

Division of Fees Between Attorneys

Lawyer A refers a matter to Lawyer Jones for which A accepts a one-third referral fee. Lawyer A's only connection with the case has been to hear the client's story, phone Jones, and inform him that he is sending over the client on the matter in question. Lawyer A has no further contact with the client or with Lawyer Jones in this matter.¹

Is the conduct of Lawyers A and Jones ethical under the American Bar Association Code of Professional Responsibility (hereinafter referred to as ABA Code)? The Supreme Court of Kansas addressed this issue in *Palmer v. Breyfogle*² and decided that referral fees were ipso facto violative of the ABA Code, Disciplinary Rule (hereinafter referred to as DR) 2-107.³ In *Palmer*, Wife⁴ had asked Palmer to represent her in a divorce action. Palmer then referred Wife to the Breyfogle firm.⁵ After the case, the Breyfogle firm, relying on DR 2-107, refused Palmer's request that they remit a portion of the fee to him.⁶ Palmer sued the Breyfogle firm for his asserted portion of the fee on the ground that, in referring Wife to the Breyfogle firm and in keeping her happy during the case, he had performed a "service"

1. The hypothetical occurrence was composed by Professor Jerome E. Carlin as part of a study of the observance by the bar of professional standards. J. CARLIN, *LAWYER'S ETHICS* 200 (1966).

2. 217 Kan. 128, 535 P.2d 955 (1975).

3. The Supreme Court of Kansas adopted the ABA Code of Professional Responsibility (hereinafter cited as ABA CODE), Disciplinary Rule (hereinafter cited as DR) 2-107 in 1970. *Id.* at 957.

DR 2-107(A) reads as follows:

(A) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:

(1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.

(2) The division is made in proportion to the services performed and the responsibility assumed by each.

(3) The total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they rendered the client.

4. The court referred to the parties to the divorce as Wife and Husband to shield them from unwanted publicity. *Palmer v. Breyfogle*, 217 Kan. 128, 535 P.2d 955, 957 (1975).

5. Although other attorneys and firms ultimately played a part in representing Wife, for the sake of clarity, defendant will be identified as the Breyfogle firm.

6. *Palmer v. Breyfogle*, 217 Kan. 128, 535 P.2d 955, 958 (1975).

within the context of DR 2-107.⁷ The lower court awarded Palmer one-third of the fee collected by the Breyfogle firm as a referral fee.⁸ The Supreme Court of Kansas reversed on appeal stating "that merely to recommend another lawyer or to refer a case to another lawyer and to do nothing further in the handling of the case cannot be construed as performing a legal service or discharging responsibility in the case."⁹

Nevertheless, Judge Fatzer, dissenting, advanced the argument that Palmer's continued contact with Wife through their social relationships played a supportive role and kept Wife happy, and therefore Palmer performed a service in the sense of DR 2-107.¹⁰ The majority quickly disposed of that argument:

We . . . reject the concept that "trying to keep a client happy" while litigation is in progress, carried out in a friendly, supportive way because of a social relationship . . . constitutes the performance of a legal service or the assumption of responsibility"¹¹

Despite the bell-ringing support of DR 2-107 found in *Palmer v. Breyfogle*, the prohibition against unearned fee splitting is a relatively new and controversial concept in judicial ethics. Not all courts have found the referral fee as onerous as the Kansas court did in *Palmer v. Breyfogle*.¹²

The History of DR 2-107

Prior to the adoption of the various codes of professional responsibility,¹³ disputes between lawyers over fees were treated by courts

7. The court found that while the Breyfogle firm spent three hundred hours on the case and another firm one hundred and thirty-three hours, Palmer had done nothing beyond referring his client to defendant. *Id.* at 964, 965, 968.

8. The court noted that the common practice in Kansas was for the forwarding attorney to receive one-third of any fee collected by the forwarder. *Id.* at 958.

9. *Id.* at 967.

10. *Id.* at 970.

11. *Id.* at 969.

12. See, e.g., *Parker v. Gartside*, 178 Ill. App. 634 (1913).

13. The first code of professional responsibility for lawyers was adopted by Alabama in 1887. The original Canons of Professional Ethics of the American Bar Association adopted in 1908 was based on the Alabama model and contained thirty-two canons. The ABA adopted the present ABA Code, replacing the canons with Disciplinary Rules and Ethical Considerations, in 1969. The Disciplinary Rules are mandatory in character and state the minimum level of conduct below

as mere contract actions¹⁴ devoid of ethical considerations.¹⁵ Generally courts were asked to adjudicate disputes between attorneys who had failed to agree to a division of fees before associating.¹⁶ In those instances, the majority rule dictated that “[a]ttorneys who jointly undertake to prosecute or to defend a lawsuit are entitled, in the absence of any agreement to the contrary, to share equally in the compensation, and it is immaterial which attorney furnished the most labor and skill.”¹⁷ Regardless of whether courts called these arrangements partnerships,¹⁸ special partnerships,¹⁹ joint adven-

which no lawyer may fall without being subject to disciplinary action. The Ethical Considerations are “aspirational in character” and “represent the objectives toward which every member of the profession should strive.” At the writing of this comment all states have adopted the ABA Code with minor changes. Carrington, *The Major Problems of the Legal Profession During the Seventies*, 30 Sw. L.J. 665, 669-73 (1976) (citations omitted).

Although most of the local variances in the ABA Code are inconsequential vis-à-vis this comment, the variance in Alabama is important. The Rules Governing the Conduct of Lawyers in Alabama (hereinafter referred to as Alabama Rules), Disciplinary Rule (hereinafter referred to as DR) 2-108 (which corresponds with ABA Code, DR 2-107) states:

- (A) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:
- (1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.

Significantly missing from Alabama Rules, DR 2-108 are the two-fold ABA Code, DR 2-107 requirements that the divided fee be based on service and responsibility and that the total fee not be unreasonable.

