LOS ANGELES COUNTY BAR ASSOCIATION
PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE

OPINION NO. 486: (November 1995)

SUMMARY OF OPINION

A referral of prospective clients to attorneys who sublease office space from the landlord-attorney must be done in compliance with Rule 2-200 before a referral fee is paid. While no attorney-client relationship is formed between the landlord-attorney and the prospective client, the landlord-attorney should take reasonable steps to prevent the prospective client from misunderstanding the nature of the relationship between the landlord-attorney and the subleasing attorney to whom the prospective client is referred.

AUTHORITIES

In re Marriage of Zimmerman (1993), 16 Cal. App. 4th 556
Scolinos v. Kolts (1995), 37 Cal. App. 4th 635
California Rules of Professional Conduct, Rules 1-100, 1-400, 2-200, 3-310, 3-500
LACBA Formal Opinion 467
ABA Formal Opinion 94-388

INQUIRY FACTS

Landlord-attorney "A" proposes to refer matters to other attorneys who sublease office space from "A". "A's" proposal includes the following elements:

1. The subleasing attorneys will pay "A" a flat percentage of the fees earned from any referral. There will be one percentage rate for attorneys who pay rent ($1200 per month according to the Inquiry); there will be a higher percentage rate for attorneys who do not pay rent. The amount of the percentages is not set forth in the Inquiry.
2. The payment to "A" of a percentage of the fee earned by the subleasing attorneys for matters referred to them by "A" will be solely for the referral. Any additional work or services provided by "A" with respect to the referred matter will be separately compensated pursuant to an arrangement to be worked out between "A" and the subleasing attorneys.
3. "A" does not intend to enter into an attorney-client relationship with any prospective clients "A" refers to the subleasing attorneys, at least as to the matters referred. "A" will rely on the subleasing attorneys to inform the prospective clients that no attorney-client relationship exists between "A" and the prospective clients.

The Inquiry also discloses that "A" uses a letterhead that states the form of practice as " 'A' and Associates".

DISCUSSION

The use of subleasing arrangements between attorneys often arises in practice; yet, aside from the generic Rule addressing the division of fees among lawyers not in the same firm (Rule 2200), the California Rules of Professional Conduct do not specifically address the issues involving referrals of clients to attorneys subleasing office space from the referring attorney. The Rules do, however, address a number of concerns that are raised by such referrals. Consequently, where the referred to attorney subleases office space from the referring

attorney, the context in which referrals are made must be carefully evaluated by both the referring and referred to attorneys to insure that professional obligations are acknowledged and observed. Because the conclusions and recommendations of this Opinion are based on the facts set forth in the Inquiry, in circumstances where the referral(s) involve different facts or relationships, the referring attorney must carefully evaluate the nature of the relationship with the prospective client and the other attorney to whom the prospective client is referred.

1. What ethical duties does "A" assume in agreeing to refer clients to subleasing attorneys?

Rule 2-200 provides:

A member shall not divide a fee for legal services with a lawyer who is not a partner of, associate of, or shareholder with the member unless:

(1) The client has consented in writing thereto after a full disclosure has been made in writing a division of fees will be made and the terms of such division; and

(2) The total fee charged by all lawyers is not increased solely by reason of the provision for division of fees and is not unconscionable as that term is defined in Rule 4-200.

Rule 2-200's disclosure and consent requirements apply to all referrals which contemplate the eventual division of a fee when the referral is made to a lawyer outside the firm of the referring lawyer.[1]Although Rule 2-200 is silent as to when disclosure to and consent of the client to the fee division must be obtained, this Committee has suggested that disclosure should be made and consent obtained by the referred to lawyer as soon as practical. Cf. L.A.C.B.A. Formal Opinion 467 (1992); see Scolinos v. Kolts, (1995) 37 Cal. App. 4th 635, 640 (referral agreement made without disclosure and consent of client is void and unenforceable by lawyer).&

Although the referral contemplated by the Inquiry is subject to Rule 2-200, the Committee does not believe an attorney-client relationship arises out of the making of the referral, even when the referring attorney does so with the expectation of receiving a referral fee from the other attorney. The fact that the person who sought the referring attorney's professional services enters into an attorney-client relationship with another attorney and with respect to the same matter the person initially consulted the referring attorney should negate a finding that an attorney-client relationship, express or implied, exists between that person and the referring attorney. Because no lawyer-client relationship exists, the fact that a referring lawyer, such as "A", will receive a referral fee does not constitute an "interest in the subject matter of the litigation" which must be disclosed under Rule 3-310(B)(4). This results since Rule 3-310(B) applies only when a referring lawyer, such as "A", "accepts" or "continues representation" of a client, and neither has occurred here.

