

NYSBA Ethics Issues New Opinions - 778, 779/2004

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State Bar Ethics Committee Issues New Opinions

Opinion 779 11/05/04. Purchasing Leads from a National Marketing Firm. The NYSBA Committee on Professional Ethics considered the relationship between a lawyer and a national marketing service (Marketer) which provides customers with help in federal income tax reduction. Marketer advertises nationally and screens customers to determine if they are good candidates for favorable treatment by the IRS.

A participating attorney pays Marketer a onetime signup fee of \$500. This entitles him to purchase bundles of prescreened customer "leads" from the Marketer. Each bundle contains 20 leads and costs the lawyer \$1400. Marketer obtains a suggested partial fee of \$1000 from each customer and remits the fee to the lawyer, together with the customer's Power of Attorney and a copy of the lawyer's retainer agreement. If the customer decides not to go ahead, Marketer keeps the lawyer's money. If the customer goes ahead, the lawyer represents him before the IRS and collects the balance of the agreed upon fee.

Question: May an attorney participate ethically in this arrangement?

Answer: No. It would be improper for an attorney to pay money to a marketing organization in return for "leads" to potential clients provided by that organization. The arrangement is governed by DR 2103(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:

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 firm to provide legal and other professional services on a systematic and continuing basis as permitted in DR 1107, 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
2. A lawyer may pay the usual and reasonable fees and dues charged by a qualified legal assistance organization or referral fees to another lawyer as permitted by DR 2107.

Neither of the two exceptions to DR 2103 (B) applies in the case of this Marketer. The payments by the lawyer would be compensation paid to Marketer "to recommend or obtain employment by a client." A lawyer may not participate in a business network that requires reciprocal referrals. See, N.Y. State Opinion 741 (2001).

Some services can be performed both by lawyers and by nonlawyers. For example, nonlawyer CPAs and registered agents may engage in tax return preparation. Other nonlawyers may do financial planning and even legal research for lawyers. The nonlawyers performing such services are not considered to be engaged in the unauthorized practice of law. However, "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." The services to be performed by any lawyer purchasing leads from the Marketer in this set of facts would constitute the practice of law, and the lawyer performing the services would be governed by DR 2103(B) of the Code.

Opinion 778 8/30/04. Representing Multiple Defendants. Insurance company has extended liability coverage to the owner of a building and a general contractor hired by the owner. The contractor has agreed to indemnify the owner against any claims arising from the construction. A worker employed by a subcontractor was injured and sued both the owner and the contractor. The amount claimed exceeds the policy limits. May one lawyer represent both the contractor and the owner in defending against the worker's claims?

The controlling disciplinary rules are contained in DR 5105 (A) and (B) of the Code. These provisions require a lawyer to decline to represent multiple clients if the exercise of independent professional judgment on behalf of one client will be or is likely to be adversely affected by his representation of the other client, or if it would be likely to involve the lawyer in representing differing interests.

But 5105(C) permits a lawyer to represent multiple clients if (1) a disinterested lawyer would believe that the lawyer can competently represent the interest of each, and (2) each consents after full disclosure of the implications of the representation and of the advantages and risks involved.

The Code defines "differing interests" as "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether...conflicting, inconsistent, diverse, or other..." Under these facts, the lawyer's differing interests are created by the obligation of the general contractor to indemnify the owner against any recovery in excess of the policy limits.

Because there are differing interests, the lawyer must first inquire whether a disinterested lawyer would conclude that the lawyer can competently represent the interests of both owner and contractor. A disinterested lawyer might question, for example, whether joint representation would be possible if the owner were to insist on asserting a cross claim for indemnification, or if the employee were to allege an independent claim against the owner requiring apportionment of liability between the two defendants.

Assuming however, that the disinterested lawyer standard were satisfied, the lawyer would nevertheless be bound to obtain the consent of both clients after full disclosure of the implications of the joint representation and of the advantages and risks involved. The obvious advantage in joint representation would be the assertion of a unified defense and the cost savings inherent in a single trial. If, in a unified defense, the litigation were to result in a settlement or in a verdict for less than the policy limit, joint representation would greatly simplify the litigation with no risk to the owner.

But if the owner did not assert his cross complaint for indemnification immediately and if the employee obtained an excess judgment, the owner would be disadvantaged by the possible subsequent

unavailability of witnesses, by the employee's enforcement of the judgment before the cross complaint could be litigated, and by the possibility that the general contractor would become judgment proof.

The lawyer must also consider his obligation to disclose to one client any confidences or secrets communicated to him by the other party, NYS Opinion 761 (2003), and also the possible disadvantage at trial of limits on peremptory challenges.

Because of the differing interests of the parties created by the policy limits, the defendants must be advised of their right to retain independent counsel on the excess claim. "The lawyer contacted by the insurance company may find it advisable to recommend to the owner that he or she seek separate counsel to advise both as to the excess claim and as to the advisability of asserting a cross complaint in the present litigation."

The ultimate decision on these facts must be made by the owner. If the owner decides that it's wiser to present a unified defense and is willing to defer the cross complaint, then the lawyer may represent both parties. But if the lawyer proceeds after both parties consent, he will be precluded from representing either party in a subsequent action by the owner on the indemnification claim without the separate consent of each after full disclosure. DR 5108(A).

The Opinion concluded: A lawyer engaged by an insurance company to represent two defendants, one of whom has a potential indemnification claim against the other, may not do so unless the lawyer determines a disinterested lawyer would believe the lawyer can competently represent the interests of each defendant, the defendant with the indemnification claim waives the right to assert it as a cross claim, and both defendants otherwise consent after full disclosure.