

LOS ANGELES COUNTY BAR ASSOCIATION  
PROFESSIONAL RESPONSIBILITIES AND ETHICS COMMITTEE  
FORMAL OPINION NO. 467

FEBRUARY 24, 1992

SUMMARY

An attorney may not pay a referral fee to an attorney who is not a partner of, associate or shareholder with the attorney unless the client has consented in writing after full disclosure has been made in writing regarding the division and the total fee charged to the client is not increased by reason of the division of fees nor is it an unconscionable fee.

AUTHORITIES CITED: *Moran v. Harris* 131 Cal. App.3d 913 (1982). *California Rules Of Professional Conduct* 2-200; 3-500; 4-200(B)

FACTS AND ISSUES

The facts as submitted to us are as follows:

Attorney A is contacted by his client to represent him in a will contest. Attorney A is not a probate lawyer and Attorney A declines client's representation but refers client to Attorney B. Attorney B agrees to represent client on a contingent fee basis.

By oral agreement Attorney B is to pay 1/3 of the fee collected from client to Attorney A as a referral fee or alternatively agrees to fully and fairly compensate Attorney A for referring the matter. The referral fee in no way increases the amount due from the client for legal services by Attorney B.

Attorney B then settles the case for a sum of money, a small part of which is to be paid every month, but the bulk of which is to be paid at a later date. Attorney B defers his demand for his contingency fee until a later time and receives no part of the monthly payments.

Attorney B then writes to Attorney A stating that the client has not yet agreed to pay any referral fee.

Three issues are presented:

1. At what time is the client's consent required?
2. Does a referral fee have to be based upon actual work performed by the referring attorney or may a fee be paid simply for referring the case?
3. Is a referral fee that is 1/3 of fee to be charged to the client by Attorney B reasonable?<sup>1</sup>

I

DISCUSSION

REFERRAL FEES ARE PAYABLE IF THE CLIENT CONSENTS  
PRIOR TO THE TIME THE FEE IS PAID

An attorney may pay a referral fee to an attorney not associated with him upon certain conditions. *Rules of Professional Conduct 2-200 provides:*

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<sup>1</sup>We have also been asked to determine the time the referral fee would be due since the fee payment has been deferred.

The time at which the referral fee is due would be subject to contract between the parties. Since this presents a legal issue, rather than an ethical issue, we do not address it.

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

The referral fee may be paid only upon the satisfaction of the conditions set forth in Rule 2-200. There is nothing in the rule to indicate that the consent of the client must be prior to the representation or at the time of the referral fee agreement. However, under this rule, the fees may only be paid after the client has consented in writing after full disclosure.

Nonetheless, it is preferable that the written consent be given prior to entering into the agreement. Failure to do so is fraught with peril. It may be construed as a breach of the fiduciary duties to the client as well as the lawyer's duty to keep the client reasonably apprised of developments relating to the engagement. *Rules of Professional Conduct 3-500.* Certain factors that may be of concern to the client cannot be addressed at the conclusion of the engagement. These concerns may include 1) whether the client is actually retaining the best attorney for the work or whether Attorney B was recommended simply because of

his agreement to pay a referral fee; 2) whether Attorney B will devote sufficient time to the matter in light of the fact that he will be receiving a reduced fee; and 3) whether the client may prefer to negotiate a more favorable arrangement directly with Attorneys A & B.

Each of these factors militates in favor of disclosure at the time of the referral or at a time reasonably close to the fee arrangement.

## II

### THE AMOUNT OF THE REFERRAL FEE NEED NOT BE PROPORTIONATE TO THE AMOUNT OF TIME SPENT

The amount of the referral fee is not dependent upon the time spent or reasonable value of services of the referring attorney. The payment of a referral fee, under certain circumstances, was approved in *Moran v. Harris*, 131 Cal. App. 913 (1982). *Moran* was decided after the 1979 amendment to Rule 2-108, the predecessor to Rule 2-200.

The court held referral fee arrangements are no longer contrary to public policy. Rule 2-108, the predecessor to Rule 2-200, was amended by the State Bar and the Supreme Court in 1979 by deleting the provision that the division of fees must be "made in proportion to the services performed or responsibility assumed by each lawyer."

Thus, a straight referral fee, without Attorney A doing any work on the case, may be paid provided it complies with the two conditions of Rule 2-200.

Attorney B shall not pay the referral fee without the client's written consent. Although referral fee arrangements are no longer contrary to public policy, certain conditions are imposed upon their enforceability. Until the client has consented in writing to the division of fees, the fees cannot be divided.

### III

#### IS THE ATTORNEYS' AGREEMENT REASONABLE?

The amount of the referral fee is subject to negotiation between the attorneys. Ethically, the concern is whether the fee to the client is unconscionable. Assuming that the fee charged to the client is not unconscionable no further inquiry on our part is required. *See: Rules of Professional Conduct 4-200(B)* as to the factors to be considered in the determination of unconscionability.

This opinion is advisory only. The committee acts only specific questions submitted ex-parte and the opinions are based only on the facts set forth in the questions presented.