KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-288
Issued: September 1984

This opinion was decided under the Code of Professional Responsibility, which was in effect from 1971 to 1990. Lawyers should consult the current version of the Rules of Professional Conduct and Comments, SCR 3.130 (available at http://www.kybar.org), especially Rules 7.01-7.50 and the Attorneys' Advertising Commission Regulations, before relying on this opinion.

Question: May a lawyer who is a member of the Kentucky Lawyer Referral Service ethically participate in that organization's proposed plan for funding its expenses, to wit: that in lieu of forwarding an initial consultation fee of $15.00, the lawyer contributes 10% of any fee collected as a result of further compensation.

Answer: Yes.

References: Code of Professional Responsibility (1969); Disciplinary Rules 2-103(C), 2-106(A), 2-107, 3-102; ABA Formal Opinion 291 (1976); ABA Informal Opinion 1076 (1968); California Opinion 1983-70 (MOPC 801:1605); Maryland Opinion 82-35 (MOPC 801:4317); Maryland Opinion 81-11 (MOPC 801:4306); New Jersey Opinion 393 (1978) (MARU 12116); Chicago B.A. Opinion 75-38 (1976) (MARU 11018); San Diego B.A. Opinion 1973-12 (MARU 7950); Los Angeles Co. B.A. Informal Opinion 1965-7 (MARU 7814); Arizona Opinions 151(1964) and 154(1970) (MARU 5897, 5894); Michigan Opinion 192 (1962) (MARU 1366). See also Emmons, Williams, Mires & Leech v. State Bar, 6 Cal. App. 3d 565; 86 Cal. Rptr. 367 (1970).

OPINION

The Committee has received requests for a formal opinion from the Louisville Bar Foundation and from several attorneys concerning a proposal of the Kentucky Lawyers Referral Service (KLRS). The proposal has been advanced as a way to make the referral service financially solvent by having member attorneys share in the operating expenses of the service from which they benefit.

ABA Formal Opinion 291 (1956) provides in pertinent part:

> Registrants (of a lawyer referral plan) may be required to contribute to the expense of operating it by a reasonable registration charge or by a reasonable percentage of fees collected by them.

Moreover, ABA Informal Opinion 1076 (1968) held that a lawyer referral service may be financed by any of the following methods:

(1) lawyers pay annual fees for membership on the panel;
(2) clients pay modest registration fees, which are waived in hardship cases;
(3) some or all of the initial consultation fee is returned to the association sponsoring the service;
(4) lawyers return part of their fees exclusive of the initial consultation fees to the association sponsoring the service.

The Code of Professional Responsibility (1969), DR 2-103(C), provides in pertinent part:

> A lawyer shall not request a person or organization to recommend employment, as a private practitioner, of himself, his partner, or associate, except that he may request referrals from a lawyer referral service operated, sponsored, or approved by a bar association representative of the general bar of the geographical area in which the association exists and may pay its fees incident thereto.

Suggestions continue to be made that the proposed arrangement might conflict with DRs 3-102, 2-107, and 2-106, in spite of the above mentioned authorities. The Committee has carefully researched state and local bar opinions addressing such objections, and collected many of them in the references to this opinion. Without discussing each separately as it may bear upon any particular attorney's objection or objections to the proposal of the KLRS, we make the following observations, which we believe are amply supported by these authorities.

1. A lawyer my pay a bar association lawyer referral service a reasonable percentage of any net fee. Such payment constitutes a contribution to administrative expenses rather than a division of fees. *See, e.g.*, California Opinion 1983-70 (1983) (MOPC 801:1605); Maryland 82-35 (1982) (MOPC 01:4317); New Jersey Opinion 393 (1978). But compare Illinois Opinion 506 (1975) (MARU 10914) (which is analyzed and refuted in Chicago B.A. Opinion 73-38 (1976). Moreover, the proposal of the KLRS carries with it none of the dangers associated with prohibited fee-splitting between lawyer and layman. Emmons, Williams, Mires & Leech v. State Bar, 86 Cal. Rptr. (identifying same, and upholding a similar funding mechanism); Chicago B.A. Opinion 7-33 (1976) reprinted at 57 Chicago Bar Record 311.

2. DR 2-107 governing the division of a lawyer's fee with another lawyer is inapplicable. Moreover, the proposal does not involve a division of fees but rather a contribution to expenses.

3. Finally, it has been suggested that a lawyer who receives a case from a lawyer referral service might increase his or her hourly rate or the percentage in a contingent fee agreement or in some other way pass on the costs under the proposal, resulting in an excessive fee to KLRS referral clients in violation of DR 2-106. The short answer to this objection is that the lawyer who participates in an approved lawyer referral service may not engage in such conduct under the Code, and the KLRS may not approve a plan permitting

such conduct. The suggestion that a lawyer may profit from the KLRS plan while refusing to support it, because otherwise he or she might be tempted to violate DR 2-106, contains a germ of creative but unacceptable reasoning.

As long as funds generated by the proposal are used to defer the reasonable expenses of the KLRS and are not used for unrelated projects or expenses of the sponsoring bar association, we see no conflict between the proposal and the above mentioned rules.

Other objections have been raised to the proposal, and no doubt more will be raised in the future. For example, it is contended that prospective referrals ought to be informed of the arrangement, and that fee dispute mediation by the KLRS or the KBA Fee Dispute Panel will no longer be possible due to bias or interest. With regard to the former objection, we agree with the caveat contained in San Diego B.A. Opinion 1973-12 that the Lawyer Referral Service should disclose the arrangement to referred clients, although that opinion held that the percentage of the payment need not be disclosed. *Cf.* Chicago B.A. Opinion 7-38 (1976). Assuming that such a disclosure will be made, we reject the suggestion that mediation or arbitration of fee disputes, which require the consent of both parties, must be scrapped.

We note that a number of states have implemented similar proposals and operated successful and financially solvent Lawyer Referral Services, which have benefited the public without undermining confidence in the profession.

Finally, it should be noted that this opinion cannot be considered controlling authority in certain areas. *See, e.g.*, 11 U.S.C. 504; Florida Bar Memorandum of April 7, 1983 (Florida Lawyer Referral Service defers to the Administrative Office of the U.S. Courts, and will not accept remittance fees from attorneys in bankruptcy court … construction of federal law is a federal question).

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 (or its predecessor rule). The Rule provides that formal opinions are advisory only.