Even when no attorney-client relationship is formed, the referring attorney may owe fiduciary duties to the person who seeks representation from the referring attorney. See In re Marriage of Zimmerman (1993), 16 Cal. App. 4th 556, 564 n.2 ("[a] fiduciary relationship between lawyer and client does not require a formal agreement and extends to preliminary consultation by a prospective client with a view to retention of the lawyer, although actual employment does not result"). The Committee does not offer an opinion as to what these fiduciary duties may encompass or how they would differ, if at all, from duties that would arise from an attorney-client relationship. The Committee recommends that a referring attorney, such as "A", clearly communicate in writing (1) that no attorney-client relationship exists and (2) that "A" will have no involvement in the representation other than the referral. If it is contemplated that the referring attorney will have some involvement in the representation, such as being retained as a consultant or associate attorney, that fact may, if realized, create in the mind of the client, based on all the facts, a reasonable expectation that a lawyer-client relationship exists with "A". Such a fact may create disclosure requirements under Rule 3-310(B) that do not exist in the case of a referral alone.

2. Does "A's" form of practice raise any other "ethical" considerations?

The Inquiry does not delineate the nature of the relationship between "A" and the subleasing attorneys. "A's" letterhead may suggest that "A" practices with other attorneys ("Associates") but it is not clear whether the subleasing attorneys are part of this group of "Associates." This uncertainty raises several questions which "A" must resolve.

Letterheads are a form of attorney communication subject to ethical restriction. Rule 1-400(A)(2), California Rules of Professional Conduct. Rule 1-400(D) further provides that a communication shall not be untruthful, false or deceptive. The Inquiry does not indicate who the "Associates" are who are referred to in "A's" letterhead. A particular difficulty arises in that the juxtapositioning of "A's" letterhead and the referrals to subleasing attorneys may mislead or confuse prospective clients as to the relationship between "A" and the subleasing attorneys. This could constitute a violation of Rules 1-400(D)(2), (3) which provide:

"A communication... shall not --

(2) Contain any matter, or present or arrange any matter in a manner or format which is false or deceptive, or which tends to confuse, deceive, or mislead the public...; or

(3) Omit to state any fact necessary to make the statements made, in the light of the circumstances under which they are made, not misleading to the public...."

Attorneys have an obligation not to mislead prospective clients about the size of the "firm," the resources available to the "firm" or the relationship between the "firm" and other law firms with which it is affiliated or associated. ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 94-388, at 2-4 (December 5, 1994).

"A's" letterhead, his subleases, and his conduct with respect to prospective clients also raise issues as to whether a "de facto" law firm or "office sharing" arrangement exits. The facts set forth in the Inquiry are insufficient to address these issues and the Committee expresses no opinion as to them.

This Opinion is advisory only. The Committee acts on specific Inquiries submitted ex parte, and its opinions are based only on such facts as are set forth in the Inquiries submitted.

[1] Rule 1-100(B)(1) defines a "Law Firm" as

(a) two or more lawyers whose activities constitute the practice of law, and who share its profits, expenses, and liabilities; or
(b) a law corporation which employs more than one lawyer; or
(c) a division, department, office, or group within a business entity, which includes more than one lawyer who performs legal services for the business entity; or
(d) a publicly funded entity which employs more than one lawyer to perform legal services.

Although the Rule does not literally encompass the situation of a law practice with a principal and associate employees, the Committee believes that for purposes of the issues discussed in this Opinion, a practice in the form of "A and Associates," is a law firm.

A division of fees among lawyers within a law firm does not implicate Rule 2-200.