

Advisory Opinion 1983-1

The question presented to the Advisory Opinions Committee in this instance is whether it is unethical for New Mexico lawyers to use the National Legal Referral Service. The National Legal Referral Service is a private referral service which is not as yet approved by the State Bar of New Mexico. It is the committee's understanding that this particular service is owned by non-lawyers and charges an initial fee to its lawyer members for organizational costs, advertising, production, etc. After this initial charge, its lawyer members are assessed a periodic, fixed charge for advertising referral which is not directly or indirectly determined by the amount of referrals or clients which the lawyers receive.

Rule 2-103 of the New Mexico Code of Professional Responsibility provides in part:

(B) Except as permitted under Rule 2-103(C), a lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client, except that he may pay the usual and reasonable fees or dues charged by any of the organizations listed in Rule 2-103(D).

(C) 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 Rule 2-101, 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;

(2) he may cooperate with the legal service activities of any of the offices or organizations enumerated in Rule 2-103(D)(1) through (4) and may perform legal services for those to whom he was recommended by it to do such work if:

(a) the person to whom the recommendation is made is a member or beneficiary of such office or organization; and

(b) the lawyer remains free to exercise his independent professional judgment on behalf of his client.

(D) 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, one 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:

(1) a legal aid office or public defender office:

(a) operated or sponsored by a duly accredited law school;

(b) operated or sponsored by a bona fide nonprofit community organization;

(c) operated or sponsored by a governmental agency;

(d) operated, sponsored or approved by a bar association;

(2) a military legal assistance office;

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

This rule is one of several promulgated by the New Mexico Supreme Court in order to carry out the intent of Canon Two which provides: "A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available." Thus, there is a recognition by the legal profession that it has a duty to educate the public as to its legal needs and to provide information relevant to the selection of the most appropriate counsel. However, there is also a realization that in so doing,

the public is best served if the recommendation of counsel is disinterested and informed. In addition, there is the concern that a lawyer's freedom to exercise independent judgment on behalf of his client be preserved and kept free from compromising influences and considerations.

It is the committee's decision that so long as the National Legal Referral Service is not approved by the State Bar of New Mexico, that an attorney using its services is in violation of Rule 2-103. However, there still remains the question of whether or not the State Bar should promulgate rules for determining whether or not a private referral system should be granted bar approval. This concern stems both from the recognition of the goals of the legal profession to educate the public and from the realization that there are certain forms of solicitation which have been held to be constitutionally protected. For example, in *In re Primus*, 436 U.S. 412 (1978), the Supreme Court held solicitation on behalf of the American Civil Liberties Union to be constitutionally protected on the ground that it was within the zone of First Amendment protection reserved for associational freedoms. See also, *NAACP v. Button*, 371 U.S. 415 (1963). California has adopted a set of minimum standards for lawyer referral services which is attached hereto. It reflects certain of the committee's concerns as to what may be constitutionally protected activity.

In conclusion, it is the finding of the Advisory Opinions Committee that an attorney who participates in the National Legal Referral Service is in violation of the New Mexico Code of Professional Responsibility. However, the State Bar of New Mexico has the power to adopt reasonable rules and regulations governing private referral services. The committee feels that it would be preferable for the State Bar to promulgate rules and regulations concerning same in that it is doubtful whether the State Bar has the power to ban all private referral services which are not bar related.