



# LAWYER REFERRAL NETWORK

Published by the Standing Committee  
on Lawyer Referral and Information Service  
American Bar Association

Spring 1993, Volume 6, Number 4

## Percentage Fees: Available *and* Ethical

by Michael Franck

Lawyer referral and information services are not immune from economic reality. They too must cope with the twin pressures of less generous sources of income and escalating expenses. The traditional funding sources of sponsor subsidy plus client and panelist fees are increasingly inadequate. Additional income must be generated if referral and information service components are to maintain the quality standards essential to properly serving the public.

The most equitable source of additional funding for the service is obviously the lawyer who benefits financially from its operation. Why shouldn't that lawyer's contribution be directly proportionate to the monies earned as the result of a referral? Many services have forgone this potential source of funding because they regard it as fee-splitting, which is prohibited by the ethical standards of the profession. Careful analysis of that concern suggests that it is misplaced.

The long-standing prohibition against fee-splitting reflects the concern that a third party sharing in a legal fee would interfere in the lawyer-client relationship, by seeking to influence the lawyer to conduct the representation with an eye toward maximizing the fee to be earned, rather than to benefit the client. This concern first manifested itself in prohibitions against nonlawyer solicitation of claims in exchange for a percentage of the lawyer's fee (see *Mequire v. Corwine*, 101 U.S. 108 (1879)) and in prohibitions against the practice of law by corporations (see *In re Cooperative Co.*, 198 N.Y. 479 (1910)).

The prohibition against lawyers paying laypersons for soliciting cases was incorporated in the original Canons of Professional Ethics adopted by the American Bar Association in 1908. Other forms of fee-sharing with nonlawyers were originally prohibited only by statutes and case law. In 1928, the American Bar Association adopted Canon 34 of the Canons of Judicial Ethics which prohibited the sharing of legal fees entirely, except with another lawyer based upon a division of service or responsibility. But, as Gilbert and Sullivan's *Little Buttercup* reminded us in *H.M.S. Pinafore*, things are seldom what they seem.

In 1956, the ABA Committee on Professional Ethics issued an opinion as to whether a referral service sponsored by a local bar association could require those lawyers utilizing the service to assist in its financing, either by a flat fee or sliding-scale charge based on the fees derived by the lawyers from the cases referred to them. The Committee opined that registrants could be required to contribute to the expense of operating the re-

ferral service by a reasonable registration charge or by a reasonable percentage of fees they collected. The latter appeared to clearly be a division of legal fees with a nonlawyer. Nevertheless, the Committee concluded the arrangement would not constitute a violation of Canon 34.

The Ethics Committee gave absolutely no reason for its conclusion that the proposed percentage fee conformed to the existing Canon provision. We can only speculate that the Committee was determined not to impede the then-recent development of the lawyer referral service by the application of an ethical standard which had not anticipated that means of providing legal services to the public.

In 1969, the ABA Canons of Ethics were replaced by the ABA Model Code of Professional Responsibility. The Code retained the prohibition against a lawyer or law firm sharing legal fees with a nonlawyer, with exceptions only for death benefits payable to the estate of a deceased lawyer, compensation for services rendered prior to death payable to the estate of a lawyer, and the inclusion of nonlawyer employees in a firm retirement plan, even though the plan may be based on a profit-sharing arrangement (DR 3-102(A)). However, the Code also incorporated the lawyer referral service exception first sanctioned in Opinion 291. DR 2-103(B) prohibited the giving of compensation by a lawyer to a person or organization for having recommended or secured the lawyer's employment, or as a reward for having made a recommendation resulting in the lawyer's employment by a client, except that the lawyer was permitted to pay the usual and reasonable fees or dues charged by any of the organizations listed in DR 2-103(D). That subsection permitted the lawyer to be recommended by, among others, a lawyer referral service operated, sponsored, or approved by a bar association. The percentage fee now had formal Code sanction.

