

# WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

New York Metropolitan Offices

150 East 42nd Street, New York, New York 10017-5639 Tel: (212) 490-3000 Fax: (212) 490-3038  
3 Gannett Drive, White Plains, New York 10604 Tel: (914) 323-7000 Fax: (914) 323-7001

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www.wemed.com

Adam R. Bialek  
Adam.Bialek@WilsonElser.com

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## ATTENTION BNI DIRECTORS

### Re: Attorney Membership in BNI

With increasing frequency, BNI is being approached by BNI attorney-members who are concerned that opinions released by State Bar Association Ethics Committees may prohibit their participation in BNI. BNI has viewed this issue very seriously and is taking steps across the country to clarify the opinions so that the attorney-members' concerns are addressed accordingly. The following guideline is intended to clarify BNI's position on this issue and dispel the common misconceptions regarding attorney-membership in BNI.

At the outset, it should be noted that no BNI attorney-member, Chapter Leadership Team Member or Executive Director should make any representations or statements to any governmental body or ethics committee without first giving notice to BNI. BNI actively protects its trademarks, and protects its image, and any misrepresentation could be damaging to BNI. Moreover, as history has shown, such uncoordinated provision of information often results in inaccurate or incomplete information being provided which places BNI in a negative light. It also allows for someone to improperly construe that active participation in BNI is violative of the attorney's disciplinary rules. As such, it is recommended that any questions or concerns first be addressed to BNI and/or the undersigned so that the proper portrayal of BNI is provided.

It is BNI's goal that the information contained in this memorandum be disseminated to the attorney-members at the Chapter level, so that consistent positions are taken throughout the organization. This memorandum hopes to provide guidance to attorney-members on how to address ethical issues that may arise. With that said, this memorandum is not being issued for the purpose of providing legal advice to any member, and we and BNI note that laws in each jurisdiction may vary. As such, if an attorney-member has any questions, it is suggested that they seek counsel in their own jurisdiction and have such counsel contact the undersigned to discuss any individual concerns.

### **Guideline for Attorney Participation in BNI**

As evidenced by the arguments presented by each of the States in which Ethics Opinions arguably related to BNI have been issued, attorney-membership in BNI has presented three main issues. First, State Bar Associations have complained that membership in BNI, which requires individuals to give referrals as a mandatory condition of membership, is violative of the disciplinary rules. Second, the Ethics Committees have argued that attorney-members' dues constitute "giving something of value" for recommending the attorney's services. And, finally, the Ethics Committees have argued that attorney-membership results in improper in-person solicitation of prospective clients. For the following reasons, BNI disagrees with these concerns and have advised the State Ethics' Committees accordingly.

It should be noted that BNI believes that mere membership in an organization should not violate any disciplinary rule. Rather, it is the specific conduct of an attorney that must be evaluated to determine whether that attorney's conduct violates any rule. BNI believes that every attorney-member has a Constitutional Right to assemble and associate, and barring any violative conduct, there is no reason to preclude membership.

As to the specific concerns:

- 1) State Bar Associations have complained that membership in BNI, which requires individuals to give referrals as a mandatory condition of membership, is violative of the disciplinary rules.

In response to an inquiry whether "an attorney may ethically participate in a business network that *requires* members to refer clients to and to accept referrals from other network members", we have seen State Ethics Committees respond in the negative. However, it was not the membership in and of itself that was problematic for the Ethics Committee. Rather, the Committee took issue with several specific practices.

The Ethics Committee at that time had been operating under a misconception of BNI's rules and practices. While the information provided to the Ethics Committee could lead one to believe that participation in such an organization could lead to an ethics violation, the information was not reflective of BNI's position.

According to these opinions, the requirement to make referrals to other chapter members created a conflict of interest under the Disciplinary Rules. For example, in New York (many states follow the Model Code of Professional Responsibility and the rules can be found in the same form throughout the country), Disciplinary Rule 5-101(A) states:

A lawyer shall not accept or continue employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property or personal interests, unless a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby, and the client consent to the

representation after full disclosure of the implications of the lawyer's interests.

However, the Ethics Committee conceded that the member-attorneys may properly refer a client to a member of the organization *if the client is informed as to the attorney's membership in the organization and the obligation to refer the client to another member of the organization*. As such, a client's informed consent negates the conflict of interest, and therefore, the ethical concern.

More importantly, though, BNI further believes that since there is no obligation to make referrals, the *quid pro quo* of concern to the Ethics Committee is absent. It must be noted that BNI does NOT require attorney-members, or any members for that matter, to give referrals. While BNI promotes word-of-mouth marketing and hopes that every member receives from and gives many referrals to other members, it has been BNI's policy that members could either give referrals or bring guests to Chapter meetings. It is possible that an attorney-member of BNI never provides a referral to another BNI member, provided the other criteria are met. Since this obviates the "requirement", there is no mandatory condition of membership, and thus, membership should not violate any of the disciplinary rules.

BNI has learned that individual chapters have taken it upon themselves to modify BNI's rules to require a minimum number of referrals from attorney-members. Not only does this violate BNI's rules, but it could place in jeopardy the attorney's position in the Bar. As such, this should be stressed to every Chapter. In addition, any internet-related information should be modified accordingly. Please feel free to refer to the modifications made to the BNI.com website in 2003, which still exist today.

