

City Bar OKs Referral Fees To Pro Bono Organizations

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As the City Bar's Committee on Professional and Legal Ethics has informed us, there is a growing trend among law firms to pay referral fees to pro bono organizations for referrals of matters which the firms can then assign to their lawyers. In Formal Opinion 2009-4, the Committee considered whether these payments are proper under the new Rules of Professional Conduct.

The Committee acknowledged that the propriety of these payments is still a matter of debate among lawyers. Supporters of payment argue that it encourages private law firms to extend their services to the general public, and pro-bono organizations to expand their services to indigent clients. They argue also that the level of lawyer competence is enhanced by the ability of the law firms to assign experienced lawyers to the pro bono matters. Critics of the "pay to play" system argue that law firms that pay for referrals will dominate the pro bono system and discourage participation by a "wide range of attorneys, including solo practitioners, lawyers at small firms and in-house counsel."

Because pro bono organizations "are increasingly soliciting payment in exchange for referral" and because "no ethics opinion or other authority" on the subject exists, the Committee believed it "appropriate" to provide its own guidance to lawyers, especially under the new Rules of Professional Conduct. The Committee concluded that the controlling Rule was Rule 7.2, successor to DR 2-103(D) and (F), and that the new Rule compelled it to join the ranks of "pay to play" supporters. The Committee said, "We believe the language of the Rule permits these fees as long as certain conditions are met."

Rule 7.2(a) contains essentially the same restrictions on referral fees as those we have all come to recognize and respect:

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...

However, the Rule goes on to express two exceptions. The second, 7.2(a)(2), reads:

[except that...] A lawyer may pay the usual and reasonable fees or dues charged by a qualified legal assistance corporation or referral fees to another lawyer as permitted by Rule 1.5(g).

The Committee relied on this exception to justify its support for "pay to play."

Rule 7.2(a)(2), however, sets forth an exception to this broad prohibition, providing that "a lawyer may pay the usual and reasonable fees or dues charged by a qualified legal assistance

organization . . .” In turn, Rule 7.2(b) specifies which organizations are “qualified legal assistance organizations.” But as the language of Rule 7.2 establishes, nothing in the rule prohibits qualified legal assistance organizations from limiting pro bono referrals only to those lawyers or firms who pay “usual and reasonable fees or dues.” (emphasis supplied.) As long as any such fee is usual and reasonable and the pro bono organization meets the definition of a qualified legal assistance organization, Rules 7.2(a) and (b) permit lawyers or law firms to pay such fees to pro bono organizations.

[Author’s Quere: Did the Committee really mean that a qualified legal assistance organization can contract with one law firm to cut all other law firms out of its pro bono services?]

However, the Committee did set a number of conditions on the payment of referral fees by a law firm to a legal assistance organization. First of all, Rule 1.1(a) requires a lawyer to “provide competent representation to a client.” [Author’s note: The term “competent representation” refers to “the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”]

Further, Rule 1.1(b) provides:

A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.

This emphasis on competence by the pro bono lawyer led the Committee to conclude:

These provisions highlight the need for both the attorney undertaking a pro bono matter, and any attorney at a pro bono organization referring that matter, to ensure that the underlying pro bono client receives competent...representation.

In addition to the assurance of competence, the law firms placing lawyers in pro bono assignments must satisfy the requirements of Rule 5.4(c):

Unless authorized by law, a lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal services or to cause the lawyer to compromise the lawyer’s duty to maintain the confidential information of the client under Rule 1.6.

The Committee construed this language as assurance that the pro bono lawyer will be free of control by the legal assistance organization, and that the confidences communicated by the pro-bono client to the lawyer will be observed and respected. This construction was buttressed by Comment 2 to Rule 7.2. (Author’s note: The Comments to the Rules were supplied by COSAC, not by the Courts.)

Having satisfied itself that “pay to play” is permitted, the Committee asked and answered two additional questions requiring resolution under the terms of Rule 7.2:

- 1) What constitutes the “usual and reasonable” fees or dues of a qualified legal assistance organization? and 2) What is a qualified legal assistance organization?

Usual and Reasonable Fees

The Rules offer no definition of the term “usual and reasonable.” The consequence is to make the issue fact-specific. Fees are “usual” if they are charged “in the ordinary course” on some basis indicating consistency among law firms and as to the fees charged a particular firm. A uniform flat fee will make the fee “usual.” A fee imposed on an ad-hoc basis (e.g., for “special” cases) or “in response to a sudden budget shortfall” would not be “usual.”

Whether a fee is “reasonable” is a more complex issue. The market may impose a range of amounts charged by different organizations, all reasonable in the light of the relationship between the law firm and the organization. Another factor determining “reasonableness” is the cost to the organization of providing services to its clients, including its intake process, administrative overhead, and the cost of a supervising lawyer.

Qualified Legal Assistance Organizations

A qualified legal assistance organization is an organization which satisfies the definition in Rule 1.0 (Terminology):

...an office or organization of one of the four types listed in Rule 7.2(b)(1-4) that meets all the requirements thereof.

The Committee identified the four types as: 1) a legal aid or public defender office (e.g., the Legal Aid Society); 2) a military legal assistance office; 3) a lawyer referral service operated, sponsored, or approved by a bar association or authorized by law or court rule; and 4) any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries, provided certain specific conditions are met (e.g., *Advocates for Children*, in Motion).

The Committee noted that the conditions imposed on organizations of the fourth type were designed to discourage lawyers from setting up or promoting organizations for the “primary purpose of making money, with only secondary attention to serving society...”

It also stressed that it did not intend to discourage contributions or donations to legal assistance organizations of the fourth type simply because they did not meet all the conditions imposed upon such organizations.

To the contrary, the Rules strongly encourage lawyers both “to provide pro bono legal services to benefit poor persons” and “to contribute financially to organizations that provide legal services to poor persons.” Rule 6.1(a)(1)-(2)... although payments to non-qualified legal assistance organizations in exchange for referrals are prohibited, donations generally to support such organizations are not. (Such a donation must not, however, be made “pursuant to a tacit arrangement of compensation in exchange for referrals.”)