

Nebraska Ethics Advisory Opinion for Lawyers
No. 87-2

[Opinion No. 81-12](#) Superseded.

AN ATTORNEY MAY PARTICIPATE IN A "FOR PROFIT" LAWYER REFERRAL PROGRAM IF THE ATTORNEY DOES NOT GIVE ANYTHING OF VALUE TO THE PROGRAM FOR RECOMMENDING HIS SERVICES AND IF THE PROGRAM IS IN COMPLIANCE WITH THE APPLICABLE PROVISIONS OF THE CODE OF PROFESSIONAL RESPONSIBILITY. IT IS THE INDIVIDUAL ATTORNEY'S RESPONSIBILITY TO ASSURE THE PROGRAM'S COMPLIANCE WITH THE CODE.

FACTS

An attorney asks whether he may ethically participate in a "for profit" lawyer referral program. The Committee has previously issued [Opinion 83-4](#) which approved participation in a "not-for-profit" lawyer referral service.

DISCUSSION

DR 2-103(A) of the Code of Professional Responsibility provides as follows:

"A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written communication permitted by these rules and may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization."

As indicated, a lawyer cannot generally pay another to recommend his services. The Committee is aware of "for profit" lawyer referral programs in which participating attorneys are required to charge reduced fees for clients referred through the program. The Committee is of the opinion that reduced fees in such situations do not

constitute the giving of "anything of value to a person for recommending the lawyer's services" within the meaning of DR 2-103 (A).

There is nothing inherently unethical or improper with an attorney participating in a "for profit" lawyer referral service. Attorneys should be mindful, however, that lawyer referral services must adhere to the applicable provisions of the Code of Professional Responsibility.

Caution should be used by attorneys participating in lawyer referral programs to insure that DR 2-101 (F) is not violated. This Code provision states as follows:

"(F) On the front of each envelope in which an advertisement of a lawyer is mailed or delivered or on the front of each post card, if the advertisement is printed on a post card, shall be placed the words: 'This is an advertisement.' These words shall be printed in type size at least as large as the print of the address and shall be located in a conspicuous place on the envelope or card."

The Committee is also concerned about the use of "telemarketing" to promote lawyer referral services. DR 2-104 (A) and (B) provide:

(A) A lawyer may initiate personal contact with a prospective client for the purpose of obtaining professional employment only in the following circumstances and subject to the requirement of paragraph (b):

1. If the prospective client is a close friend, relative, former client or one whom the lawyer reasonably believes to be a client:

2. Under the auspices of a public or charitable legal services organization; or

3. Under the auspices of a bona fide political, social, civic, fraternal, employee or

trade organization whose purposes include but are not limited to providing or recommending legal services, if the legal services are related to the principal purposes of the organization.

(B) A lawyer shall not contact, or send a written communication to, a prospective client for the purpose of obtaining professional employment if:

1. The lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer.

2. The person has made known to the lawyer a desire not to receive communications from the lawyer; or

3. The communication involves coercion, duress or harassment.

As indicated, a lawyer may initiate personal contact with a prospective client only in very limited situations. It is the opinion of the Committee that the above-cited Code provisions generally prohibit solicitation by telephone. (See: New York City Bar Association Opinion 90-44, Law. Man. Prof. Conduct 801:6311; Penn. Bar Association Formal Opinion 85-170, Law. Man. Prof. Conduct 801:7302; Wisc. Bar Association Opinion E-83-16, Law. Man. Prof. Conduct 801:9110) The Committee does note however the exceptions to this general rule as provided in DR 2-104 (A) (3).

The term "telemarketing" may include solicitation by the use of telephone recording machines. Though the authorities appear to be divided in regard to this issue (See Maryland Bar Association Opinion 85-17, Law. Man. Prof. Conduct 801:4350 and Alabama State Bar Opinion 85-119, Law. Man. Prof. Conduct 801:1109) the Committee is of the opinion that the use of such machines is not permissible and should be construed as

"personal contact" within the meaning of DR 2-104 (A).

Certain plans may attempt to require the participating attorney to provide information concerning the client, his records, or other information. Care must be taken to preserve the confidences and secrets of clients under Canon 4 and the applicable Disciplinary Rules thereunder. Certain plans may seek to impose territorial limits which might impede a lawyer's ability to fully represent a client. "Full availability of legal counsel requires both that persons be able to obtain counsel and that lawyers who undertake representation complete the work involved." EC 2-31.

[Opinion No. 81-12](#) of this Committee stated: "It is improper for an attorney to accept clients referred by a savings and loan association for the purpose of providing the client with a free will." This decision was based on the rationale that:

"The violation arises by virtue of the fact that a lawyer taking part in the proposed referral plan would be giving to the savings and loan association something of value in return for the association's recommendation of him; that is, the association would acquire the capability to attract depositors by means of the inducement of free legal services."

This Committee is unable to maintain a distinction between a lawyer giving free services or discounted services, either of which provide an attraction to the for-profit entity making the referral. The lawyer, however, is giving these benefits to the client, and the Committee does not believe there is a giving of "anything of value to a person for recommending the lawyer's services" within the meaning of DR 2-103 (A). Thus this Committee hereby withdraws and supersedes [Opinion No. 81-12](#).

CONCLUSION

In conclusion, there is nothing inherently unethical or

improper with an attorney participating in a "for profit" lawyer referral program. Caution should be exercised by the participating attorney however to insure compliance with applicable provisions of the Code of Professional Responsibility.

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