No case has been found in Alabama interpreting Alabama Rules, DR 2-108 or its predecessors. Nevertheless, in a related case, *Smith v. Waldrop*, the Alabama Supreme Court recognized the custom in the Birmingham bar, where one firm associates with another firm, to divide the fee equally regardless of which firm performed the most services or took the most responsibility. *Smith v. Waldrop*, 201 Ala. 37, 38, 77 So. 331, 332 (1917).

Since the *Smith* decision predates the Alabama Rules by more than sixty years, its authority is doubtful. Nevertheless, there would appear to be no express reason why forwarding fees would be illegal under the Alabama Rules.

14. See *Ford v. Freeman*, 40 Cal. App. 221, 180 P. 545 (1919); *Glover v. Maddox*, 98 Ga. App. 548, 196 S.E.2d 288 (1958).

15. See *Underwood v. Overstreet*, 188 Ky. 562, 223 S.W. 152 (1920); *Langdon v. Kennedy, Holland, DeLacy & McLaughlin*, 118 Neb. 290, 224 N.W. 292 (1929); *Carson v. McMahan*, 215 Or. 38, 332 P.2d 84 (1958).

16. *McCann v. Todd*, 203 La. 631, 14 So. 2d 469 (1943).

17. *Id.* at 472 (emphasis added).

18. *Harris v. Flournoy & Flournoy*, 338 Ky. 329, 38 S.W.2d 10, 12 (1931) (The court applied the partnership theory to four attorneys representing a client in a will dispute and concluded, “It is well settled under the law governing partnerships

tures,²⁰ joint undertakings,²¹ limited partnerships,²² or panned no name at all,²³ the result was uniformly the same—each attorney shared the fee pro rata.

Courts adopting the majority rule advanced two reasons for their holdings. First, in theory “each partner in taking care of the joint property is practically taking care of his own interest and is but performing his own duties and obligations growing out of the partnership.”²⁴ Therefore, each partner or joint adventurer is assumed to have contracted for his pro rata share of the fee by failing to stipulate otherwise before undertaking to represent the client. Given the fact that courts were called upon to interpret these associations after the fact, and given that the lawyers involved could have avoided the dispute by a prior written contract, the courts understandably took recourse in the general principles of partnership law.²⁵

The second reason for the majority view was entirely practical. If courts had decided to divide fees between disputatious attorneys on the basis of the value of services rendered, the resultant proof problems were perceived as enormous. In *Langdon v. Kennedy*, the court reasoned,

the relative value of services rendered by the several partners of a firm cannot be estimated and equalized, for it is impossible

that, when the question is one of division of profits; the presumption is that the profits are to be divided equally.”)

19. *Langdon v. Kennedy*, Holland, DeLacy & McLaughlin, 118 Neb. 290, 224 N.W. 292, 293 (1929). Here the court termed the association of two attorneys a “special partnership” and held “where such a relationship exists a partner—‘Has no right by implication to claim anything extra by reason of any inequality of services rendered by him, as compared to those rendered by his copartners.’” (citations omitted). The court also referred to the association as a “joint adventure.” See note 20 *infra*.

20. *McCann v. Todd*, 203 La. 631, 14 So. 2d 469, 471 (1943). The court called the association of two or more attorneys a “joint adventure” stating, “[A] joint adventure has been defined as a special combination of two or more persons, wherein some specific venture a profit is jointly sought without any actual partnership or corporate designation.” *Id.* (citations omitted).

21. *Underwood v. Overstreet*, 188 Ky. 562, 223 S.W. 152 (1920).

22. *Bailey v. Griggs*, 174 Okla. 90, 49 P.2d 695, 697 (1935).

23. *Gill v. Mayne*, 162 N.W. 24 (Iowa 1917).

24. *Langdon v. Kennedy*, Holland, DeLacy & McLaughlin, 118 Neb. 290, 224 N.W. 292, 293 (1929).

25. *Harris v. Flournoy & Flournoy*, 238 Ky. 329, 38 S.W.2d 10, 12 (1931).

to see how far the relative knowledge, skill and ability of each enter into the adjustment of the terms of the contract.²⁶

The majority of courts relying on the *Langdon* rationale opted out of deciding the relative value of each attorney's work, and as a result "the fact that one attorney did most of the work did not entitle him to a larger portion of the fee"²⁷

Despite the "impossibility" of measuring the value of a lawyer's work, a few courts deviated from the majority rule and awarded fees on quantum meruit.²⁸ Often these cases turned on the fact that the court was directed by statute to award fees in certain cases.²⁹ A common example of such statutes are probate laws.³⁰ Those cases held that the attorneys had no right to contract in derogation of the statute or to take the responsibility for allocating fees from the court.

In other cases, courts divided fees on a quantum meruit basis when one attorney terminated his representation before the end of the case.³¹ The court in *Justice v. Lairy* stated the general rule that when one attorney had withdrawn, the contract of employment "is of a divisible nature, under which a recovery may be had for services, of which the client has already had the benefit," and the withdrawing lawyer "can have no interest in fees for service rendered by the remaining members of the firm in concluding that particular business."³² But it has also been argued that employment contracts between attorneys are entire in nature, and if one attorney withdraws before the contract is completed, he receives no compensation.³³

Finally, only one opinion has been found in which the court

26. *Langdon v. Kennedy, Holland, DeLacy & McLaughlin*, 118 Neb. 290, 224 N.W. 292, 293 (1929).

27. *Underwood v. Overstreet*, 188 Ky. 562, 223 S.W. 152, 154 (1920).

28. *Komisarow v. Lansky*, 219 N.E.2d 913 (Ind. Ct. App. 1966); *Justice v. Lairy*, 19 Ind. App. 272, 49 N.E. 459 (1898); *Mau v. Woodburn, Foreman, Wedge, Blakey, Folsom & Hug*, 390 P.2d 721 (Nev. 1964).

29. *Mau v. Woodburn, Foreman, Wedge, Blakey, Folsom & Hug*, 390 P.2d 721 (Nev. 1964).

30. For an example of a probate statute that mandates court approval of fees, see NEV. REV. STAT. § 150.060.

31. *Justice v. Lairy*, 19 Ind. App. 272, 49 N.E. 459, 462 (1898); *Jones v. Thomas*, 106 Neb. 635, 184 N.W. 151 (1921).