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## Ethical Issues Face LRIS's Too

by Richard Zitrin

Each state has its own rules of conduct for lawyers, and also treats LRIS's differently. Many states have not had much opportunity even to consider LRIS ethical issues in any "official" way, such as by court decision or formal ethics opinion. So it's impossible to tell exactly how these issues will be addressed in your state. In fact, the most valuable information available in most states is the anecdotal information about what most LRIS's actually do when difficult situations arise.

The goal of this article is to present a few important ethical issues, but not necessarily to offer the answers. Solutions will come as each LRIS in each state grapples with the issues as they arise. This article will address three general issues: (1) what constitutes the unauthorized practice of law; (2) whether client communications with LRIS's are confidential; and (3) what to do with problem clients and problem attorneys.

Before we begin, however, remember that ethical issues that face the typical Lawyer Referral and Information Service are very different from those which confront lawyers in their day-to-day practice. First, an LRIS does not act as a lawyer for the client, but as a facilitator, to get that client to the right lawyer or the right service program. Second, of course, almost all LRIS interviewers—indeed, the vast majority of LRIS directors—are nonlawyers. Thus, the formal, written rules of conduct for attorneys in each state do not directly apply to LRIS's.

### 1. Unauthorized Practice of Law

When does an LRIS interviewer step over the line and engage in the practice of law during the phone screening of clients? On one extreme, at least one state, New Jersey, in ruling that private, profit-making lawyer referral programs could not operate in that state, held that any organization that has nonlawyers doing significant client screening is engaging in the unauthorized practice of law. On the other extreme are those who believe that legal interviewers for referral services should be able to do thorough screening without it being considered practicing law without a license.

These two extremes show that there is no obvious solution that will work everywhere, except to do little, if any, screening. But more and more LRIS's now feel that they—rather than panel member attorneys—are best equipped to make nonlegal agency and public service referrals for their callers' benefit.

In many states, the semantics of what the interviewers say could be very important in determining whether they are practicing law. For instance, if a caller wants a referral on an employment case, which an experienced interviewer knows is virtually certain to be rejected by any lawyer, the interviewer could pass this information on to the client in several ways. One interviewer might simply

say, "I don't think you have a case." Another might cite to the recent State Supreme Court opinion on limitation of actions to explain why the caller's case is weak. A third might say that in his or her experience, "lawyers in town have told us they won't take cases of this sort, for the following reasons. . . ."

The first two interviewers are much more likely to be guilty of the unauthorized practice of law than the third. This is because of the way in which they responded, more than the substance of what they actually said. By simply passing on what *lawyers* have been telling the service, the third interviewer may be protecting the service against the claim of unauthorized practice. In the case of insistent clients, the interviewer can still send the individual on to an attorney, who will in turn pass on the bad news personally.

### 2. Confidentiality

Is what a client tells a lawyer referral service interviewer confidential? An informal survey at the 1992 ABA workshop showed that LRIS's clearly consider the communications confidential. But will this claim stand up in court? Again, there's no clear answer. One theory is that the LRIS, serving as a prescreener for its panel attorneys, is covered by the attorney-client confidential relationship. But what happens when there is a conflict between the client and the lawyer, and the LRIS tries to act on behalf of the client to resolve the conflict? The attorney-

***Does your LRIS have a concern or problem? Even though you may feel alone, probably another LRIS has faced a similar situation and solved it. Let us hear from you (anonymously if you wish), and we will attempt to find an answer or two for you from among the many LRIS's that we keep in contact with all over the country.***

***This is your newsletter.*** Drop us a line telling us news about your LRIS, staff changes, new programs that worked (or didn't, but which we can all learn from), and about your concerns. Is there anything that you want to know more about and would like to see discussed in *LRN*? Let us know about that, too, and we'll try to address it in a future issue.

—Editor

client privilege may not protect the client from disclosure to that very same lawyer.

