THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS

FORMAL OPINION 2009-4

PAYMENTS FOR PRO BONO REFERRALS

TOPIC: Pro bono organizations requiring payments for referral of pro bono matters.

DIGEST: It has been increasingly common for pro bono organizations to require lawyers or law firms to make payments for referral of pro bono assignments. Although there is some disagreement as to whether this practice is advisable or good policy, the New York Rules of Professional Conduct permit such payments as long as they are "usual and reasonable" and made to "qualified legal assistance organizations."

RULE/CODE: Rule 1.1 (former DR 6-101); Rule 1.5 (former DR 2-106); Rule 5.4(c) (former DR 5-107(b)); Rule 6.1; Rule 7.2 (former DR 2-103).

QUESTION: Under what circumstances may a law firm or attorney, consistent with the New York Rules of Professional Conduct, make a payment to a pro bono organization to obtain pro bono assignments, and under what circumstances may a lawyer in such an organization seek and accept such a payment?

OPINION

Background

Lawyers long have been encouraged to provide pro bono legal services[1] and recently they have answered the call in increasing numbers. This welcome development has been attributed to a number of factors, including a heightened desire by the private bar to "give back" to the community, business-driven efforts to elevate law firms' standing in the community and relative to other firms,[2] and an effort to attract, train and retain associates. Whatever the

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1 *See, e.g.*, Rule 6.1 ("Lawyers are strongly encouraged to provide pro bono legal services . . . .").

2 *See, e.g.*, Ben Hallman, *The A-List 2008: Rarefied Air*, The American Lawyer, July 1, 2008 ("We rank firms in four categories: revenue per lawyer, pro bono hours, associate satisfaction, and diversity representation . . . Revenue per lawyer and pro bono scores count double.").

reasons, lawyers and law firms are spending more time on pro bono representations,[3] and many practitioners and firms have a strong interest in obtaining "quality" pro bono matters and being viewed as competitors for "desirable" pro bono assignments.

At the same time, various pro bono organizations over the years have been soliciting or even requiring payments from lawyers or law firms in exchange for referrals of pro bono assignments.[4] Perhaps in recognition of the increasing value lawyers and firms place on pro bono representations, or simply because of greater budgetary constraints, pro bono organizations appear to have stepped up their requests for referral fees as lawyers and law firms spend more time on pro bono matters.

Recently these payments—at times pejoratively characterized as "pay to play arrangements" or "quid pro quo payments"—have attracted attention in the legal community and the press. The views expressed about this practice have been divided. Some observers have supported it as providing private lawyers with opportunities to serve the public, while at the same time funding non-profit organizations and providing competent representation to indigent clients.[5] Others, however, question the advisability, if not necessarily the propriety, of such payments.[6] Critics of this practice have argued that it undermines the salutary objective of making pro bono opportunities readily available to a wide range of attorneys, including solo practitioners, lawyers at small firms and in-house counsel.

Because pro bono organizations are increasingly soliciting payments in exchange for referrals, and because we have located no ethics opinions or other authority on the subject, we believe it is appropriate to provide guidance under the New York Rules of Professional Conduct (the "Rules").

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[3] Dick Dahl, *Big Firms Pay for the Privilege of Providing Services Pro Bono*, LAWYERS USA, July 30, 2007 ("[F]or the fifth consecutive year, the number of pro bono hours has increased, with a whopping increase of 36 percent since 2002.").

[4] One non-profit international legal services provider, for example, requires law firms to donate at least $7,500 a year to guarantee access to its cases. *See* Ashby Jones, *Law Firms Willing to Pay to Work for Nothing*, THE WALL STREET JOURNAL, June 19, 2007 at B1. Another organization purportedly refers its most desirable cases to the firms that contribute to it. *See id.*

[5] "The upshot is increased support for the public-interest organizations that coordinate and send pro bono work to firms, and a lot more pro bono getting done." Ashby Jones, *supra* note 4 at B1.

[6] "At least so far, nobody has identified this as an ethics issue under the Rules of Professional Conduct . . . But it does raise a couple of questions about whether in the long term it's good for pro bono representation. It might give people the impression that pro bono is being done for personal gain as opposed to the reason most people do it, which is just to help others out." Dick Dahl, *supra* note 3 (quoting Mark I. Schickman, chair of the American Bar Association's Standing Committee on Pro Bono and Public Service).

Discussion

Rule 7.2, entitled "Payments for Referral," (former DR 2-103 (D) and (F)), primarily governs the payments at issue. Although referral fees are not expressly mentioned in the Rule or its predecessor under the Code of Professional Responsibility, we believe that the language of the Rule permits these fees as long as certain conditions are met.

