

March 1960

Legal Ethics, Attorney's Forwarding Fees

Rexford R. Cherryman

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Legal Ethics and Professional Responsibility Commons](#)

Repository Citation

Rexford R. Cherryman, *Legal Ethics, Attorney's Forwarding Fees*, 2 Wm. & Mary L. Rev. 502 (1960), <https://scholarship.law.wm.edu/wmlr/vol2/iss2/15>

Copyright c 1960 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmlr>

LEGAL ETHICS—ATTORNEY'S FORWARDING
FEES¹

In a recent Missouri case,² plaintiff, a lawyer, referred a case involving a will contest to the defendant. In the course of several months defendant won a settlement of \$100,000 and was awarded a fee of \$20,000, half of which the plaintiff claimed. There was strong evidence that although plaintiff communicated with both client and defendant, he did not discharge any responsibility nor did he perform any services with respect to the litigation or settlement.

The trial court implied a promise on the part of defendant to share the fee in the case, and held that the two attorneys were engaged in a joint adventure. A judgement for \$6,666.66 or one-third of the total fee, was awarded plaintiff as a "customary" finder's fee. On appeal the Missouri Supreme Court unanimously held that it was error for the trial court to recognize a "custom" of allowing the procuring or referring attorney to receive one-third of a fee, and it was error to impute a joint adventure³ or special partnership⁴ to the relationship.⁵

Prior to the adoption of Canon 34 as one of the American Bar Association's Canons of Professional Ethics, there was a well-established custom,⁶ particularly with respect to claim cases, of the division of an attorney's fee between the forwarding or recommending attorney and the attorney who actually performed the service. In 1928, Canon 34 was adopted as follows:

¹ Also referred to as "finder's fees", "referral fees", and "procuring fees" by attorneys and authorities writing on the subject.

² *McFarland v. George*, 316 S.W. 2d 662 (1958).

³ 48 C.J.S. *Joint Adventures*, § 1 (1947).

⁴ *Henry v. Basset*, 75 Mo. 89 (1881).

⁵ *McFarland v. George*, *supra* note 2 at 670-1. A distinction was drawn between the legal profession and commercial occupations, such as brokerages, where the producing of a customer is of itself a service and therefore compensable. For a development of this subject see Drinker, "Brokerage vs. Law Profession", 7 U. Fla. L. Rev. 433 (1955).

⁶ *Parker v. Gartside*, 178 Ill. App. 634 (1913). The case concerned a Seattle lawyer forwarding a claim for collection to a law firm in Chicago.

No division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility. But the established custom of sharing commissions at a commonly accepted rate, upon collections of commercial claims between forwarder and receiver, though one be a lawyer and the other not (being a compensation for valuable services rendered by each), is not condemned hereby, where it is not prohibited by statute.

In 1933, the words *established custom* and the parenthetical expression were deleted from the second sentence, and *commercial claims* were limited to *liquidated commercial claims*. In 1937, the second sentence of the Canon was struck out altogether, and since then the first sentence, unchanged, has constituted Canon 34⁷ in its entirety.⁸

In the history of the interpretation of Canon 34 there has been little controversy over the intended meaning of the phrase *another lawyer*,⁹ and since the 1937 change there is general agreement on the impropriety of dividing fees with laymen.¹⁰ Some conflict of opinion has arisen concerning the applicability of Canon 34 to express prior fee-splitting agreements.¹¹ In an effort to circumvent the prohibition of the Canon, there have

⁷ 62 A.B.A. Rep. 767 (1937).

⁸ The counterpart to Canon 34 in the Accounting Profession is Rule 4 of the American Institute of Accountants, which disapproves of a finder's fee. However, there is controversy among accountants over interpretation of the rule. See Lawrence, "Professional Responsibility in Referral Fees," 106 J. Accountancy 56 (1958). In the medical profession, the impropriety of accepting referral fees appears to be well settled. See 164 A.M.A. Journal, 1484.

⁹ A.B.A. Decision 352A; Drinker, *Legal Ethics*, 187 (1953).

¹⁰ A.B.A. Opinions 8, 48 (patent applications), 180, 234 (tax services), 257 (patents), 269 (accountants), 272 (accountants), 282 (insurance claims); *Virginia State Bar*, Opinions 56, 87 (real estate agents); *Abramson v. Sperling*, 162 Misc. 813, 295 N.Y.S. 165 (1937). There are several New York Bar opinions on the subject. See *Opinions of the Committees of Professional Ethics of the Bar Ass'n of the City of New York and the New York County Lawyer's Ass'n* [hereafter referred to as N.Y. City and N.Y. County, respectively], Index, *Division of Fees*.

¹¹ Condoning the practice: *Freidland v. Bishop*, 310 Ill. App. 537, 35 N.E. 2d 385 (1941); A.B.A. Decisions 351A and 353A. Condemning: A.B.A. Opinions 18 and 204; N.Y. County Opinions 81 and 382. During World War II, special consideration was given lawyers inducted in the service. See A.B.A. Opinion 217, N.Y. City opinion 343.

been attempts to give a broad interpretation to the word *responsibility*.¹² This tactic has been dealt with fairly successfully by consistent rulings to the effect that merely recommending or forwarding does not come within the meaning of *responsibility* as used in the Canon.¹³ The principal case has gone further and introduced unprecedented concepts into the definition of *responsibility*¹⁴ in order to limit the use of the forwarding fee.

