NEW YORK STATE BAR ASSOCIATION
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ETHICS OPINION 1131

New York State Bar Association
Committee on Professional Ethics

Opinion 1131 (8/8/17)

Overrules N.Y. State 902 (2012) (as to payment of marketing fee)

Topic: Lead generation; lawyer paying for-profit company for leads

Digest: A lawyer may pay a for-profit service for leads to potential clients obtained via a website on which potential clients provide contact information and agree to be contacted by a participating lawyer, as long as (i) the lawyer who contacts the potential client has been selected by transparent and mechanical methods that do not purport to be based on an analysis of the potential client's legal problem or the qualifications of the selected lawyer to handle that problem; (ii) the service does not explicitly or implicitly recommend any lawyer, and (iii) the website of the service complies with the requirements of Rule 7.1. A lawyer who purchases such a lead to a potential client may ethically telephone that potential client if the potential client has invited the lawyer selected by the service to make contact by telephone.

Rules: 1.0 (a) & (f), 1.5(g), 5.4, 7.1(a), (f) & (h), 7.2(a), 7.3

FACTS

1. A lawyer wishes to pay a for-profit company that maintains an internet-based service (the "Service") directed at individuals or entities seeking a lawyer. Those who wish to be contacted by a lawyer submit their names and contact information (including the method the lawyer may use to contact them), their geographic locale, and the practice area in which they seek legal advice. The Service then searches its database of participating lawyers to identify all lawyers who state that they engage in the requested practice area in the requested locale. The Service selects a lawyer meeting the geographic and practice area criteria based on neutral (mechanical) criteria, such as the order in which the lawyers registered with the Service (the first lawyer to register gets the first lead; second lawyer gets the second lead, etc.). The selection method is clearly described to potential clients. The Service forwards the potential client's information to that lawyer.

2. The participating lawyer pays a fixed monthly fee to the Service or a fee for each such potential client, and the fee does not vary depending on whether the lead results in retention of the lawyer or the amount of the fee the lawyer charges the client if retained. If the potential client decides not to retain that lawyer or if the assigned lawyer has a conflict of interest and cannot represent the potential client, the potential client may request that the Service provide the client's information to another participating lawyer.

3. This opinion addresses the implications of this arrangement under the advertising, referral, and solicitation provisions in the New York Rules of Professional Conduct ("Rules").

QUESTIONS

4. Does the Service's website constitute an "advertisement" by or on behalf of the lawyer for which the lawyer is responsible under the Rules?

5. Does the lawyer's payment to the Service for the names of potential clients constitute an impermissible payment for obtaining employment by the lawyer?

6. If the lawyer may use the Service, does the lawyer's outreach to the potential client constitute an impermissible "solicitation" or "advertisement' within the meaning of the Rules?

OPINION

7. Because of the wide variation in the structure of the many web-based services operating in this area, this opinion does not attempt to address every factual permutation that may exist. This opinion also does not address whether the Service would implicate § 495(1)(d) of the Judiciary Law ("No corporation . . . shall . . . furnish attorneys or counsel"), which is a question of law beyond our jurisdiction.

Prior Committee Opinions

8. In N.Y. State 779 (2004) a lawyer wished to pay a marketing organization a fee in return for a bundle of pre-screened potential clients that might need representation regarding their federal income taxes. Applying the New York Code of Professional Responsibility (the "Code"), the predecessor to the current Rules, we concluded that accepting leads in this fashion was impermissible under DR 2-103(B), which provided, in pertinent part: "A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client."

9. In N.Y. State 799 (2006), this Committee addressed whether a lawyer could ethically pay to participate in a website that forwarded inquiries from potential clients to lawyers who then contacted the prospect by telephone, where the service purported to analyze the prospective client's problem. N.Y. State 799 opined that, subject to the rules on attorney advertising, a lawyer may pay to be included in "an online 'directory' . . . that provides tools by which a potential client can filter a list of attorneys by geography and/or practice area," and opined that such an on-line directory did not violate DR 2-103(B). The Committee stated, however, that the line between a permissible "directory" and an impermissible "recommendation" would be crossed when the service purports to analyze the prospective client's problem:

> We find that the line is crossed . . . when a website purports to recommend a particular lawyer or lawyers for the prospective client's problem, *based on an analysis of that problem*. For example, if a potential client describes a slip-and-fall incident on an intake form and the website determines that the problem calls for a personal injury lawyer and then recommends one or more lawyers in that area, the website is 'recommending' those lawyers.