Rule 7.2(a) provides in pertinent part that "[a] lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client."[7] Rule 7.2(a)(2), however, sets forth an exception to this broad prohibition, providing that "a lawyer may pay the usual and reasonable fees or dues charged by a qualified legal assistance organization . . . ." In turn, Rule 7.2(b) specifies which organizations are "qualified legal assistance organizations." But as the language of Rule 7.2 establishes, nothing in the rule prohibits qualified legal assistance organizations from limiting pro bono referrals only to those lawyers or firms who pay "usual and reasonable fees or dues." As long as any such fee is usual and reasonable and the pro bono organization meets the definition of a qualified legal assistance organization, Rules 7.2(a) and (b) permit lawyers or law firms to pay such fees to pro bono organizations.

Other rules, however, impose some limits. Regardless of whether payments made to or requested by a referring pro bono organization are otherwise permitted under Rule 7.2, lawyers accepting referrals must always also comply with Rules 1.1 (former DR 6-101) and 5.4(c) (former DR 5-107(b)). Rule 1.1 requires a lawyer to "provide competent representation to a client," while prohibiting a lawyer from handling legal matters which "the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it." Rule 5.4(c) provides that a lawyer cannot "permit a person who recommends, employs, or pays the lawyer to render legal service for another to direct or regulate the lawyer's professional judgment in rendering such legal services or to cause the lawyer to compromise the lawyer's duty to maintain the confidential information of the client under Rule 1.6." These provisions highlight the need for both the attorney undertaking a pro bono matter, and any attorney at a pro bono organization referring that matter, to ensure that the underlying pro bono client receives competent, independent representation.[8]

These requirements are echoed in the comments to Rule 7.2 prepared by the New York State Bar Association's Committee on Standards of Attorney Conduct ("COSAC"). Comment 2 states that "a lawyer may pay the usual charges of a qualified legal assistance

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[7] The Rules do not define the term "employment" and do not otherwise limit the term to the representation of clients who pay fees for legal services.

[8] If the payment of fees or dues to a referring organization were to affect a lawyer's judgment in connection with the representation of a referred pro bono client, disclosure of the payment and prior consent of the client would be required. However, if there is "no interference with the exercise of independent professional judgment," such disclosure would be unnecessary. *See* Rule 7.2(b).

organization. A lawyer so participating should make certain that the relationship with a qualified legal assistance organization in no way interferes with independent professional representation of the interests of the individual client."[9]

Comment 2 to Rule 7.2 also admonishes that "a lawyer should avoid . . . situations in which considerations of economy are given undue weight in determining the lawyers employed by [a qualified legal assistance] organization or the legal services to be performed for the member or beneficiary, rather than competence and quality of service." In other words, the interests of the client in securing independent, competent representation cannot be subordinated to the financial interests of the organization.

As for the fees themselves, the Rules do not define what is "usual and reasonable"[10] and provide no specific examples of what is meant by the term. As with the assessment of attorneys' fees under Rule 1.5(a), which prohibits fees that are "excessive or illegal," the question of whether pro bono fees or dues are "usual and reasonable" will be a fact-specific inquiry. Consequently, a lawyer must adequately evaluate all pertinent facts and circumstances when determining whether fees or dues are "usual and reasonable" within the meaning of the Rule 7.2(a)(2).

As a general matter, we believe that "usual" fees or dues in this context would mean fees or dues charged in the ordinary course on some equivalent basis for all referrals to law firms and lawyers which accept referrals from an organization. A uniform flat fee, for example, would generally be deemed a "usual fee." In contrast, a fee would not be "usual" if it were imposed on an ad hoc basis (for "special" cases) or in response to a sudden budget shortfall.

The term "reasonable fees or dues" is more difficult to define in part because the marketplace may establish a range of reasonable amounts charged by different pro bono organizations. Although we believe reasonableness must be established on a case-by-case basis by the attorneys and firms involved, we note that in addition to the marketplace, another relevant factor would be the extent to which the fee is reasonable in relation to an organization's cost of

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[9] The Appellate Divisions of the Supreme Court of the State of New York did not adopt any of the New York State Bar Association's proposed comments to the Rules. However, on April 1, 2009, COSAC issued its own comments to the Rules as adopted by the Courts. *See* http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/FinalNYRPCsWithComments.pdf (last visited April 13, 2009). Comment 2 to Rule 7.2 is identical to the comment accompanying the Rules as originally proposed by COSAC. It therefore was reviewed and approved by the New York State Bar Association's House of Delegates before it submitted the proposed Rules for approval to the Appellate Divisions.