With respect to the observance of Canon 34 by practicing attorneys, a national survey¹⁵ revealed a considerable reluctance on the part of many jurisdictions to conform to the spirit and intent of the Canon. The survey's explanation for this response was that the custom had been prevalent for so many years and in so many localities that it had come to be observed by the bar as common practice.¹⁶

In Virginia, this attitude is manifested in a state bar opinion¹⁷ to the effect that it is not unethical for a trustee's attorney to share his fee with attorneys who forward the claims of trust creditors. In a more recent opinion,¹⁸ however, the Virginia State Bar pointed out, *inter alia* that it would be improper to pay a forwarding fee to a corporation attorney who selected a lawyer to represent a borrower in closing a loan. Virginia, unlike Missouri, has not made forwarding fees a matter of substantive law, and there are no reported Virginia cases dealing with the subject. To give force and effect to the Canons of Professional Ethics, Virginia relies on its integrated bar,¹⁹ whereby every practicing lawyer in the state subjects himself to the Canons and to discipline by the bar.

¹² *Drinker, Legal Ethics*, 186 (1953); *Silver v. Paulson*, 285 App. Div. 1089, 139 N.Y.S. 2d 456 (1955).

¹³ A.B.A. Opinions 97, 153, 204, 265; N.Y. City opinions 127, 592; N.Y. County Opinions 81, 382; *McFarland v. George*, *supra* note 2 at 671-2.

¹⁴ *McFarland v. George*, *supra* note 2 at 671: "The word 'responsibility' as used in the rule means the doing of something." ". . . [T]he responsibility called for under the rule must be related to the legal services rendered in the actual handling of the case."

¹⁵ *McCraken*, "Report on Observance by the Bar of Stated Professional Standards," 37 Va. L. Rev. 399, 415 (1951).

¹⁶ *Id.*, at 416-7.

¹⁷ *Virginia State Bar*, Opinion 3 (1943).

¹⁸ *Id.* Opinion 74 (1957).

¹⁹ 171 Va. xvii (1938).

In the principal case, the court relies on Canon 34 as promulgated by the Missouri Supreme Court Rules of Procedure²⁰ and not merely as a Canon of the American Bar Association. Whether the court would have decided as it did in the absence of the local rule is of course conjectural, although it is probable that they would have. By making Canon 34 a rule of substantive law,²¹ Missouri has brought the intent of the Canon into sharper focus. Clearly the decision is an unequivocal step toward giving added efficacy to the Canon.

Virginia is presented with the same situation with respect to forwarding fees as that which existed in Missouri before it incorporated Canon 34 into its Supreme Court Rules in 1937.²² Missouri, like Virginia today, had an integrated bar, which, although a highly effectual organization, was not a sufficient deterrent to the unethical use of the forwarding fee. In view of the lack of Virginia cases and the dearth of Virginia State Bar Opinions on the subject, it is evident that the forwarding fee needs more policing in this state than it has received in the past.²³ As a policing instrumentality the machinery established in Virginia for enforcing the Canons²⁴ is fundamentally passive in nature, in that it relies on complaints from without

²⁰ *McFarland v. George*, *supra* note 2 at 670: "It was the intention of the Supreme Court in adopting Rule 4.34 to prohibit the practice that had been followed prior to the adoption of the Rule." And at 672: "Prior to the adoption of Supreme Court Rule 4.34, it was the practice of the bar to charge and pay a finder's or referral fee. However, such practice or custom is unavailing as a justification for its continuance in the face of the plain intent of the rule. It was the purpose of Rule 4.34 to condemn this practice."

²¹ For a development of the subject of Canon 34 as substantive law, see 24 Mo. L. Rev. 558-61 (1959).

²² Mo. Sup. Ct. Rule 4.34, 342 Mo. vii, viii (1937); 352 Mo. xxxi, xxxvi (1944).

²³ That the forwarding fee generally needs policing is amply corroborated by McCracken's survey (*supra* note 15). A list of 52 questionable practices was submitted to which the respondents were to give their opinions (1) as to whether they were professional or not, and (2) whether the occurrences of the practices were common, rare, or non-existent. The question, "Is the so-called forwarding fee of 33⅓% proper under . . . [Canon 34]?", was the only item where a substantial majority (70%) considered the practice "not unprofessional." Only one other item was considered "not unprofessional" by a majority (rejection of criminal cases, 56%). With respect to the frequency of the practice, the forwarding fee was the only item in the survey where more respondents (80%) considered the practice common than considered it rare or non-existent.

²⁴ For a description of how unprofessional conduct by attorneys is dealt with in Virginia, see Williams, "The Disciplining of Attorneys in Virginia," 2 William and Mary Rev. of Va. Law 3.

to set its investigative²⁵ and disciplinary²⁶ processes in motion. With respect to forwarding fees, a more aggressive procedure would seem appropriate in order to preserve the high professional standards intended to be fostered by the Canons of Professional Ethics.²⁷

R. R. C.

²⁵ Va. Code of 1950 § 54-48.

²⁶ Rules for Integration of the Bar, as amended, IV § 5, 194 Va. clxix (1953).

²⁷ See preamble to the Canons for a definitive statement of the intent and scope of the Canons.

EVIDENCE—INTRODUCTION OF CIRCUMSTANTIAL EVIDENCE BASED ON AN INFERENCE ON AN IN- FERENCE ALLOWED

In a recent California case the appellate court affirmed a conviction of kidnapping, asserting:

We can not say as a matter of law that there was no evidence to support the inference of asportation by the defendant in this case.¹

The defense was based on the principle that an inference cannot be based upon an inference.

The only evidence tending to prove the guilt of the accused was that he was discovered with the child shortly after her disappearance. To support the inference of kidnapping evidence was introduced that; (1) the defendant had been in the victim's home on a previous occasion and (2) the child was asleep in her second story bedroom forty-five minutes before the alleged crime took place.

The court ruled that the principle of the inadmissibility of an inference based on an inference has been discarded by many courts and asserted that:

¹ *People v. Phillips*, 343 P2d 270, 273 (1959).