

DELAWARE STATE BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS

Opinion 1982-3

The Committee has been asked by a Delaware lawyer for its opinion as to a proposal under consideration by three Delaware lawyers who are also Fellows (the "Fellows") of the American Academy of Matrimonial Lawyers ("AAML"). The proposal described by the inquiring lawyer is as follows: The Fellows would cause the AAML to be listed in the classified section of the local telephone directory under the heading "Lawyer Referral Service". The listing for AAML would be in bold face type, and would contain a local telephone number (the "AAML number"). The party answering the AAML number would greet callers with the words "American Academy of Matrimonial Lawyers," and would refer callers, on a rotation basis, to the Fellows.

ISSUE

May the Fellows cause the AAML listing to be published in the classified section of the local telephone directory and thereafter participate in the referral service?

OPINION

Unless the AAML has been certified as a specialist group (or all of the members of the organization are certified as such specialists) by the Delaware Supreme Court or the membership of the AAML or the AAML is open to all lawyers

duly admitted to the Delaware bar and in good standing, the Fellows may not ethically cause the AAML listing to be published in the classified section of the local telephone directory or participate in a referral service. Even if the AAML were open to all such lawyers, unless the organization or all its members were certified as such specialists, no lawyer referral service designed to provide reference to lawyers whose practice involves domestic relations matters may ethically lead a public participant in the service to believe that reference will be made to a specialist in "matrimonial law" - that is, to a lawyer with special competence in domestic relations.

DISCUSSION

The inquiry raises questions in three broad areas of controversy, viz., advertising, specialization, and solicitation of business. The questions raised by the inquiry in these areas, however, do not lend themselves to discrete analysis. Accordingly, this Opinion will treat the questions raised by the inquiry as a whole.

For the purposes of this Opinion, the Committee has made no investigation of the AAML or its membership criteria. Rather, it is assumed simply that the AAML is an association of lawyers whose practice involves domestic relations matters. Accordingly, it is not a "lay intermediary" between the public and the bar. It is further assumed that the Fellows are aware of the restrictions and require-

ments imposed by the Delaware Lawyer's Code of Professional Responsibility (the "Delaware CPR"), Disciplinary Rule ("DR") 2-105(A) with respect to specialization and limitation of practice.*

At the outset, the Committee recognizes that there is an inherent conflict between the duty of a lawyer to assist the legal profession in fulfilling its duty to make legal counsel available to the public and the duty of a lawyer to refrain from unprofessional solicitation of business. Where these conflicting duties meet is a gray area in which certainty is a luxury not often or easily obtained. At its most basic, the inquiry raises a question as to whether or not a small number of Delaware lawyers may establish and operate their own lawyer referral service. It is to this basic question which the Committee first turns.

Delaware lawyers are bound by the Canons and Disciplinary Rules promulgated by the Delaware Supreme Court as the operative parts of the Delaware CPR. Several provisions of the Delaware CPR are relevant to the questions raised by the inquiry. First and foremost of these is Canon 2, which states that "[a] lawyer should assist the

*The Committee wishes to stress that it has not considered questions other than those presented directly by the inquiry. Accordingly, it has not considered the question of advertising by the Fellows individually, except to the extent that the AAML advertisement can be said to be an advertisement of the Fellows.

legal profession in fulfilling its duty to make legal counsel available." The manner in which a lawyer should fulfill this obligation, however, is limited by the obligations and duties imposed by other provisions of the Delaware CPR.

One such limitation is contained in Delaware CPR, DR2-103(C), which states, in part, as follows:

A lawyer shall not request a person or organization to recommend or promote the use of his services or those of his partner or associate, or any other lawyer affiliated with him or his firm, as a private practitioner, except as authorized in DR2-101, and except that:

(1) He may request referrals from a lawyer referral service operated, sponsored or approved by a bar association and may pay its fees incident thereto.

* * *

Delaware CPR, DR2-103(C).