(Emphasis in original.) On that basis, Opinion 799 distinguished a searchable directory from the website

service addressed in N.Y. State 779.

10. Finally, in N.Y. State 902 (2012) the Committee held that a lawyer could not pay a marketing company a fixed fee each time the marketer makes an introduction to a potential client.

11. The current inquiry implicates provisions whose language is in many respects identical to the provisions addressed in Opinions 779, 799 and 902, including Rule 7.2(a), which incorporates the above-quoted restriction of its predecessor, DR 2-103(B). The questions presented here are whether a New York lawyer who uses the Service runs afoul of the principles reflected in those opinions. We believe that such a lawyer would not violate the Rules if the lawyer abides by the conditions set forth in this opinion.

Advertising and Required Disclosures

12. Rule 7.1 governs lawyer advertisements. Rule 1.0(a) defines "advertisement" for purposes of the various advertising restrictions in the Rules. It provides:

> "Advertisement" means any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or the law firm's services, the primary purpose of which is for the retention of the lawyer or law firm.

Here, the Service's website is a communication "on behalf of" a lawyer "about" the lawyer's services for the "primary purpose" of retention of the lawyer. It is therefore an "advertisement" within the meaning of Rule 1.0(a).

13. Rule 7.1(a) prohibits a lawyer from participating in an advertisement that "(1) contains statements or claims that are false, deceptive or misleading; or (2) violates a Rule." Rule 7.1 also requires that certain advertisements contain prescribed disclosures, such as the label "Attorney Advertising," and information about the lawyer whose services are advertised. *See* Rules 7.1(f), 7.1(h). Even though the Service, not the lawyer, creates and disseminates the Service's website, each participating lawyer is "participat[ing] in the use and dissemination of" this advertisement within the meaning of Rule 7.1(a) and therefore has a duty to assure that the website is consistent with Rule 7.1. This means that a participating lawyer must determine that the website does not make false, misleading, or deceptive statements or claims, or otherwise violate the Rules.

14. Rule 7.1(h) requires that "[a]ll advertisements shall include the name, principal law office and telephone number of the lawyer or law firm whose services are being offered." We have previously concluded that lawyers may not engage in advertising on the internet, including "group advertising," without complying with this Rule. *See, e.g.*, N.Y. State 839 (2010) ("Group radio advertisement that does not broadcast the lawyer's name, principal law office address and telephone number, but instead directs listeners to contact an agent who provides that information, is prohibited under Rule 7.1(h).").

15. The question raised by N.Y. State 839 is how the Service's website may operate consistently with Rule 7.1(h). N.Y. State 597 (1989) provides one possible solution. In that opinion, each lawyer was assigned a specific geographical area – either a county or a zip code. Applying the Code, the Committee said that it was irrelevant that the operator of the service had no discretion in choosing lawyers for potential clients. If

the client was not choosing a *particular lawyer*, the referral was prohibited. Nevertheless, the Committee stated that the conclusion would be different if an advertisement not only contains an 800 number, but also "presents in a meaningful fashion the names of the lawyers or law firms participating in the group advertisement, along with their addresses and the geographical areas assigned to them, so that the potential client knows the identity of the lawyer to whom his call will be referred and there is no discretion in referrals on the part of the advertising agent."

16. Here, the Service can comply with Rule 7.1(h) by providing a link to either (i) a list of all participating attorneys with the required contact information or (ii) a list of all participating attorneys who fall within the geographic and practice area parameters that may be set by the potential client, along with the required contact information. In this way, the potential client will know the names and addresses of the lawyers from which the Service may designate a lawyer who will contact the potential client.