32. *Justice v. Lairy*, 19 Ind. App. 272, 49 N.E. 459, 462 (1898).

33. *Jones v. Thomas*, 106 Neb. 635, 184 N.W. 151, 154 (1921) (dissenting opinion).

awarded fees on a quantum meruit basis in a contingent fee case.³⁴ In *Komisarow*, plaintiff and defendant contracted to represent an accident victim on a contingency fee basis. Plaintiff performed most of the work on the case. After the suit was successfully concluded, defendant collected the fee and refused to remit one-half to plaintiff. Plaintiff sued defendant under partnership theory. The court found that plaintiff and defendant had not agreed on the method of dividing the fee. Then the court decided that plaintiff should not be limited to one-half of the fee, but rather the court awarded plaintiff five-sevenths of the fee on a quantum meruit basis in the interest of "fairness." Notably absent in the court's opinion was any discussion of partnership theory.

The maverick *Komisarow* approach has been clearly rejected by the overwhelming weight of court decisions.³⁵ One court has pointed out that the application of quantum meruit in the cases previously discussed is technically incorrect.³⁶ When two lawyers agree to represent a client, they agree to serve the client, not each other. While either attorney might be able to sue the client for the value of his services rendered to that client under quantum meruit, neither can sue the other attorney working with him under quantum meruit since neither provided his services for the other attorney. Therefore, in theory, an attorney may not demand greater than his pro rata share from another attorney in the situations previously discussed.³⁷

Concurrent with the development of the partnership, joint adventure, and quantum meruit theories of allocating fees among attorneys who associate without a prior contract, courts developed the "customary practice" approach for referral cases.³⁸ Almost all courts³⁹ and legal commentators⁴⁰ have recognized the universal cus-

34. *Komisarow v. Lansky*, 219 N.E.2d 913 (Ind. Ct. App. 1966).

35. See notes 14-27 *supra* and accompanying text.

36. *McCann v. Todd*, 203 La. 631, 14 So. 2d 469 (1943).

37. *Id.*

38. *Parker v. Gartside*, 178 Ill. App. 634 (1913). In *Parker* the court admitted evidence "tending to prove that where a lawyer sends a claim to another for collection, a general custom prevails of a division of fees of one-third to the lawyer sending the business and two-thirds to the lawyer receiving same." *Id.* at 635-36.

39. *Palmer v. Breyfogle*, 217 Kan. 128, 535 P.2d 955, 958 (1975); *Parker v. Gartside*, 178 Ill. App. 634, 636 (1913); *McFarland v. George*, 316 S.W.2d 662, 670 (Mo. 1958).

40. H. DRINKER, *LEGAL ETHICS* 186 (1953) [hereinafter cited as DRINKER]; Steirett, *The Sale of a Law Practice*, 121 U. PA. L. REV. 306, 313 (1972); Panel

tom of the one-third referral fee.⁴¹ As a result, the only major exception to a pro rata distribution of fees under the partnership and joint adventure rules arose when the sole act of one attorney was to refer a client to another lawyer. In such a situation, courts awarded the forwarder one-third of the fee and the forwarder two-thirds. The reaction against this one-third "kickback" eventually led to DR 2-107.⁴²

The first step on the road to DR 2-107 was taken by the ABA when it dealt with fee splitting between lawyers and laymen. Canon 34 of the ABA Canons of Professional Ethics (hereinafter referred to as Canon 34) adopted in 1928 provided that no division of fees was proper between laymen and lawyers unless the fee was for the collection of liquidated commercial claims.⁴³ In 1937, Canon 34 was amended to eliminate the exception for commercial claims,⁴⁴ and today, ABA Code DR 3-102(A) prohibits fee splitting between laymen and attorneys with a few exceptions that are irrelevant for this discussion.

Canon 34 not only proscribed fee-splitting between attorneys and laymen, but it also required that fees divided between attorneys be "based on a division of service and responsibility."⁴⁵ The same language is used in today's ABA Code DR 2-107,⁴⁷ and recently the ABA Committee on Professional Ethics (hereinafter referred to as ABA Committee)⁴⁸ has placed an increasingly stricter interpretation on the terms "service" and "responsibility." Originally, both the ABA Committee⁴⁹ and the Committee of Professional Ethics of the Association of the Bar of the City of New York⁵⁰ decreed that Canon

Discussion, *The Determination of Professional Fees from the Ethical Viewpoint—A Panel Discussion*, 7 U. FLA. L. REV. 433 (1954); 24 MO. L. REV. 557, 558 (1959).

41. The referral fee is also called a forwarding fee or a finder's fee.

42. For the text of DR 2-107, see note 3, *supra*.

43. 53 A.B.A. REP. 130.

44. 62 A.B.A. REP. 352, 765.

45. See *Utz v. State Bar of Cal.*, 21 Cal. 2d 100, 130 P.2d 377 (1942).

46. ABA CANONS OF PROFESSIONAL ETHICS, No. 34.

47. DR 2-107 is stated in note 3 *supra*.

48. Hereinafter all ABA COMMITTEE ON PROFESSIONAL ETHICS, OPINIONS will be cited as ABA OPINIONS, and ABA COMMITTEE ON PROFESSIONAL ETHICS, INFORMAL OPINIONS will be cited as INFORMAL OPINIONS.

49. INFORMAL OPINIONS, No. 353 ("when the client specifically agrees that the forwarding lawyer shall receive one-third and the forwarder two-thirds contingently, Canon 34 is not violated").

50. THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SELECTED OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS [hereinafter cited as N.Y. CITY

34 did not apply if a client knowingly consented to a forwarding fee. Ultimately, the ABA Committee decided that Canon 34 would be violated by forwarding fees even if the client consented.⁵¹ The ABA Committee's position⁵² is the overwhelming view of bar associations which have expressed an opinion on the issue.⁵³ Next, the ABA Committee decided that in merely recommending a lawyer to one's client, the recommending attorney performs no service within the meaning of DR 2-107.⁵⁴ Also, the ABA Committee rejected the concept of a "customary" fee.⁵⁵ The ABA Committee has specifically disapproved the one-third referring fee.⁵⁶ Even if an attorney refers a client because the rules of court in another jurisdiction demand participation of a local lawyer, the forwarding attorney cannot receive a portion of the fee unless he has performed some service or assumed responsibility for the case.⁵⁷ Finally, ignorance of DR 2-107 does not excuse errant conduct.⁵⁸

The strict interpretation of DR 2-107 by bar associations has been bolstered by the few courts which have ruled on the validity of referral fees.⁵⁹ The principal case construing DR 2-107 before

OPINIONS], No. 85 (1928); see also H. DRINKER, *supra* note 40, at 188.

51. INFORMAL OPINIONS, No. 936 (1966).

52. INFORMAL OPINIONS, No. 848 (1965).

53. FLORIDA BAR ASSOCIATION, OPINIONS, No. 64-35, 39 FLA. B.J. 314 (1965) (all forwarding fees are unethical); ILLINOIS STATE BAR ASSOCIATION, OPINIONS, No. 118 (forwarding fees between lawyers are ethical only if the recipient of the fee shares in the services or responsibility); LOS ANGELES COUNTY BAR ASSOCIATION, OPINIONS, No. 232, 31 L.A.B. BULL. 339 (1956); N.Y. CITY OPINIONS No. 123 (1929); N.Y. CITY OPINIONS No. 500 (1939); NEW YORK COUNTY LAWYER'S ASSOCIATION, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS [hereinafter cited as N.Y. COUNTY OPINIONS], No. 42 (1914); N.Y. COUNTY OPINIONS, No. 180 (1920); NORTH CAROLINA STATE BAR, OPINIONS, No. 265 (1959); OREGON BAR ASSOCIATION No. 109, 22 ORE. ST. B. BULL. 9 (1962); WASHINGTON STATE BAR ASSOCIATION, OPINIONS, No. 10 (1951). Many of these opinions may be found in O. MARA, DIGEST OF BAR ASSOCIATION ETHICS OPINIONS (1970).

54. ABA OPINIONS, No. 153 (1936); ABA OPINIONS, No. 204 (1940).

55. ABA OPINIONS, No. 265 (1945) ("An attorney who recommends an attorney in another jurisdiction to his client, or who, at the client's request, retains such attorney to represent the client is not thereby ipso facto entitled to any 'customary' division of the fee earned by the latter.").

56. INFORMAL OPINIONS, No. 932 (1966).

57. INFORMAL OPINIONS, No. 511 (1962).

58. N.Y. COUNTY OPINIONS, No. 382 (1948).

59. Although the reported court decisions on fee splitting *between attorneys* are in accord with the various bar associations' opinions, the decisions are noteworthy for their scarcity. This author could find only five decisions that directly dealt

Palmer is *McFarland v. George*.⁶⁰ In *McFarland*, plaintiff referred his client to defendant because plaintiff was running for prosecuting attorney at the time and could not give the case the attention it merited.⁶¹ Defendant successfully represented the client in a will dispute for which defendant received twenty thousand dollars from the court for his fee.⁶² Plaintiff successfully sued defendant for his alleged portion of the fee.⁶³ On appeal, the state supreme court reversed. The court relied on Missouri Supreme Court Rule 4.34, which was essentially the same as DR 2-107,⁶⁴ and interpreted Rule 4.34:

To merely recommend another lawyer or to refer a case to another lawyer and to do nothing further in the handling of the case cannot be construed as performing service or discharging responsibility in the case. The service and responsibility referred to in the rule, before the lawyer is entitled to a division of fees, must relate to an actual participation in or handling of the case. As we said before the rule would be meaningless if this were not so.⁶⁵

Given the strong statements by courts and bar associations interpreting DR 2-107 as evidenced by the holding in the *McFarland*

with the forwarding fee problem. *Palmer v. Breyfogle*, 217 Kan. 128, 535 P.2d 955 (1975); *McFarland v. George*, 316 S.W.2d 662 (Mo. 1968); *Orenstein v. Albert*, 39 Misc. 2d 1093, 242 N.Y.S.2d 505 (1963); *Clark v. Robinson*, 252 App. Div. 857, 299 N.Y.S. 474 (1937); *Baylis v. Wood*, 248 App. Div. 585, 287 N.Y.S. 372 (1930). The three New York decisions are also noteworthy for their failure to discuss the policy reasons for DR 2-107 except to state that forwarding fees are "against public policy and unenforceable." *Orenstein v. Albert*, 39 Misc. 2d 1093, 242 N.Y.S.2d 505 (1963).

Nevertheless, many cases concerning fee splitting *between attorneys and laymen* have been reported. This author can only conjecture that the overwhelming hostility with which DR 2-107 is viewed by the practicing bar has resulted in the litigation of only a few violations of 2-107. For a discussion of the reception of DR 2-107 within the bar see the text and accompanying notes in the section of this comment entitled *The Myth*.

60. 316 S.W.2d 662 (Mo. 1968).

61. *Id.* at 664.

62. *Id.* at 665.

63. The plaintiff actually sued for one-half the fee on the ground that defendant had misled plaintiff into believing that the suit was worthless. The lower court found plaintiff's argument on the fraud issue unpersuasive but awarded plaintiff one-third of the fee as a finder's fee. *Id.* at 664.

64. *Id.* at 669.

65. *Id.* at 670.

case and pronouncements by the ABA Committee, it would seem beyond dispute that referral fees would be viewed by almost all lawyers as undesirable as well as illegal. Nothing could be further from the truth.

