept compensation for his legal services from one other than his client.
 - (2) Accept from one other than his client anything or value related to his representation of or his employment by his client.
- (B) A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.

Previous opinions as well as a Supreme Court Rule have held that an attorney may ethically participate in prepaid legal services plans (See KBA E-69, KBA E-101, ABA Opinion 332, ABA Opinion 333 and SCR 3.475) and that he may receive a commission from a title insurance company (See ABA Opinion 237, which holds that the attorney must fully disclose his financial interest in the transaction or credit the client's bill with the amount of the commission).

Additionally, it is unquestioned that attorneys may ethically receive payments from one other than his client where this is provided by statute or by court rules. Such is the case when an attorney is appointed guardian ad litem or winding order attorney or is employed as a public defender or by the Legal Services Corporation.

Likewise, it is generally accepted that, where there is no conflict of interest between an insurance company and its policy holder, an attorney paid by the insurance company may represent both.

Certainly there are other instances where attorneys may ethically receive compensation for their legal services from ones other than their clients. The essential elements of each of these situations are:

- (1) full disclosure to the client,
- (2) the client's consent,
- (3) the independent exercise of the attorney's professional judgment in spite of the source of payment, and the absence of any appearance of professional impropriety.

Turning next to the situation where an attorney seeks to receive compensation from a person or organization other than his client for merely referring his client to that person or organization, we run full force into the dual questions of whether the attorney has his client's best interests at heart and the problem of an appearance of impropriety.

Most payments in this sort of situation would be in the nature of referral fees. But, whether they are called referral fee or commissions or even kickbacks, they have one common characteristic, they are payments to an attorney for allowing that person or organization to make a profit from his client. While it may be that the client needs the product or service being sold by the other person or organization, such a referral in the average case would raise a strong presumption of at least an appearance of professional impropriety.

The questions which the public can be legitimately expected to raise in even the most innocent transaction include the following:

1. Did the client really need the product or service?
2. Is the product or service the best to which the attorney could have directed the client?
3. Could the client have obtained the product or service more cheaply absent the fee paid to the attorney?

It is impossible for us to say there are no situations where such a referral fee would be proper, but attorneys are cautioned that a presumption exists that such referral fees are, even with full disclosure to the client and with his consent, unethical because they lend themselves to the appearance of impropriety. Should an attorney acting in a professional capacity accept such a fee and a question ever arise about it, the attorney involved will have the burden of showing that there was no such appearance of impropriety.

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.