Referrals and Referral Fees

17. Rule 7.2(a) states 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 Rule contains three exceptions that are not relevant to this inquiry: (1) referrals without monetary rewards permitted by Rule 5.8, (2) referrals to another lawyer permitted by Rule 1.5(g), and (3) referrals by a qualified legal assistance organization (defined in Rule 1.0(p) as one of the types of organizations listed in Rule 7.2(b)(1) – (4)). The Service here is not operated or sponsored by a bona fide non-profit community organization or operated, sponsored or approved by a bar association and therefore does not constitute a qualified legal assistance organization.

18. Since the Service here does not qualify for any of the exceptions in Rule 7.2(a), Rule 7.2(a) is a problem if the lawyer pays the Service to "recommend" the lawyer or if the lawyer pays the Service to obtain employment by a client. Nevertheless, Comment [1] to Rule 7.2 makes clear that a lawyer may pay for advertising permitted by the Rules without violating the prohibition against "paying to obtain employment" within the meaning of Rule 7.2(a). Consequently, if the Service complies with the advertising rules and the lawyer's payment is reasonable for that form of advertising, a lawyer's using the Service will not run afoul of Rule 7.2 unless the Service is deemed to "recommend" the lawyer.

19. Comment [1] to Rule 7.2 includes a definition of the term "recommendation":

> A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities.

20. As we observed in Opinion 799, to "recommend" also includes identifying a particular lawyer or lawyers to a potential client as "a right" or "the right" lawyer for the client's situation after an analysis of either the potential client's legal problem or the lawyer's qualifications to address that problem. We believe identifying "a right" or "the right" lawyer implies some qualitative, comparative assessment of the lawyers available to perform the services the potential client requires.

21. We believe that the Service would not constitute a "recommendation" as long as the Service's advertising does not state or imply that the Service is making a recommendation and makes clear that (i)

being included on its list of participating lawyers requires only a payment and the Service does not vet the qualifications of such lawyers, other than, for example, confirming the lawyer's good standing with the licensing authority, if that is the case, (ii) the Service's selection of a participating lawyer from that list is the result of a neutral process that involves no evaluative judgment, and (iii) when a lawyer is chosen by the Service, it does not mean the selected lawyer is the "best" or "right" lawyer for the client's needs or that the lawyer is otherwise preferred over other lawyers. If these three conditions are met, a lawyer's payment to the Service to participate in its matching service as a lawyer available to contact potential clients is permissible under Rule 7.2(a).

22. These three conditions are consistent with Comment [1] to Rule 7.2, which was amended in 2015 to provide guidance on how the prohibition on paying for referrals or employment applies to paying for client leads. Comment [1] says, in part:

> [A] lawyer may pay others for generating clients leads, such as Internet-based client leads, as long as (i) the lead generator does not recommend the lawyers, (ii) any payment to the lead generator is consistent with Rules 1.5(g) (division of fees) and 5.4 (professional independence of the lawyer), (iii) the lawyer complies with Rule 1.8(f) (prohibiting interference with a lawyer's independent professional judgment by a person who recommends the lawyer's services), and (iv) the lead generator's communications are consistent with Rules 7.1 (Advertising) and 7.3 (Solicitation and Recommendation of Professional Employment). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. *See also* Rule 5.3 (Lawyer's Responsibility for Conduct of Nonlawyers).

The New York State Bar Association's Committee on Standards of Attorney Conduct ("COSAC"), which recommended the amendment to Comment [1], explained the amendment as follows:

> The Internet and other technologies have made it possible for lawyers to find clients in ways that did not exist five or ten years ago, and have enabled nonlawyers to develop new ways to assist lawyers in finding new clients. COSAC recommends amending Comment [1] to Rule 7.2 to clarify the situations in which a lawyer may pay others for generating client leads gathered from the Internet or elsewhere.