A similar provision is contained in Delaware CPR, DR2-103(D), which provides, in part, as follows:

A lawyer or his partner or associate or any other lawyer affiliated with him or his firm may be recommended, employed or paid by, or may cooperate with, 1 of the following offices or organizations that promote the use of his services or those of his partner or associate or any other lawyer affiliated with him or his firm, if there is no interference with the exercise of independent professional judgment in behalf of his client:

* * *

(3) A lawyer referral service operated, sponsored or approved by a bar association.

* * *

Delaware CPR, DR2-103(D).

Thus, the question which must be answered by the Committee is whether or not the referral service proposed to be operated by the Fellows is "a lawyer referral service operated, sponsored or approved by a bar association." Unfortunately for the interests of ease and certainty DR2-103(C)(1) and DR2-103(D)(3) have been amended since their original promulgation, and the amendments have rendered an answer to the questions raised by the inquiry more troublesome.

As originally promulgated, DR2-103(C) read as follows:

A lawyer shall not request a person or organization to recommend employment, as a private practitioner, of himself, his partner, or associate, except that he may request referrals from a lawyer referral service operated, sponsored, or approved by a bar association representative of the general bar of the geographical area in which the association exists and may pay its fees incident thereto.

Delaware CPR, DR2-103(C) (superseded) (emphasis added).

As originally promulgated, DR2-103(D) read, in part, as follows:

A lawyer shall not knowingly assist a person or organization that recommends, furnishes, or pays for legal services to promote the use of his services or those of his partners or associates.

However, he may cooperate in a dignified manner with the legal service activities of any of the following, provided that his independent professional judgment is exercised in behalf of his client without interference or control by any organization or other person:

* * *

(3) A lawyer referral service operated, sponsored, or approved by a bar association representative of the general bar of the geographical area in which the association exists.

Delaware CPR, DR2-103(D) (superseded) (emphasis added).

As originally adopted, the Delaware CPR provided in its Definitions section that "[a] bar association representative of the general bar' includes a bar association of specialists as referred to in DR2-105(A)(1) or (4)." The provisions of Delaware CPR, DR2-103(C) and DR2-103(D) were amended effective November 22, 1977, into the form quoted, in part, infra at 4. The amendment deleted the limitational phrase "representative of the general bar of the geographical area in which the association exists" after the phrase "bar association" in what are now DR2-103(C)(1) and DR2-103(D)(3). The Definitions section of the Delaware CPR, however, still includes the reference to "a bar association representative of the general bar," although that would now appear to be an outdated reference. The amendments to DR2-103(C) and DR2-103(D) were promulgated as part of a complete revision of Canon 2 in response to the decision of the United States

Supreme Court in Bates v. State Bar of Arizona, 433 U.S. 350 (1977).*

The provisions of the American Bar Association Code of Professional Responsibility (the "ABA Code"), DR2-103(C) and DR2-103(D), as originally promulgated, were interpreted by the American Bar Association Committee on Ethics and Professional Responsibility (under this and any of its former names, the "ABA Committee") in its Informal Opinion 1139 (August 9, 1970), in response to an inquiry similar to that considered herein. The ABA Committee was asked whether a bar association composed of lawyers having a special interest in a particular legal field (specifically, trial practice) may establish a lawyer referral service. The bar association in question was the American Trial Lawyers Association ("ATLA") and its official local affiliates. The ABA Committee noted specifically that membership in ATLA was open to any practicing lawyer.

The ABA Committee reviewed the relevant Ethical Considerations promulgated in connection with Canon 2 of the ABA Code. Among the relevant Ethical Considerations were the following:

*All of the case law and ethics committee opinions which predate Bates must be examined closely for their continuing vitality in light of the sweeping changes in the law and in the profession's thinking about itself caused by Bates.

In some instances a lawyer confines his practice to a particular field of law. In the absence of state controls to insure the existence of special competence, a lawyer should not be permitted to hold himself out as a specialist, or as having special training or ability, other than in the historically excepted fields of admiralty, trademark, and patent law.

EC2-14.

. . . Use of a lawyer referral system enables a layman to avoid an uninformed selection of a lawyer because such a system makes possible the employment of competent lawyers who have indicated an interest in the subject matter involved. Lawyers should support the principle of lawyer referral systems and should encourage the evolution of other ethical plans which aid in the selection of qualified counsel.