[10] Rule 1.0(q) provides a definition of the terms "reasonable" and "reasonably" solely as they pertain to "conduct by a lawyer [and] denotes the conduct of a reasonably prudent lawyer." The definition does not pertain to the reasonableness of fees or dues charged by a pro bono organization.

providing services to its clients. Such services could include, among other things, an intake process, administrative overhead, and a supervising attorney's time.[11]

In addition to satisfying the "usual and reasonable" requirement of the Rule, the lawyers of any organization making referrals, and the lawyers and law firms making payments in exchange for referrals, must also determine whether the organization in question is a "qualified legal assistance organization" within the meaning of Rule 7.2(b)(1)-(4). The Rules define a "qualified legal assistance organization" as "an office or organization of one of the four types used in Rule 7.2(b)(1)-(4) that meets all the requirements thereof." Rule 1.0(p). Rule 7.2(b)(1)-(4), in turn, recognizes four categories of qualified legal assistance organizations: (1) a legal aid or public defender office; (2) a military legal assistance office; (3) a lawyer referral service operated, sponsored, or approved by a bar association or authorized by law or court rule; and (4) a bona fide organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, provided that the specific conditions of the Rule with respect to these organizations are met.

Most non-profit organizations which both actively provide pro bono representation as well as refer pro bono matters to other lawyers and law firms will be considered qualified legal assistance organizations under either the first or fourth clause of Rule 7.2(b). For example, organizations such as the Legal Aid Society, the Office of the Appellate Defender, the Office of the Public Defender, and the Office of the Federal Defender fall within this first category.

Examples of pro bono organizations that fall within the fourth category include: Advocates for Children, The Door, Human Rights First, inMotion, The Lawyers' Committee for Civil Rights Under Law, Rainforest Alliance, and Volunteer Lawyers for the Arts. In this regard, it should be noted that the conditions set forth in Rule 7.2(b)(4)(i)-(vi) for the fourth category were specifically "designed to guard against one of the bar's great fears—the fear that lawyers themselves . . . will set up or promote organizations for the 'primary purpose' of making money, with only secondary attention to serving society. Thus, an organization is not 'bona fide' if the lawyer or any of the lawyer's cohorts started the organization or somehow 'promoted' it and if their primary purpose was to make money."[12]

It merits emphasis that this opinion is not intended to discourage donations to non-qualified legal assistance organizations. To the contrary, the Rules strongly encourage lawyers both "to provide pro bono legal services to benefit poor persons" and "to contribute financially to organizations that provide legal services to poor persons." Rule 6.1(a)(1)-(2). Thus, although payments to non-qualified legal assistance organizations in exchange for referrals

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[11] A prior ethics opinion addressing the question of whether a lawyer may pay a fee to a legal referral service operated by a bar association noted that allowing lawyers "to contribute to the administrative expenses of a nonprofit lawyer referral service is consistent with the spirit of Canon 2 . . . ." NY STATE 651 (1993).

[12] Simon's New York Code of Professional Responsibility Annotated 344 (2008 ed.).

are prohibited, donations generally to support such organizations are not.[13] (Such a donation must not, however, be made "pursuant to a tacit arrangement of compensation in exchange for referrals."[14])

CONCLUSION

Payments to a pro bono organization to obtain pro bono assignments may be made without violating the Rules provided that (a) the fees or dues paid by the law firm or lawyer to the pro bono organization are "usual and reasonable"; and (b) the pro bono organization charging such fees or dues is a "qualified legal assistance organization" as defined by Rule 7.2(b)(1)-(4). General donations to non-qualified legal assistance organizations—as opposed to payments in exchange for pro bono referrals—may be made without violating the Rules so long as there is no tacit agreement that the donation is in exchange for case referrals. Any lawyer or law firm making the payment, and any responsible lawyer in the pro bono organization requesting or receiving the payment, must comply with the ethical standards for competent representation, Rule 1.1, independent professional judgment, Rule 5.4(c), and maintenance of confidences, Rules 1.6 and 5.4(c).

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[13] NY STATE 691 (1997) ("A donation to such a non-[Rule 7.2(b)]-qualified entity by an attorney included on that entity's referral list could be viewed as compensation, or something of value, in exchange for obtaining referrals, particularly if the donating attorney has received referrals from the organization in the past. Nonetheless . . . in view of the salutary purpose of the organization, such a donation should be permitted as long as it is clearly intended to be charitable.").

[14] *Id.*