*The Myth*⁶⁶

One legal writer comments about DR 2-107, "In the past this proscription has been honored more in its breach."⁶⁷ Another writer concludes, "Probably the most often violated canon of ethics is former Canon 34 [now DR 2-107]."⁶⁸ These statements are not isolated; other authorities in the field of the legal profession have reached the same conclusion.⁶⁹

If DR 2-107 is being violated, how extensive are the violations? The answer was one of the subjects of three studies.⁷⁰ In one study,⁷¹ McCracken found that

66. A scholar in the field of the legal profession once penned the following statement: "A profession which continues to operate on the basis of myths, without considering all the factors which contribute to its fabric, will accelerate the decay of its influence, its prestige, and its very existence." Cohen, *Confronting Myth in the American Legal Profession: A Territorial Perspective*, 22 ALA. L. REV. 513, 551 (1970).

67. Cady, *Canons to the Code of Professional Responsibility*, 2 CONN. L. REV. 222, 236 (1969).

68. Brizius, *Advice to the Young Lawyer on Building a Practice*, 17 PRAC. LAW. no. 2, at 13, 31 (1971). Brizius further states, "The most frequent violation of this canon is by the splitting of fees between lawyers when the only service provided by the lawyer receiving the unearned portion is the act of referring the case. Frequently, the referral fee is one-third of the total fee." *Id.*

69. J. CARLIN, *supra* note 1, at 185-93; J. HANDLER, *THE LAWYER AND HIS COMMUNITY* 97-98 (1967); L. PATTERSON & E. CHEATHAM, *THE PROFESSION OF LAW* 276 (1971) [hereinafter cited as L. PATTERSON]; McCracken, *Report on Observance by the Bar of Stated Professional Standards*, 37 VA. L. REV. 399, 415 (1951); Steir-ett, *supra* note 40, at 313.

70. The studies referred to are found in J. HANDLER; J. CARLIN; & McCracken, note 69 *supra*.

71. See generally McCracken, *supra* note 69, at 414-16. McCracken sent a questionnaire to one or more representative lawyers in every one of the then forty-eight states. He admitted that many variations would affect the statistical validity of the results, but nevertheless concluded "as to the great preponderance of the questions, there [was] a striking similarity in the answers received." *Id.* at 400. The pertinent question for our purpose is as follows: "Is the so-called forwarding fee of 33 1/3 percent proper under this canon [34]?" The results were:

Considered Unprofessional	7
Not Unprofessional	16
Doubt or No Opinion	2

the so-called forwarding fee of 33 1/3 percent has been transmitted for so many years and in such a large number of communities that it has come to have been accepted by the Bar as an accepted practice. . . . Moreover, it seems to be common throughout the country.⁷²

In *The Lawyer and His Community*,⁷³ Professor Handler concluded the following: less than half of the bar considered accepting a referral fee unethical; the sanctions chosen by authorities who disapproved of such conduct were relatively mild; and "*the average portion of lawyers who either did not disapprove or, if they did disapprove would take no action whatsoever, was about 80 percent of the bar.*"⁷⁴ Almost sixty percent of the bar freely admitted violating the "referral fee rule."⁷⁵ Furthermore, Handler found that the rate of violation was the same for high income attorneys as for the remainder of the bar.⁷⁶ Income and status had no effect on adherence to DR 2-107.⁷⁷

Finally, in the Carlin study,⁷⁸ over sixty-five percent of the

Common Practice	19
Rare	4
Non-existent	1
No Opinion	1

Id. at 415.

72. McCracken, *supra* note 69, at 417.

73. See generally J. HANDLER, *supra* note 69, at 1-141. Handler's survey was based on interviews of lawyers in private practice in a middle-sized midwestern city in 1964. The population of the metropolitan area was about one hundred twenty thousand. Ninety-one lawyers practiced in the city; eighty-three were interviewed. *Id.* at 6-7. Handler presented the following fact situation to the interviewees: "Lawyer A refers a matter to Lawyer Jones for which A accepts a one-third referral fee. Lawyer A's only connection with the case has been to hear the client's story, phone Jones, and inform him that he is sending over the client on the matter in question. Lawyer A has no further contact with the client or with Lawyer Jones in this matter." *Id.* at 95.

74. *Id.* at 97-98 (emphasis added).

75. *Id.* at 107.

76. *Id.* at 137.

77. *Id.* at 138.

78. See generally J. CARLIN, *supra* note 1, at 165-95. The population in the Carlin study consisted of all lawyers in private practice in Manhattan and Bronx listed in *Martindale-Hubbell Law Directory* or the *Manhattan or Bronx Red Book* as engaged in private practice. Target samples were used. Eight hundred and one lawyers were interviewed. *Id.* 185-93. Carlin presented the same hypothetical fact situation that is set out in note 73 *supra*. The results were as follows:

Accept fee	67 percent
Take more than one-third	1

attorneys responding said they would accept the one-third referral fee. Only twenty-five percent would not accept the fee unless some work was performed.⁷⁹

Although repudiation of DR 2-107 by most of the bar would seem clear from the above studies,⁸⁰ the reasons for the rejection of the rule remain to be considered. In an effort to find those reasons, Carlin divided ethical standards found in the bar into two kinds: "those that proscribe behavior considered immoral and unethical by society generally" such as stealing, bribery, and cheating; and "those that deal with professional problems" like business practices, conflicts of interest, and relations among colleagues.⁸¹ Carlin concluded that while most lawyers accept the general standards, the distinctly professional standards are accepted for the most part only by the elite lawyers. The reasons for the dichotomy are practical: the professional standards impose special restraints—"they tend to cut off practitioners 'from many opportunities for financial gain . . . legitimately open to the businessman.'"⁸² While McCracken agreed with the conclusion that DR 2-107 is rejected because it is not "considered realistic and applicable to business and professional conditions of the modern American world," he also found that some lawyers "for reason of gain or in their zeal to win cases, see fit to disregard certain canons"⁸³ Finally, Handler concluded:

It can be argued that the rules violated were not serious, for the most part. They did not conflict with usual community standards, such as cheating, stealing and bribery; and they did

Take less than one-third	2
Accept if client's fee is not affected	1
Not accept unless some work is performed	25
No answer	4
Total	100

Id. at 200.