EC2-15.

In giving its opinion, the ABA Committee focused on ABA Code, DR2-103(C) and DR2-103(D) as they then existed. At the time of Informal Opinion 1139 was issued, these Disciplinary Rules contained the language "representative of the general bar of the geographical area in which the association exists" that formerly existed in the Delaware CPR. These provisions were amended in response to Bates, as well. Accordingly, Informal Opinion 1139 of the ABA Committee must be evaluated in terms of the subsequently enacted amendments to the ABA Code.

The ABA Committee, after reviewing the relevant Ethical Considerations and Disciplinary Rules, concluded that the limitations on the use by lawyers of lawyer referral

services had a two-fold purpose: First, they were intended to preclude the use of small, inadequately staffed bar associations not truly representative of the general bar of the area in question in order to ensure that the legal services delivered pursuant to the lawyer referral service in question were adequate to meet the public need. Second, they were intended to prevent duplication of effort (and the resulting public confusion) by bar associations with similar constituencies and subject matter interests. In light of those conclusions, the ABA Committee opined as follows:

We believe, however, that a specialist bar association may qualify to have a lawyer referral service if such organization has been recognized as a qualified specialist group in a particular field of law or law practice (as their name might imply) by the authority having jurisdiction under state law over the subject of specialization and the membership of such group can be said to be truly representative of the general bar of the area by accepting all applications for membership from the general as well as the specialized bar of the area.

Although the conclusions reached by the ABA Committee in Informal Opinion 1139 were based on Disciplinary Rules which have since been amended, the Committee believes that they are still sound. The Committee does not believe that the term "bar association" as used in DR2-103(C) and DR2-103(D) is intended to include any group of two or more lawyers joined together for a common purpose. Rather,

the term "bar association" as used in the Disciplinary Rules has a more specific and limited meaning. As a result, Delaware lawyers are restricted in the extent to which they may participate in lawyer referral services operated by associations of lawyers. A consideration of several other relevant opinions by various ethics committees will help to show the reasons for the Committee's decision.

In its Formal Opinion 179 (May 8, 1938), the ABA Committee considered the propriety of a local bar association's sponsorship of a radio broadcast which could dramatize the need for competent legal assistance in will drafting. Noting the basic conflict inherent in situations such as that presented in the present inquiry, the ABA Committee said:

We recognize a distinction between teaching the lay public the importance of securing legal services preventive in character and the solicitation of professional employment by or for a particular lawyer. The former tends to promote the public interest and enhance the public estimation of the profession. The latter is calculated to injure the public and degrade the profession.

In approving the plan of the bar association to sponsor the radio broadcast, the ABA Committee suggested four limitations to guard against possible evils. Most pertinently, the first limitation is that the plan "should be carried on by the organized bar in order that any semblance of personal solicitation will be avoided." The other limitations

were that the purpose of the plan be to educate the public, that it must not appear as if motivated by a desire to increase lawyers' employment, and that it be carried out with dignity.

In Formal Opinion 205 (November 23, 1940), the ABA Committee opined as follows:

A local bar association may form a panel of attorneys who are willing to serve low-income persons at fees which are within the financial ability of the client if (1) the plan is supervised by the local bar association, (2) no individual attorney's name is advertised, and (3) such publicity as is necessary is directed toward apprising low-income persons of the method and means by which the plan is to be carried out.

The focus of the Formal Opinion 205 is on the question of advertising, which was generally prohibited by Canon 27 of the Canons of Professional Ethics. In opining that the lawyer referral plan inquired about was not prohibited by Canon 27, the ABA Committee cited the fact that the salutary purpose of the plan was to provide legal services to low-income groups, the fact that the plan was to be supervised and directed by the local bar association, and the fact that advertisement of the plan was not to involve mention of individual lawyers' names.*

*Formal Opinion 205 should be contrasted with the ABA Committee's Formal Opinion 191 (February 18, 1939). There, the ABA Committee opined that it was improper for a group of lawyers to advertise (by individual names) their availability for consultation with lower income persons at nominal rates. Although the purpose of the plan was "laudable", the Committee found fault with the listing of individual lawyers' names.

