

Los Angeles County Bar Association Professional Responsibility and Ethics Committee

FORMAL ETHICS OPINION NO. 503

January 24, 2000

PREPAYING REFERRAL FEES ON WORKERS' COMPENSATION CASES

SUMMARY

California Rules of Professional Conduct prohibit a payment by one lawyer to another lawyer for referring a workers' compensation matter unless the payment qualifies as a gift or division of fees as permitted under Rule 2-200. There must be an attorney fee already paid or payable in order for the payment to qualify as a division of fees under Rule 2-200(A).

AUTHORITIES CITED

Cases:

Moran v. Harris, (1982) 131 Cal.App.3d 913
Turner v. Donovan, (1935) 3 Cal.App.2d 485

Statutes and Regulations:

Labor Code §§ 3215, 3217, 4903, 4906 Title 8 California Code of Regulations §§ 10775, 10776
California Code of Professional Responsibility, rules 1-320, 2-200

Others:

State Bar Formal Opinion No. 1994-138

ISSUES PRESENTED:

Under what circumstances may a workers' compensation lawyer pay a fixed referral fee to another lawyer? May the lawyer pay the referral fee when the existence of the fee on which it is based is subject to a future award by a tribunal?

STATEMENT OF FACTS :

A lawyer representing injured employees in seeking compensation benefits under the Workers' Compensation laws has asked whether a fixed referral fee of \$250 per case may be paid to another lawyer in consideration for the referral. The inquirer has also asked whether a lawyer may ethically pay the referral fee of \$250 per workers' compensation case to another lawyer before the resolution of the case, prior to the approval and award of a fee by the Workers' Compensation Appeals Board.

DISCUSSION:

A lawyer may not pay a fee, or otherwise give or promise anything of value to any other lawyer for the purpose of recommending or securing employment for the lawyer, except as permitted by Rule 2-200 of the Rules of Professional Conduct¹. Rule 2-200, subd. (A) permits a division of fees only (i) among partners or associates, or (ii) to another lawyer who is not a partner or associate if the payment complies with four separate, specified criteria: (1) full disclosure to the client of the fact and the terms of the agreement to split the legal fee; (2) written consent by the client; (3) the division must not result in an increase in the fee; and (4) the total fee charged must not be unconscionable.

Public policy does not prohibit fee splitting among lawyers. Moran v. Harris, (1982) 131 Cal.App.3d 913; Turner v. Donovan, (1935) 3 Cal.App.2d 485. Therefore, dividing fees with another lawyer is permissible, provided that there is full compliance with the requirements of Rule 2-200(A).

As discussed further in this Opinion, not all payments from one lawyer to another constitute the division of fees. A gift or gratuity made in response to a referral is permitted under rule 2-200 subd. (B) "provided that the gift was not offered in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future."² Also, a payment made to an independent contractor or other non-employee lawyer for work actually performed on behalf of a client is not subject to rule 2-200.³ As another example, after a predecessor counsel substitutes out of a case or refers the client to a new lawyer, the pro rata apportionment of lawyer fees among the client's prior and current lawyers would not constitute an impermissible division of fees. Each of these situations can be distinguished from that posed in this inquiry, however, since none of these examples involve the payment of money in exchange for the agreement to refer clients.

Here, the \$250 payment is purely a payment for a referral, a payment which is permissible on that basis alone, if the requirements of Rule 2-200 are met. Thus, after the payor attorney is awarded the fee, once the client consents in writing pursuant to the provisions of Rule 2-200, subd. (A), the fee may be divided.⁴

The inquiry also raises the separate issue of whether a lawyer may prepay a flat fee of \$250 to another lawyer upon the referral of a Workers' Compensation case. Since the payor lawyer has not yet received a fee, there is no fee to divide⁵. In that the payment cannot be a division of a fee made in accordance with the terms of Rule 2-200, subd. (A), the payment of money in gratitude for a referral can be made only to the extent set forth in Rule 2-200, subd. (B). Here, according to the facts of the inquiry, the payment does not fall within the exceptions of Rule 2-200, subd. (B). Consequently, because the fee payment based on the facts presented in this inquiry is a payment made before a fee exists to divide, it is prohibited.

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

¹ The text of rule 2-200(A) is as follows:

(A) 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 that 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 provisions for division of fees and is not unconscionable as that term is defined in Rule 4-200."

² Rule 2-200(B) provides in full:

"Except as permitted in paragraph (A) of this rule or rule 2-300, a member shall not compensate, give, or promise anything of value to any lawyer for the purpose of recommending or securing employment of the member or the member's law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's law firm by a client. A member's offering of or giving a gift or gratuity to any lawyer who has made a recommendation resulting in the employment of the member or the member's law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future."

³ As discussed in State Bar Formal Opinion No. 1994-138, to determine whether a payment is for services performed, three criteria are suggested: (1) the amount paid is compensation for work actually performed and is paid whether or not the payor lawyer is paid by the client; (2) the amount paid by the payor lawyer to the other lawyer is not based on the amount of fees which have been paid to the payor lawyer by the client; and (3) the payee lawyer has no expectation of receiving a percentage fee. If all three criteria are met, there is no need to comply with rule 2-200, because the payment is not a division of fees paid by the client.

⁴ The Committee does not opine whether the attorney fee must have been actually received by the payor attorney before division may occur, or whether the issuance of a court order approving the attorney fee would suffice.

⁵ This Committee does not opine on issues of general law. However, we note that an attorney's entitlement to any fee for representing an applicant in a workers' compensation proceeding is governed by Labor Code §§ 4903, 4906; and Title 8 Cal. Code of Regs. §§ 10775, 10776. Any payment must comply with Labor Code §§ 3215, 3217, 4903, and 4906. These statutes and regulations provide that in workers' compensation cases, an attorney's fees cannot be paid until that fee is approved and awarded by the Workers' Compensation Appeals Board. The proposed payments, paid before any fee is approved and awarded by the WCAB, may therefore violate substantive law. An attorney who recklessly or repeatedly fails to comply with legal requirements may fail to act competently, in violation of rule 3-110, Rules of Professional Conduct.