79. J. CARLIN, *supra* note 1, at 200.

80. *Id.*

A final point needs to be made about the studies. Despite the fact that the respondents differed vastly from study to study in income, geographic location, types of practice, types of populations served, and date of interview, each study is remarkably similar in outcome, and in each study the rejection rate for DR 2-107 never fell below sixty-five percent.

81. J. CARLIN, *supra* note 1, at 165.

82. *Id.* (citations omitted).

not threaten more distinctive interests, such as loyalty to client, honesty and candor in dealings with colleagues, and prohibitions against predatory competitive practices.⁸⁴

The last aspect of the myth of DR 2-107 that needs examination is the curious fact that some courts refuse to apply DR 2-107 in situations clearly governed by the rule. Although courts are quick to apply DR 2-107 in cases that directly confront the issue of forwarding fees,⁸⁵ there appears to be a marked disinclination to discuss the rule in cases that involve dividing fees among lawyers but do not entail the extreme violation of the forwarding fee. Thus, in situations where both attorneys have done some work, albeit in disproportionate amounts, a court is likely to apply the partnership or joint adventure rule and divide the fee pro rata while appearing to ignore the mandate of DR 2-107 that fees be divided on a basis of service and responsibility. The two cases of *McCann v. Todd*⁸⁶ and *Carson v. McMahan*⁸⁷ apply the partnership and joint adven-

83. McCracken, *supra* note 69, at 400.

84. J. HANDLER, *supra* note 69, at 140.

85. See note 59 *supra*.

86. 203 La. 631, 14 So. 2d 469 (1943). When *McCann v. Todd* was decided, Louisiana Canons of Professional Ethics, Canon 34, provided that "no division of fees for legal services is proper, except with another lawyer, based upon a division of service and responsibility, or with a forwarding attorney." G. BRAND, BAR ASSOCIATIONS, ATTORNEYS AND JUDGES 254 (1956). In *McCann*, three attorneys representing the same client settled a contingent fee case for \$60,279. One of the attorneys decided that their fee should be divided on the basis of quantum meruit. The other two attorneys sued to have the fee divided pro rata. The Louisiana Supreme Court held that the fee should be divided pro rata since it appeared from the evidence that no prior agreement on the division of fees had been made, and thus, all three attorneys were partners in the endeavor. The court completely ignored the Louisiana Canons of Professional Ethics, Canon 34 requirement that fees be divided on the basis of "service and responsibility," and stated, "[Neither attorney has a right] by implication to claim anything extra by reason of any inequality of services rendered by him, as compared to those rendered by his copartners." *McCann v. Todd*, 203 La. 631, 14 So. 2d 469, 472 (1943) (citations omitted).

87. 215 Or. 38, 332 P.2d 84 (1958). Oregon adopted the ABA Canons of Professional Responsibility, Canon 34 as Oregon Canons of Professional Responsibility, Canon 33 in 1952. G. BRAND, BAR ASSOCIATIONS, ATTORNEYS AND JUDGES 541 (1956). In *Carson v. McMahan*, plaintiff's deceased husband and defendant had represented a client on a contingent fee basis. After the case was litigated, defendant collected a fee of \$75,000. Defendant then claimed he had "hired" the deceased and had paid him a salary for his work. Plaintiff argued that since no contract existed between defendant and deceased, the fee should be split pro rata. The court, again ignoring the mandate of Oregon Canons of Professional Responsibility, Canon 34, found for plaintiff on partnership theory.

ture rules despite the fact that both jurisdictions have adopted some form of DR 2-107. Three decades after the American Bar Association decided that divisions of fees among lawyers should be based on the amounts of service rendered and responsibility assumed, the *McCann* court wrote, "Attorneys who jointly undertake to prosecute or to defend a lawsuit are entitled, in the absence of any agreement to the contrary, to share equally in the compensation, and it is immaterial which attorney furnishes the most labor or skill."⁸⁸

Regardless of the reasons, a clear majority of the bar has rejected DR 2-107, and some courts have hesitated to implement the rule in any case except the extreme situation of the customary, one-third forwarding fee. Therefore, it must follow that the effectiveness of the rule is mythical and this duplicity by the bench and bar threatens, in Professor Cohen's words, to "accelerate the decay of [the bar's] influence, its prestige, and its very existence."⁸⁹ Although this may be an extreme view of the importance of DR 2-107, nevertheless, it is at least clear that a rule provoking such disrespect should be reexamined to determine whether its value is sufficient to overcome the disadvantages of its unpopularity.

A Reexamination of DR 2-107

Proponents of DR 2-107 first argue that the practice of law is a profession and not a "mere business,"⁹⁰ in which clients are treated as merchandise.⁹¹ The *McFarland* court warned, "it should never be forgotten that the profession is a branch of the administration of

88. *McCann v. Todd*, 203 La. 631, 14 So. 2d 469, 472 (1958) (emphasis added). The reasons that would impel a court to apply DR 2-107 when forwarding fees are involved but ignore the disciplinary rule when both attorneys perform some service, albeit in unequal amounts, are obscure. Perhaps the perceived difficulty of assessing the worth of each attorney's services prevents application of DR 2-107 in all but the clearest of cases—the forwarding fee. Applying DR 2-107 to the forwarding fee is relatively easy for a court to do—it simply denies recovery for the forwarder. Perhaps the perceived inequity of rewarding the "finder" with one-third of a hard-earned fee makes that case an easy target for courts. Or perhaps, given the hostility of the bar to DR 2-107, many practitioners do not even know that they can use the protection of DR 2-107 when they are forced to divide fees pro rata with an attorney who merely refers the client. In any event, this author could find no case in which DR 2-107 was applied other than in the forwarding fee scenario.

89. Note 66 *supra*.

90. *Palmer v. Breyfogle*, 217 Kan. 128, 535 P.2d 955, 965 (1975).