In Formal Opinion 227 (July 12, 1941), the ABA Committee again opined that:

Canon 27 as it applies to bar associations does not prohibit the employment of advertising facilities by an organized bar association to acquaint the lay public with the desirability of securing legal services promptly when a legal problem arises and to apprise the public of a lawyers reference service, the plan under which it operates, and the availability of the service.

The plan in question called for members of the bar association to file a registration form indicating willingness to accept employment in the following classifications: (1) consulting with other lawyers as specialists in a particular field, (2) serving lower-income groups at relatively low fees, and (3) serving laymen seeking a lawyer in a particular field. The ABA Committee stated its opinion that, as to the second and third of these classifications, the plan should be broadened so as to permit registration by all members of the bar duly licensed, in good standing and engaged in active practice. Underlying this qualification is the feeling of the ABA Committee that "[a]n organized group of lawyers may not solicit professional employment for members of the group, nor any selected number thereof."

In Formal Opinion 291 (August 1, 1956), the ABA Committee opined that:

A local bar association operating a lawyers' referral service should not operate the plan for the benefit of any particular group of attorneys although it may use its reasonable discretion in deciding whether to confine the referral panel to bar association members only.

In rendering its opinion, the ABA Committee recognized the conflict between the duty of a bar association to see to it that members of its lawyer referral service panel are competent and its duty to refrain from operating a lawyer referral service that would operate (or would appear to operate) for the benefit of any particular group of lawyers. The ABA Committee left the matter of exclusion from the panel of non-members of the bar association to the discretion of the bar association, noting that in some instances such exclusion might be appropriate.

In its Informal Opinion 411 (July 24, 1961), the ABA Committee dealt with an inquiry as to the propriety of the patent section of a local bar association inserting in the yellow pages of the telephone directory a notice of a patent attorney reference service. The ABA Committee's response was that the proposed lawyer reference service was acceptable, with a caveat. The ABA Committee noted that lawyers were generally not permitted to designate themselves as engaged in specialty fields. Also, the ABA Committee noted the need to eliminate the possibility of multiple lawyer referral services run by various specialty segments of the bar. In light of these concerns, the ABA

Committee stated that any advertising of a patent lawyer reference service in the yellow pages of a telephone directory should be done by the bar association itself, and not by a specialty section thereof.

Informal opinion 411 may be compared and contrasted with an opinion by the committee of the State Bar of Michigan charged with issuing opinions on professional ethics.

In Opinion 188, that committee apparently opined that "[a] lawyer referral service may be conducted only by a general state or local bar association. Segments of the bar or associations of lawyers engaged in limited fields of law, such as the Michigan Patent Law Association, may not operate such services." (Summarized in Maru, Digest of Bar Association Ethics Opinions, No. 1362 (1970)).

In light of the foregoing, and in light of the relevant provisions of the Delaware CPR,* the Committee

*The Model Rules of Professional Conduct (proposed final draft) currently under consideration by the various bar associations of the United States, has several provisions which are relevant to the questions raised by the inquiry: Proposed rule 7.2 provides as follows:

(a) Subject to the requirements of the rules 7.1 and 7.3(b), a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, radio or television, or through written communication not involving personal contact.

(b) A copy or recording of an advertisement or written communication shall be kept for one year after it dissemination.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services,

must answer this question: "Is the AAML a "bar association" for purposes of DR2-103(C) and (D)?" There is no definition of "bar association" in the Delaware CPR. There is, however, an opinion by the ABA Committee which deals with the definition of "bar association". In Informal Opinion 784 (August 24, 1964), the ABA Committee responded to an inquiry as to the meaning of "bar association" in Canon 27. The ABA Committee cited with approval the following definition of bar association from the book The Lawyer from Antiquity to Modern Times, by Roscoe Pound:

[Footnote continued from previous page.]

except that a lawyer may pay the reasonable cost of advertising or written communication permitted by this rule.