The ABA's Committee on Lawyer Referral and Information Service, which sponsors the annual workshop, has authored proposed ABA Model Rules that include a rule making communications between client and lawyer referral service both confidential and privileged (meaning not admissible in court). This rule will go before the ABA's House of Delegates in August. If your local bar is interested in supporting these rules, the Committee would welcome this support. Sheree Swetin at the ABA can provide you with more information.

In the meantime, how should communications be treated? As a practical matter, almost all LRIS's have treated the communications as confidential. This certainly seems reasonable unless and until an appropriate authority, such as a court, requires disclosure. And, as far as is known, courts have rarely done this. Nevertheless, it is important for your interviewers to know that the claim of confidentiality is far from clear at this time.

### 3. Problem Clients, Problem Lawyers

Newsletter space considerations allow little more than the mention of these problems here. But here as food for thought are a few of the ethical problems that can trouble any LRIS: what is the obligation to an insistent client who you have been unable to refer to a lawyer—how long must you keep trying?; are you entitled to warn a lawyer that the client who is coming for a consultation is very difficult (and whether that warning would violate LRIS/client confidentiality)?; what is your responsibility to the client when you learn that the lawyer is making mistakes in the client's case?; what is your responsibility when you learn the lawyer has a substance abuse problem and may be making errors in many cases?; what do you do when you learn that one of your panel member lawyers has been subject to discipline by the State Bar?

It is hoped that these and other ethical issues can be discussed further, either at the ABA Annual Meeting or in a future issue of *Lawyer Referral Network*. ☺

### Winning Ideas from the 1991 Best Idea Contest

*[In the last two issues we've featured five of the top ten winners of the Best Idea Contest held at the 1991 LRIS National Workshop in Denver, and promised to print those winning ideas in upcoming issues of LRN. Listed below are three more of the ten winners.]*

#### Chicago Bar Association

Jean Pavela

The Chicago Bar Association Lawyer Referral Service is establishing a Senior Lawyer Pro Bono LRS Advisory Program to expand its public service by utilizing the expertise and experience of CBS Senior Lawyers Committee members. Participating senior lawyers will be scheduled for one week each, during which the attorney will offer pro bono advice on a one-time basis by telephone to LRS callers who, because they are unwilling or unable to pay the \$20 consultation fee or attorney's fee, are not being referred to a regular LRS panel attorney and who nevertheless feel the need to speak with a lawyer. Through this program, such callers will be told that an experienced lawyer will call them back. The lawyer scheduled for that week then calls the person at his or her convenience to provide general advice, such as self-help guidance on a legal matter not feasible to retain a lawyer or information on basic rights, potential remedies, and the processes of litigation. Where appropriate, they will refer persons to other legal and social services agencies.

#### Fairfax, Virginia LRIS

Jean Kelleher Niebauer

*Improving Operations Through Staff Moral*

The Fairfax LRIS receives an average of 2,500 calls

per month and our staff assistants set approximately 400 appointments each month. Because there has been a high volume of client inquiries since 1987, staff burnout was a problem I inherited when I became administrator in 1989.

I divided two full-time staff assistant positions into five part-time positions. In doing so, I attracted highly qualified, in fact, overqualified men and women, all of whom needed to "tailor" hours to accommodate young children or college and law school schedules. Each part-timer has brought special talents to LRIS: one is multilingual and excellent with bookkeeping; one is a former college communications instructor; another is a college senior with expertise in statistics; one is a college debater who is applying to law school; and one is a law student. The quality of our service has improved, staff morale is high, and income is up!

#### Genesee County Bar Association, Flint, Michigan

Christina A. Fias

- A. *Lawyer Referral Press*—monthly newsletter to panel members informing them of the happenings at LRIS;
- B. New Member Welcoming Meeting;
- C. LRIS Luncheon and Workshop; and
- D. LRIS Panel Member Recruitment Flyers—two flyers then mass application mailing increased panel by 17 percent.