91. *Id.* at 966.

justice and not a mere money-getting trade.”⁹² One legal scholar asserted that it is beneath the dignity of the profession to be a “broker in attorneys.”⁹³ It is argued that such business practices are demeaning.⁹⁴ The Preamble to the ABA Code takes up the cant in hortatory language: “The future of the Republic, to a great extent, depends on our maintenance of justice pure and unsullied.” “The Legal profession,” wrote James Bryce, “has in every country, apart from its relations from politics, very important functions to discharge in connection with the administration of justice. . . .” Then he asks,

Does the [legal] profession in the United States rise to the height of these functions, and in maintaining its own tone, help maintain the tone of the community, which, under the pressure of competition, seldom observes a higher moral standard than that which the law exacts?⁹⁵

Presumably, Bryce would be in favor of a rigid application of DR 2-107.

The advocates of DR 2-107 as a means of separating the legal profession from the business “rabble” sound impressive at first blush but end up begging the question. The issue is not whether the legal profession should adopt business tactics—it inherently adopts business methods at every level of its activities—rather, the issue is whether the particular business practice censured by DR 2-107 is harmful. If lawyers were proscribed from engaging in all business practices, they would cease to function. Furthermore, the major reason the practicing bar rejects DR 2-107 is that it is not “considered realistic and applicable to business and professional conditions in the modern world.”⁹⁶ Finally, there is a note of protectionism in the argument that the legal profession should act differently from general businessmen.⁹⁷ The *McFarland* court admitted to

92. 316 S.W.2d 662, 670 (Mo. 1958).

93. Panel Discussion, *supra* note 40, at 434 (quoting Henry S. Drinker); H. DRINKER, *supra* note 40, at 186 n.30.

94. *In re Ellis*, 359 Mo. 231, 221 S.W.2d 139, 141 (1949).

95. L. PHILLIPS & P. MCCOY, CONDUCT OF JUDGES AND LAWYERS 202 (1952) quoting from BRYCE, THE AMERICAN COMMONWEALTH 675 (new ed. 1910) (Phillips and McCoy use Bryce’s statement as an example of the notion that the legal profession must separate itself from mere businesses.).

96. McCracken, *supra* note 69, at 400.

97. For a discussion of the reasons for professionalism, see Wilensky, *The Professionalization of Everyone*, 70 AM. J. Soc. 137 (1964).

less than pure motive when it concluded:

Merely recommending another lawyer to a client or referring a client to another lawyer is not the performance of a legal service or the discharge of responsibility. Such a practice if approved would make the lawyer a mere broker and would destroy the professional standing of lawyers as such *and in time would tear down the wall that separates them from nonprofessional groups.*⁹⁸

A second argument advanced in support of DR 2-107 is that fee splitting tends to inflate the cost of legal services.⁹⁹ Due to the nature of fee splitting, the client has to pay two or more attorneys for work that could be done by one.¹⁰⁰ Both the *Palmer*¹⁰¹ and *McFarland*¹⁰² decisions cite this danger as a major reason for DR 2-107. The United States Supreme Court in *Weil v. Neary*¹⁰³ found the harm from fee splitting to be the temptation "to seek so as to increase the [fee] as to secure a generous provision for both [attorneys]. Motive for excessive allowance could hardly be more direct."¹⁰⁴ Following this line of argument, in addition to violating DR 2-107, referral fees could also violate the proscription against charging excessive fees found in DR 2-106(A)¹⁰⁵ as well as the directive to charge a reasonable fee embodied in the ABA Code, Ethical Consideration 2-17.¹⁰⁶

Despite the plausible argument that split fees inflate the cost of legal services, this author has been unable to find tangible evi-

98. 316 S.W.2d 662, 671-72 (Mo. 1958) (emphasis added).

99. *In re Trask*, 30 Hawaii 736 (1929).

100. *Alpers v. Hunt*, 86 Cal. 78, 88, 24 P. 846, 849 (1890) ("Such a practice [referring to forwarding fees between laymen and attorneys] would tend to increase the amounts demanded for professional services. In such a case an attorney would be induced to demand a larger sum for his services, as he would have to divide such sum with a third person."); L. PATTERSON, *supra* note 69, at 276; Cady, *supra* note 67, at 236.

101. 217 Kan. 128, 535 P.2d 955, 966 (1975).

102. 316 S.W.2d 662, 672 (Mo. 1958).

103. 278 U.S. 160 (1929).

104. *Id.* at 172.

105. DR 2-106(A) provides, "A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee."

106. The ABA Code, Ethical Consideration 2-17 provides:

A lawyer should not charge more than a reasonable fee, for excessive cost of legal service would defer laymen from utilizing the legal system in protection of their rights. Furthermore, an excessive charge abuses the professional relationship between lawyer and client.

dence that referral fees increase the cost of legal services. In fact, Handler found the inflation argument unpersuasive:

Referral fees usually were made in contingent fee negligence cases; the rate of fees in these cases was generally standardized. . . . It is more realistic to assume that the fees charged to the client would be the same regardless of whether the lawyer split the fee with a colleague.¹⁰⁷

Furthermore, with the advent of specialization, some authorities suggest that the specialist can work so efficiently that he can split the fee with the referring generalist and still make a sufficient profit.¹⁰⁸ Even assuming, with the coming of specialization, that cost savings could be realized, those savings arguably should be passed either to the client or to the attorney actually doing the work and not to the referring agent. On the other hand, if wide-scale specialization becomes a worthwhile goal, DR 2-107 may need relaxing to make it worthwhile for generalists to refer their clients to the new breed of specialists. In any event, it is clear that the jury is still out on the efficacy of the "inflation" argument.

The third argument advanced in favor of DR 2-107 is that in a system that allows forwarding fees, the forwarder will send his client to the attorney who will "kick back" the largest fee in lieu of the most qualified attorney. In *Reilly v. Beekman*, the court concluded that a recommendation of an attorney "was not likely to be disinterested, if affected by the consideration of whether or not he [the forwarder] could make a profit out of the recommendation of a particular person."¹⁰⁹ The British jurist, Lord Eldon, doubted whether professional men could be recommended, "not for skill and knowledge in their profession, but for a sum of money paid and advanced."¹¹⁰

Despite the fears of Lord Eldon, this problem evaporates under close scrutiny. Handler again debunks the argument: "It has been argued too that a lawyer ought to refer cases to the lawyer best

107. J. HANDLER, *supra* note 69, at 140.

108. Steirett, *supra* note 40, at 314 n.33; Brizius, *supra* note 68, at 32. The impact of specialization is beyond the scope of this comment, although it should be considered in assessing the merit of DR 2-107. For a discussion of the future of specialization, see Committee on Specialization, *Preliminary Report, Results of Survey on Certification of Specialists*, 44 CAL. ST. B.J. 140 (1965).

