

## BAR ASSOCIATION OF ERIE COUNTY

Opinion No: 07 04

Date: May 27, 2008

Topic: Referral Fees Paid to  
Lawyer By Funding  
Source.

Digest: A lawyer may not accept a  
fee for referral of a client  
from a funding source that  
purchases a stream of  
payments from that client.

Code: DR 5-101(A); DR 5-  
107(A)(2)

### QUESTION

May an attorney accept a fee from a funding source for referring a client to it?

### OPINION

The Committee does not render opinions on questions of law and, thus, does not opine on whether or not the proposed referral arrangement violates any statute or regulation. For the purpose of this analysis, the Committee assumes that the client's discounted sale of his income stream to the funding source is legal, thereby rendering the referral fee legal.

The permissibility of a lawyer accepting referral fees from a non-lawyer professional has been the subject of a number of New York State Bar Association Ethics Opinions. Analyzed within the confines of the Code of Professional Responsibility, the primary concern revolves around the fungible nature of the service for which the attorney will be receiving the fee.

Under DR 5-101(A):

A lawyer shall not accept or continue employment if the exercise of professional judgment on behalf of the client will be or reasonably may be

affected by the lawyer's own financial, business, property, or personal interests, unless a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby and the client consents to the representation after full disclosure of the implications of the lawyer's interest.

In general, the receipt by a lawyer of a payment from a third party in exchange for the referral of the lawyer's client implicates DR 5-101(A) and DR 5-107(A), which deals with the responsibility of a lawyer to avoid influence by others than the client.

Therefore, in N.Y. State 671 (1994), it was opined that an attorney engaged in estate planning may not accept a referral fee from an insurance company for recommending the client. The client in the life insurance situation was entitled to the full loyalty of his attorney in counseling him as to appropriate vehicles for estate planning, without fear that the attorney's advice was affected by his relationship with the life insurance company. The conflict could not be cured by disclosure.

Similarly, an attorney may not accept a referral fee from an investment advisor because "the amount of money entrusted to the investment advisor — is not objectively determined by the transaction, presenting the potential that the attorney might increase the referral fee by recommending that more of the client's funds be entrusted to the advisor without appropriate regard to the client's interest." N.Y. State 682 (1995).

The same concern adheres to this situation. When a client is deciding whether to sell a payment stream to a funding source, one of the first questions will be how much should be sold. Since the amount of the referral fee is likely determined by the size of the sale, the rationale of the investment advisor situation applies here.

Finally, as stated above, in those very limited situations where the receipt of a referral fee has been sanctioned, both the need for the product and the terms on which the product are sold are not subject to the exercise of judgment. The rationale for the approval of referral fees in N.Y. State 667 and N.Y. State 576 was premised in large part on the nature of the services. As observed in N.Y. State 682, a consentable conflict exists where "(1) the referral concern[s] a product or service that [is] fairly uniform among providers and that [is] required in an objectively determinable quantity incident to the legal services performed by the attorney; or (2) the referral concern[s] a product or service that [is] fairly uniform among different providers and [is] unconnected with any particular legal services."

For example, in N.Y. State 576 (1986) the Ethics Committee opined that an attorney may ethically accept additional fees in his capacity as an agent for a title company while also representing the real estate client. The market determines the situations in which title insurance is required and in what amount, and the cost of the insurance is standard in the industry.

Also while N.Y State 667 (1994) opined that, pursuant to DR5-107(A)(2), an attorney may ethically accept a referral fee from a mortgage broker, the committee assumed both that the amount of the mortgage was dictated by the market and that the rates and terms were essentially fungible. It would be interesting to see if today, in view of the diversity of mortgage products available, the Committee would come to the same conclusion.

Therefore, where an attorney refers a product or service that is connected to the legal services offered, and the attorney is in a position to influence the amount to be purchased or in this case sold by the client, then the referral fee represents an irreconcilable conflict which disclosure cannot cure.

A funding source does not fall within the category of relationships which would permit an attorney to accept a referral fee. An attorney could influence the amount of product purchased and thereby increase his fee—rather than counsel his client to be more conservative and sell only a portion of the stream of income.

### **CONCLUSION**

For the aforementioned reasons, the question is answered in the negative.