OPINION #86-3

OPINION OF THE PROFESSIONAL ETHICS COMMITTEE
OF THE CLEVELAND BAR ASSOCIATION

HEADNOTE

A lawyer accepting referrals from a financial consultant who offers his consulting services and the lawyer's legal services as a package deal directly to customers/clients who are defendants in foreclosure actions violates DR2-103(D) relating to legal services organizations and either the solicitation rule (DR2-103) or the fee splitting rule (DR3-102), or both.

FACTS

The inquiry gives the following background:

Mr. X calls persons against whom foreclosure actions have been initiated and tells them that for a set fee he can assist them in obtaining refinancing and provide legal assistance for them. He then comes to [the inquirer] with the Complaints and pays me a fee for representing the Defendants. My fee comes from him, not from the Defendants. Please note that I am in no way involved in soliciting these clients. All that is requested of me is to provide legal assistance to these persons who have been sued by their respective mortgagees.

Consultant's services are not spelled out in the inquiry in detail but apparently include counseling in connection with filing of bankruptcy, attempting to reestablish good standing with the mortgagee, obtaining refinancing under either FHA or VA and/or arranging a sale of the mortgaged property prior to foreclosure.

QUESTIONS PRESENTED

Under the proposed arrangement would the inquirer be assisting the Consultant to promote services of the inquirer in circumstances prohibited by DR2-103(D) and DR2-101(B)?

Does the proposed arrangement constitute a forbidden request for a recommendation of professional employment under DR2-103?

Does the proposed arrangement constitute a forbidden division of legal fees with a non-lawyer in violation of DR3-102?
CONCLUSION

The arrangement proposed by the inquirer violates DR2-103(D) and one or the other or both of Disciplinary Rules 3-102 and 2-103.

REASONING AND ANALYSIS

Summary

A lawyer's use of another person or organization to promote the lawyer's services is limited (a) to publications or broadcasts by the lawyer which are not deceptive or fraudulent and (b) to participation in qualified legal services organizations. DR2-103(D), 2-101(B). The solicitation by Consultant is not a publication or broadcast by the lawyer nor does the consultant's business meet the requirements of a bona fide legal services organization. Therefore the lawyer should not enter into the proposed arrangement with Consultant.

The inquiring lawyer would also be barred from the proposed arrangement by DR2-103(C) which prohibits a lawyer from asking others to solicit on the lawyer's behalf.

The inquiring lawyer may be barred from the proposed arrangement because it may amount to fee splitting with a non-lawyer. DR3-102(A).

The facts also raise troubling spectres of a lawyer's assisting in the unauthorized practice of law, of the consultant's clients not receiving impartial advice in selecting counsel, and of the lawyer's own impartiality because of the ongoing business relationship between the lawyer and consultant. Each of the controlling bases for rejecting the proposed arrangement, the potential problems raised by the facts given and the specific questions asked by the inquirer are discussed in turn below.

Applicable Disciplinary Rules

The pertinent Disciplinary Rules are:

DR2-101(B) In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish or broadcast, subject to DR2-102 through DR2-105, information in print media, in written or printed material distributed to consumers through the mail or otherwise; or over radio or television. The information disclosed by the lawyer in such publication or broadcast shall comply with DR2-101(A).

DR2-103(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 ... (exceptions not relevant here)

DR2-103(D) A lawyer shall not knowingly assist a person or organization that furnishes or pays for legal services to others to promote the use of his services or those of his partner or associate or any other lawyer affiliated
with him or his firm except as permitted in DR2-101(B). However, this does not prohibit a lawyer or his partner or associate or any other lawyer affiliated with him or his firm from being recommended, employed or paid by, or cooperating with, assisting and providing legal services for, 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:

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(4) Any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries provided the following conditions are satisfied:

(a) Such organization, including any affiliate, is so organized and operated that no profit is derived by it from the rendition of legal services by lawyers, and that, if the organization is organized for profit, the legal services are not rendered by lawyers employed, directed, supervised or selected by it except in connection with matters where such organization bears ultimate liability of its member or beneficiary.

(b) Neither the lawyer, nor his partner, nor associate, nor any other lawyer affiliated with him or his firm, nor any non-lawyer, shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate or affiliated lawyer.

(c) Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization.

(d) The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter.

(e) Any member or beneficiary who is entitled to have legal services furnished or paid for by the organization may, if such member or beneficiary so desires, select counsel other than that furnished, selected or approved by the organization; provided, however, that the organization shall be under no obligation to pay for the legal services furnished by the attorney selected by the beneficiary unless the terms of the legal services plan specifically provide therefor.
Every legal services plan shall provide that any member or beneficiary may assert a claim that representation by counsel furnished, selected or approved by the organization would be unethical, improper or inadequate under the circumstances of the matter involved; the plan shall provide for adjudication of such a claim and appropriate relief through substitution of counsel or through providing that the beneficiary may select counsel and the organization shall pay for the legal services rendered by such counsel to the extent that such services are covered under the plan and in an amount equal to the cost which would have been incurred by the plan if the plan had furnished designated counsel.

(f) The lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court and other legal requirements that govern its legal service operations.

(g) Such organization has filed with the Supreme Court of Ohio on or before January 1 of each year a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel, and financial results of its legal service activities or, if it has failed to do so, the lawyer does not know or have cause to know of such failure.

DR3-102(A) A lawyer or firm shall not share legal fees with a non-lawyer, except that: ... (exceptions not relevant here)

1. Promotion of the Lawyer's Services

DR2-103(D) defines the very limited situations in which a lawyer may use a third person or organization to solicit business for the lawyer or the lawyer's firm. This rule permits the lawyer to assist an organization that pays for legal services for others to promote the lawyer's services so long as the promotion is consistent with DR2-101(B). DR2-101(B) permits a lawyer to publish or broadcast information so long as the information is not fraudulent or deceptive.