109. 24 F.2d 791, 794 (2d Cir. 1928).

110. *Alpers v. Hunt*, 86 Cal. 78, 88, 24 P. 846 (1890) (quoting Lord Eldon) (citations omitted).

qualified . . . rather to those who will kick back part of the fee, but so many [lawyers] gave referral fees that the referring lawyer's choices were not limited."¹¹¹ Then, too, if DR 2-107 were abolished, all attorneys could remit the customary one-third fee, and presumably no attorney would be forced to choose between his economic benefit and the welfare of his client.

The fourth argument in favor of DR 2-107 is that referral fees damage the image of the profession. It has been said justice cannot be maintained unless the motives and conduct of attorneys merit approval of all just men.¹¹² Nevertheless, it is equally plausible that the pervasive disrespect and disobedience of the rule within the practicing bar tarnishes the image of the legal profession at least as deeply as would repeal of the rule.

A fifth reason to enforce DR 2-107 is that the financial drain on the forwarder will cause him to settle the case as soon as possible to reduce expenses. This argument is nothing more than a modification of the "inflation" argument except here the result is poorer services instead of higher costs to the client. Therefore, the same responses to the inflation argument apply.

The five arguments discussed are the major weapons used by the supporters of DR 2-107. Those opposed to the disciplinary rule argue that the mere act of referring the client to another lawyer constitutes a service and responsibility.¹¹³ It must be admitted a

111. J. HANDLER, *supra* note 69, at 140-41.

112. *In re Ellis*, 359 Mo. 231, 221 S.W.2d 139, 141 (1949).

113. The definitions of the terms "service" and "responsibility" found in DR 2-107 are extremely elusive. So difficult is the task of formulating a functional definition that the ABA Committee on Professional Ethics has refused to attempt one. INFORMAL OPINIONS, No. 848 (The Committee will not get into factual determinations over what constitutes a service or responsibility because "this is something that is extraordinarily difficult to measure."). The difficulty of measuring services, let alone defining them, was one of the reasons that courts adopted the escape hatch of the partnership and joint adventure theories. *Langdon v. Kennedy*, *Holland, DeLacy & McLaughlin*, 118 Neb. 290, 224 N.W. 292, 293 (1929). Indeed, this is one of the reasons that opponents of DR 2-107 argue the rule is unworkable. Nevertheless, courts have repeatedly demonstrated the ability to determine and measure "service" when the issue is forced upon them. *Justice v. Lairy*, 19 Ind. App. 272, 49 N.E. 459 (1898).

Opponents of DR 2-107 have argued that "supporting a client" during litigation is a "service" within the context of that rule. *Breyfogle v. Palmer*, 117 Kan. 128, 535 P.2d 955, 962 (1975). Supporters of DR 2-107 point out that such a broad interpretation of "service" would emasculate the rule. *McFarland v. George*, 316 S.W.2d 662, 670 (Mo. 1958) ("[Service] must relate to the actual participation

good referral is important to the client,¹¹⁴ and the ABA Committee has written that choosing an associate can be a service and responsibility in certain situations.¹¹⁵ Nevertheless, it can hardly be argued the "responsibility and service" is worth one-third of all fees received. Also, it seems to be a sad fact that in most cases the referring lawyer does little more than randomly choose a name from a law directory.¹¹⁶ Finally, an attorney can contract with his client to remove his liability for the referral.¹¹⁷ Therefore, the position that a referral should equal service and responsibility in the context of DR 2-107 is less than persuasive.

Conclusion

DR 2-107, as interpreted by the ABA Committee and enforced by courts confronted with egregious violations of it, has little support among the practicing bar. Its underpinning reasons—to uplift the profession and protect its image, to lower the cost of legal services while retaining a high level of service, and to insure disinterested referrals—cannot be empirically or logically proved to be served in its present environment of open hostility. The rule seems unduly restrictive without redeeming justification. Until its proponents can marshal cogent, demonstrable reasons for its existence, DR 2-107 will be ignored by the bar and only consistently enforced in cases of clear violations, and even then, only on the few occasions when a reluctant bar chooses to litigate the issue.

and handling of the case. As we said before the rule would be meaningless if this were not so."). One court has ruled that a "legal service" will not exist where the activity could have been performed by a layman. *Modern Woodmen of America v. Arnkens*, 99 Ind. App. 344, 192 N.E. 706, 708 (1934). Following that definition, "keeping a client happy" would not be a service.

The term responsibility seems easier to define than service. It has been variously defined as: "the state of being answerable for an obligation"; "judgment, skill, ability and capacity"; "the state of one who is bound or obligated in law and justice to do something." *McFarland v. George*, 316 S.W.2d 662, 671 (Mo. 1958) (citations omitted). "One's 'responsibility' is his liability, obligation, or bounden duty." *Crockett v. Village of Barre*, 66 Vt. 269, 29 A. 147 (1894).

Regardless of the definition courts eventually append to "service" and "responsibility," one activity the terms seem clearly not to encompass is the referral of clients.

114. Steirett, *supra* note 40, at 314; Panel Discussion, *supra* note 40, at 434.

115. INFORMAL OPINIONS, No. 427 (1961).

116. Panel Discussion, *supra* note 40, at 434.

117. H. DRINKER, *supra* note 40, at 186 n.30.

Until more evidence in favor of the rule is produced, DR 2-107 should be amended to allow referral fees only with the informed consent of the client and even then only when the cost to the client is no higher than it would have been without the split fee. Thus amended, the major goals of DR 2-107 would be preserved while at the same time the rule would move closer to the mainstream of opinion of the American bar.

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