

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-428
Issued: June 19, 2007

The Rules of Professional Conduct are amended periodically. Lawyers should consult the current version of the rules and Comments, SCR 3.130 (available at <http://www.kybar.org>), before relying on this opinion.

OPINION

Subject: Participation in not-for-profit bar association lawyer referral services.

Question I: May a lawyer participate in a not-for-profit bar association lawyer referral service and agree to pay the association a percentage of the legal fee earned from the referred client?

Answer: Yes

Question II: May a lawyer participate in a not-for-profit bar association lawyer referral service where the fees generated may be used to defer the reasonable expenses of the referral service and other service activities of the referral service or the sponsoring organization.

Answer: Yes

References: SCR 3.130 - 7.20; ABA Comm. on Prof. Ethics and Grievances, Formal Op. 291 (1956); ABA Comm. on Ethics and Professional Responsibility, Inf. Op. 1076 (1968); Tn. S.Ct. Bd. of Professional Responsibility, Formal Op. 88-F-115(a) (1989); State Bar of Wisc. Formal Op. E-88-8 (1988); State Bar of Cal. Formal Op. 1893-70(1983); Oh. Adv. Op. 92-1 (1992); KBA E-288 (1984).

Opinion

For well over fifty years, not-for-profit bar associations have been operating lawyer referral services as part of their public service mission. Referral services provide two separate but related services to the public. First, such services have a screening function by providing potential clients with a means of assessing their problem to determine whether there is a need for a lawyer. Second, lawyer referral services provide potential clients with an unbiased referral to a lawyer with relevant experience. Traditionally, lawyer referral services have been funded, at least in part, by charging participating lawyers (panel members) a fee for referrals received. In some cases, the fee charged to

the lawyer has been related to the amount the lawyer earned in a referred case. Where the lawyer earned nothing, he or she would pay nothing. If the referral generated a fee, the lawyer would forward an agreed upon percentage of the legal fee to the referral service or sponsoring organization. This referral fee arrangement has been the subject of dozens of bar association ethics opinions and considerable legal commentary. The ABA has issued two opinions expressing the view that bar associations may sponsor lawyer referral services where the panel members pay a percentage of the legal fee collected to the referral service, without violating the ethical prohibition on splitting fees. ABA Comm. on Prof. Ethics and Grievances, Formal Op. 291 (1956); ABA Comm. on Ethics and Professional Responsibility, Inf. Op. 1076 (1968).¹ Many state bar associations that have considered this issue have reached the same result. See, e.g., Tn. S.Ct. Bd. of Professional Responsibility, Formal Op. 88-F-115(a) (1989); State Bar of Wisc. Formal Op. E-88-8 (1988); State Bar of Cal. Formal Op. 1893-70(1983); Oh. Adv. Op. 92-1 (1992). In addition, the American Bar Association has adopted Model Standards for Lawyer Referral & Information Services, which were adopted by the House of Delegates in 1993. Those standards contemplate that panel members may be required to pay the referral service a percentage of the fee earned by the lawyer to whom a referral is made.

In 1984, the Louisville Bar Foundation asked this Committee for advice concerning the proposed Kentucky Lawyer Referral Service (KLRS). Among other things, the Foundation asked whether lawyer referral panel members could pay the referral service a percentage of fees from referred cases. At that time, the KLRS contemplated that participating lawyers might agree to contribute 10% of any fees collected from referred clients to the bar association, which would use the collected fees to defer costs for the KLRS. In KBA E-288 (1984), the Committee opined that a lawyer could participate in such a program without violating the prohibitions on fee splitting. In the intervening years, the Kentucky Supreme Court has adopted the new Rules of Professional Conduct, the American Bar Association has adopted Model Standards for Lawyer Referral & Information Service and other bar associations in the state have established lawyer referral services. The question that has been presented for consideration by the Committee today is whether the model proposed by the LBA and addressed in E-288 in 1984, is the only model in which lawyers may ethically participate.

Since the earlier opinion, the Supreme Court of Kentucky has adopted SCR 3.130 (7.20). It provides, in part, as follows:

(2) A lawyer shall not give anything of value to a non-lawyer for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or communication permitted by this Rule.

The accompanying Commentary reinforces a long line of ethics opinions, including E-288, holding that this prohibition does not apply to not-for-profit lawyer referral

¹ Although these opinions were decided under the old ABA Canons of Ethics, the concerns about fee splitting are the same as under the current rules and these opinions continue to be cited today.

services. Comment (4) is titled “Paying Others to Recommend a Lawyer” and provides that

....a lawyer may participate in not-for-profit lawyer referral programs and pay the usual fee charged by such programs.

Thus it is clear from the current rules that lawyers are permitted to participate in not-for-profit lawyer referral programs, and pay the usual fees charged by such programs. Moreover, the Committee continues to adhere to the position that a participating panel member may agree to pay the not-for-profit referral service a percentage of any fee generated from a referred case. The arrangement presented by the KLRS in 1984 contemplated a 10% payment for referred cases. It is the view of the Committee that the only ethical issue is whether percentage payments are permissible.² Having concluded that such a payment is not unethical, the amount of the payment and its method of computation is a matter of contract between the panel lawyer and the referring non-profit organization; it is not a question of ethics. Ethics Opinion E-288 should not be read to suggest that the only ethical arrangement is one which calls for a 10% payment.

The second question relates to the bar association’s use of funds generated by fees paid by panel members. When KLRS began operation, it was contemplated that the fees would be used to defer the operating expenses of the referral service. In fact, E-288 could be read to suggest that payments made by panel members could only be used to cover the reasonable expenses of the service. However, the Committee sees no ethical basis for such a limitation. Bar associations operating lawyer referral services need not operate them as a separate entity. Many of the costs incurred by the bar association will benefit the referral service and vice versa. For example, a bar association’s webpage or other publications might contain information about the referral service, as well as information of interest to the general public and members of the profession. There is no ethical reason for allocating these costs between the association and the referral service. Beyond the accounting issue, there appears no ethical reason why referral services funds cannot be used to support other public service activities of the referral service or sponsoring bar association. It is noteworthy that, while not controlling, the American Bar Association Standards for Lawyer Referral & Information Service approve of the use of fees to support not only the operating expenses of the service but also to fund public service activities of the service or its sponsoring organization, including the delivery of pro bono legal services.

Conclusion

The Committee reaffirms the conclusion reached in E-288 that there is nothing unethical about a lawyer participating in a not-for-profit bar association lawyer referral service and agreeing to pay the association a fee based upon a percentage of the legal fee from the referred client. E-288 should not be read to limit the percentage paid by the lawyer to

² Obviously there are ethical issues regarding the fee paid by the client to the lawyer and, as E-288 notes, that attorney fee cannot exceed the fee the client would have incurred if no referral service has been employed.

10%. The percentage paid is a matter of contract between the lawyer and the referral service. Finally, it is the Committee's view that there is no ethical reason why a lawyer cannot participate in a not-for-profit bar association referral arrangement where the fees paid by the lawyer are used to defer the reasonable expenses of referral service and other service activities of the referral service or the sponsoring organization. To the extent that E-288 implies otherwise, it is withdrawn.

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. The Rule provides that formal opinions are advisory only.