Proposed rule 7.4 provides as follows:

A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state or imply that the lawyer is a specialist except as follows:

(a) A lawyer admitted to engage in patent practice before the United States Patent and Trade Mark Office may use the designation "patent attorney" or substantially similar designation;

(b) A lawyer engaged in admiralty practice may use the designation "admiralty," "proctor and admiralty" or a substantially similar designation; and

(c) [Provisions on designation of specialization of the particular state].

The provisions of the proposed Model Rules of Professional Conduct, while relevant to the questions raised by the inquiry, do not appear capable of furnishing any more certainty than the provisions of the Delaware CPR.

By a bar association, then, we mean an organization of lawyers to promote and maintain the practice of law as a profession, that is, as a learned art pursued in the spirit of a public service -- in the spirit of a service of furthering the administration of justice through and according to law. This is brought out in the declared purposes of bar associations in their several constitutions, put in many varying ways, but almost universally coming substantially to the proposition just stated. The purposes generally declared are: (1) to advance the science of jurisprudence, (2) to promote the administration of justice in the jurisdiction in which the association exists, (3) to uphold the honor of the profession of the law, and (4) to establish cordial intercourse among the members of the bar of the jurisdiction.

The ABA Committee gave its opinion that the inquiring party's suggested definition of bar association did properly define that term as it was used in Canon 27. The definition of bar association suggested in Informal Opinion 784 related to a lawyer's listing of his memberships and offices in a "bar association" in the lawyer's entry in a law list (which was permitted by Canon 27).

The Committee notes that Delaware CPR, DR2-101 deals with the question raised in Informal Opinion 784 by specifically permitting a lawyer to publish his "memberships, offices and committee assignments in bar associations" DR2-101(10), and his "memberships and offices in legal fraternities and legal societies," DR2-101(11). Thus, the question of what information a lawyer may publish about himself is a significantly different matter from the question

of the meaning of "bar association" for the purpose of determining whether or not a lawyer may accept referrals from a lawyer referral service operated by such an association.

The Committee believes that the term "bar association" as used in DR2-103(C) and (D) means an "association of the bar," and not just a group of lawyers. The Committee does not mean to imply that in Delaware "bar association" means only the Delaware State Bar Association. Rather, the Definitions section of the Delaware CPR implies that the term may include an "association of specialists." In order to qualify as an "association of specialists, however, an organization itself must be certified as a specialist group, or its membership must be limited to lawyers certified as specialists, by the Delaware Supreme Court. As of the date of this Opinion, the Committee is not aware that such a certification has been given to the AAML or to "matrimonial lawyers" or other lawyers whose practice is primarily limited to domestic relations matters.

In the absence of such certification, the Committee believes that only an organization of lawyers whose membership is open to all lawyers duly admitted to the bar and in good standing may qualify as a "bar association" within the intendment of DR2-103(C) and DR2-103(D).* To opine

*This is not to say that all such organizations whose membership is open to all lawyers are "bar associations," for there are other attributes which contribute to making an organization a "bar association." See discussion infra at 15-16. Open membership is a necessary, but not the only, prerequisite.

otherwise would give the Committee's approval to a lawyer referral service that would operate (or would appear to operate) for the benefit of only a few lawyers.

Although the Committee believes that the fatal vice in the lawyer referral service described in the inquiry may be restricted membership of the AAML, it also believes that the lawyer referral service described in the inquiry might also have the effect of indicating to callers who respond to the AAML listing in the telephone directory that they will be directed to a specialist in the field of matrimonial law. As has already been noted, such an indication of specialization is not permissible under the Delaware CPR, DR2-105(A). The listing of AAML in the classified section of the local telephone directory, without more, will not adequately convey to parties consulting that directory that they will not be referred to a specialist in "matrimonial law" or to a lawyer with special competence in domestic relations*.

* * *

Ms. Mullen has requested that this Opinion be issued with a notation that she has abstained from participation in its issuance.

*The Committee has considered the possible applicability of In the Matter of R M. J, 50 U.S.L.W 4135 (January 25, 1982), in reaching the conclusions expressed herein. The decision in R M. J is specifically limited to the facts presented therein, and, in any case, the Committee responds to inquiries based upon the limitations and duties imposed by the Delaware CPR in force at the time of the Opinion.