The promotion of the inquirer's services by Consultant is not within this scope of permitted activities because the promotion by Consultant is not published or broadcast. These terms imply a mass effort to inform the public generally without regard to or knowledge of the particular needs of any individual. Here Consultant is directly contacting people known to be in legal difficulty.

Moreover, DR2-101(B) permits publication or broadcast by the lawyer. It is not necessary to define precisely what constitutes a publication or broadcast "by a lawyer." At a minimum the lawyer must retain some control of the content of the publication or broadcast. The solicitation by Consultant is not a publication or broadcast "by the inquirer" no matter how this phrase is defined since the inquirer has no control over the content of Consultant's solicitation.

DR2-103(D) also describes the types of organizations which provide legal services to others with which a lawyer may properly be affiliated. Consultant's business
does not fall within any of paragraphs (1)-(3) of subdivision (D). Only the conditions of paragraph (4) could apply to Consultant's business, but it appears that even these, especially subparagraphs (a), (b) and (g), are not met. Accordingly, the Consultant's business is not a permitted legal services organization.

The inquirer's participation with Consultant assists Consultant (who pays for the legal services) to promote the services of the inquirer in a manner prohibited by DR2-101(B) and thus the inquirer's participation is barred by DR2-103(D). Further, Consultant's plan is not a bona fide legal services organization under DR2-103(D). Accordingly the inquirer may not participate in this proposed arrangement with Consultant.

2. Solicitation on Behalf of a Lawyer

The inquiry states that Consultant brings complaints to the inquirer. The inquiry also states that the inquirer is to represent Consultant's customers in actions brought by their respective mortgagees. These statements suggest a continuing relationship between the inquirer and Consultant. The fact that Consultant solicits his customers by saying that for a set fee assistance in both refinancing and in legal matters is provided suggests that the relationship between Consultant and the inquirer is rearranged. The clear inference is that prior to Consultant's contact with his potential customer the inquirer knows what her fee will be and that a solicitation will take place. The apparently on going nature of the relationship suggests a violation of DR2-103(C), since Consultant is promoting the inquirer's services, albeit anonymously.

3. Fee Splitting

The proposed arrangement also may violate DR3-102. Consultant's services are offered together with the inquirer's legal services as part of a package deal for a single fee. This may be a violation of DR3-102 since the fee received by Consultant is split between Consultant, a non-lawyer, and the inquirer.

4. Impartiality of Advice in Selecting Counsel

The arrangement also may not be consistent with EC2-8 which emphasizes the importance of impartial advice in the selection of a lawyer. It states that

[a] laymen is best served if the recommendation [of a lawyer] is disinterested and informed. In order that the recommendation be disinterested, a lawyer should not seek to influence another to recommend his employment. A lawyer should not compensate another person for recommending him, for influencing a prospective client to employ him, or to encourage future recommendations.

5. Assisting Another in the Unauthorized Practice of Law

The facts given do not detail the services performed by Consultant. Nevertheless these services may amount to the unauthorized practice of law especially
if the presence of the lawyer in close association with Consultant is used by Consultant to encourage clients to entrust their legal position to Consultant's care. The inquirer is barred by DR3-101(A) from assisting another in the unauthorized practice of law.

6. Impartiality of Lawyer's Advice

The facts give no hint of undue influence by Consultant over the lawyer's advice and the very fact of the inquiry demonstrates sensitivity to ethical issues. EC5-21 through EC5-23 highlight the concerns which could make any ongoing arrangement with Consultant difficult, especially if referrals from Consultant were to become a significant portion of the inquirer's practice.

The inquirer asks the following questions concerning the proposed arrangement with Consultant:

1. Who is the inquirer's client, Consultant or Consultant's customer?

2. If Consultant's customer is the client, may the inquirer receive a fee for inquirer's services from Consultant rather than from Consultant's customer?

3. Is it ethical for the inquirer to accept representation where Consultant pays the fee to the inquirer on behalf of Consultant's customers?

4. Is it ethical for the inquirer to represent the clients who have had the inquirer selected as their attorney in a package deal? Would it make any difference if Consultant disclosed the financial arrangements between the inquirer and Consultant, and gave Consultant's customer the option of hiring an attorney of his or her own choice?

Questions 1 and 2

The inquirer's clients are Consultant's customers, the people against whom foreclosure is sought, and not Consultant. DR7-107(A)(1) makes clear that it is possible to receive a fee from one who is not the client, provided full disclosure is made. Under the facts of this case, Consultant has no interest in the foreclosure action and is not the client. In the legal services organization context DR2-103(D)(4)(d) unequivocally makes the person to whom services are rendered and not the legal services organization the client.

Question 3

If full disclosure is made to the client, a lawyer may accept a fee paid by another on behalf of the client, provided other Disciplinary Rules are not violated. Regardless of who pays the fee, it is important that an independent attorney-client relationship be established between the inquirer and her clients. Under the proposed arrangement where the inquirer is selected and paid by Consultant as an adjunct to his
business, it is quite possible that no independent attorney client relationship will be established.

**Question 4**

This question relates to the extent of disclosure to be made by Consultant to a prospective customer. The proposed disclosure retains the package deal arrangement and its inherent flaws of solicitation on the one hand and/or fee splitting on the other. A proper arrangement with Consultant and Consultant’s customers requires an independent attorney-client relationship between Consultant’s customers and the inquirer. An acceptable disclosure by the Consultant might state that Consultant’s fee is $Y and that legal services should perhaps be sought; that the customer is free to choose any lawyer, and that Consultant recommends the inquirer; that the fee arrangement between the customer/client and the inquirer or any other lawyer will have to be agreed upon between them.