- 2) Ethics Committees have argued that attorney-members' dues constitute "giving something of value" for recommending the attorney's services in violation of the disciplinary rules.

Ethics Committees have also noted that participation in the organization would be violative of DR 2-103(B). That particular disciplinary rule provides that:

"A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client or as a reward for having made a recommendation resulting in employment by a client . . ."

The fact that attorney-members were required to pay membership dues to the organization and make referrals caused the Ethics Committee to view the attorney as transferring something of value in exchange for referrals. However, BNI does not require its members to make referrals. As pointed out to the Ethics Committee, an attorney member may never make a referral or receive a referral while in BNI. The requirement to bring a referral or a guest to a chapter meeting has been instituted to ensure that members are actively involved in the organization.

More significantly, BNI does not itself give referrals. Thus, the transfer of dues to BNI is not being exchanged for referrals. In any event, BNI's dues are used for access to a forum in which an attorney can participate, learn and network. As such, BNI does not believe that this issue is applicable to BNI, as members are not "giving something of value for referrals." There is no "quid pro quo."

- 3) Ethics Committees have argued that attorney-membership results in improper in-person solicitation of prospective clients.

Ethics Committees have opined that the organization's written materials indicating that all members carry and freely distribute one another's business cards, exposed attorney-members to disciplinary action. According to the Ethics Committee, it appears that there is nothing unethical when members distribute an attorney-member's business cards, however, the distributors cannot encourage or recommend the attorney's services. Concededly, this is a very fine line that must be followed. The Ethics Committee apparently objected to the notion that an attorney has a "sales force" out soliciting business. BNI believes that participation in BNI does not have to violate this rule.

Attorneys are prohibited from having a sales force solicit clients. Bar Associations discourage most forms of solicitation, finding it to be improper in this profession. Nevertheless, there are forms of marketing that have been accepted (e.g. yellow page advertisements), and it is understood that referrals are a primary source of an attorney's business. Since an attorney cannot resort to the same marketing principles practiced by other goods and service providers, the referral becomes even more important to an attorney. Membership and participation in organizations is often critical to the expansion of an attorney's business (an attorney cannot attract a client unless the client knows about the attorney). Accordingly, the referral network is one that must be developed based upon trust and performance. Since a client will be relying upon the professional advice of the attorney, the profession has decided to guard against typical marketing ploys such as puffery and exaggeration of one's skills. Along this same line, attorneys cannot ask others to brag about their skills, especially when there has been no experience supporting the recommendation.

With that said, there is no prohibition against an attorney handing out his/her business card. In addition, there is no prohibition against others handing out an attorney's card. In fact, we have found no rule prohibiting another person (or BNI member) from handing out an attorney's card and recommending his or her services. What appears to be prohibited is the attorney asking another to hand out his/her card **and** asking to recommend his/her services. Provided nothing of value is given to induce someone to hand out the cards, and provided that other people are not required to perform this function as a condition of membership, a violation of the ethical rules should not occur. BNI therefore does not suggest that an attorney-member ask the other members to hand out his/her card and recommend that person's services (again, however, if that person does it on his/her own, that should not be a violation, provided nothing of value has been given in exchange for that recommendation). BNI attorney-members, however, should be permitted to hand out their cards to others in the Chapter. And, those members should be permitted to recommend the attorney's services should they believe such a referral is warranted.

This is perhaps the finest line that an attorney-member in BNI must follow in order to avoid the disciplinary traps. If, however, the attorney-member follows the disciplinary guidelines, active membership and participation should be permitted.

One overriding point that every attorney must note is that BNI has explicitly set forth in its rules that any member must follow the ethical rules of their profession, and to the extent that there is a conflict, the ethical rules of the profession will trump any BNI rule or guidance. This must be permitted by the local chapters. In the event that there is a conflict, BNI should be noted immediately so that it can determine how best to approach the issue.

### **Future Contact with State Bar Associations**

The number one obstacle we have encountered when dealing with State Bar Associations is overcoming their preconceived misconceptions as to BNI's policies and procedures. Many times, this misconception is due simply to a lack of knowledge or understanding as to the nature of BNI's business. Inquiries drafted and submitted by various attorney-members, however, are also responsible. This is not intended to place blame on any attorney-member, for it is natural for one to feel the need to ensure their actions are in compliance with their respective profession's ethical guidelines. Rather, this observation is intended to ensure that on a going forward basis, all inquiries include accurate and complete information so that fewer resources are spent clarifying BNI's position with each jurisdiction. As such, we advise that all attorney-members seek the guidance of BNI and Adam Bialek at Wilson Elser Moskowitz Edelman & Dicker LLP *prior to* writing to their State's Bar Association. This will ensure that BNI, despite its numerous Chapters, speaks with one voice.

We would be happy to discuss this matter with anyone who may have additional questions. Please feel free to contact us with your questions or concerns and please remember that unilateral action with State Ethics Committees risks exposing BNI to misinterpretations and creates additional obstacles.

Very truly yours,

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

/Adam R. Bialek/  
Adam R. Bialek

cc: Ivan Misner – Founder, BNI  
Norm Dominguez  
Leroy Gaines