See New York State Bar Association, Committee on Standards of Attorney Conduct, Proposed Amendments to the New York Rules of Professional Conduct and Related Comments 3 (December 23, 2014).

23. The first condition in amended Comment [1] is that the lead generator not recommend (or imply or create a reasonable impression that it is recommending) the lawyers. Thus, a lawyer using the Service must assure that neither the Service nor the advertising for the Services states or implies that the Service is recommending any lawyer, because false, deceptive or misleading communications violate Rule 7.1(a)(1). This means that the Service must be transparent about the methodology it uses to select lawyers. To ensure that the Service does not suggest to potential clients that the Service is comparing the relative merits of lawyers in order to choose a specific lawyer to contact the potential client, the Service must

provide sufficient information to make clear that (i) lawyers pay to participate in the Service, (ii) the selection of a lawyer by the system is not based on an analysis of the potential client's legal problem, (iii) the selection is not a recommendation nor does it imply that the lawyer selected is the "right" or "best" or preferred lawyer to handle the problem, and (iv) the selection is not an evaluation of the quality of the selected lawyer's work. An element of the Service that is solely fact-based (for instance, that the Service accepts only participating lawyers who are in good standing in their jurisdiction of practice), unadorned by evaluative measures or ratings, likewise would not render the Service's selection of a lawyer a recommendation if the Service is indeed objective.

24. Another condition set out in the excerpt from Comment [1] quoted above is that any payment to the lead generator must be consistent with Rules 1.5(g) and 5.4. We see no issue under Rules 1.5(g) and 5.4 as long as the lawyer is paying the Service a fixed sum to participate, unrelated to the lawyer's retention or the amount the lawyer charges in legal fees. Paying a fixed fee to the Service is essentially paying a marketing fee. Our Opinion 902 (2012) is hereby overruled to the extent it prohibited payment of the marketing fee described in this opinion.

25. A final condition set out in Comment [1] to Rule 7.2 is that the lawyer must comply with Rule 1.8(f). Thus the lawyer must prevent interference with the lawyer's exercise of independent professional judgment. In our view, the Service's selection method and communication protocols described above raise no apparent risks in that regard.

26. Our conclusion that the Rules permit the type of arrangement at issue here also finds support in numerous ethics opinions issued by other ethics committees. *See* ABA/BNA Lawyers' Manual on Professional Conduct: Advertising and Solicitation 81:709; *Zelotes v. Rousseau*, N. 09-0412, 26 Law. Man. Prof. Conduct 134 (Conn. Statewide Grievance Comm. Feb. 8, 2010) (dismissing disciplinary complaints against Connecticut lawyers for participating in ClearBankruptcy.com and TotalBankruptcy.com, noting that the websites did not endorse participating lawyers but bore disclaimers to the contrary and required potential clients to initiate contact by visiting the websites and voluntarily providing information); Arizona Op. 11-02 (lawyer may join an internet group advertisement listing no more than one lawyer for each zip code if program does not imply endorsement, if it is labelled as advertising, and if lawyer has paid for exclusive zip code listing); District of Columbia Op. 302 (lawyers may pursue legal work through paying a fee to access web page where potential clients post requests for bids on legal work); Nassau County (N.Y.) Ethics Op. 01-4, 17 Law. Man. Prof. Conduct 123 (2001) (subject to the operational structure and content described in the opinion, a lawyer may affiliate with an online legal services website); Nebraska Op. 07-05 (lawyer may participate in internet lawyer directory which identifies itself as a directory, disclaims being a referral service and only lists basic information about lawyers without recommending specific lawyers and charges a reasonable, flat annual advertising fee); New Jersey Committee on Attorney Advertising Op. 36 (2006) (lawyer may pay flat fee to internet marketing company for exclusive website listing for particular county in specific practice area if listing includes prominent, unmistakable disclaimer stating the listings are paid advertisements and not endorsements or authorized referrals); North Carolina Op. 2004-1 (lawyer may participate in for-profit online service that is a hybrid referral service-legal directory, provided there is no fee-sharing with the service and communications are truthful); Oregon Op. 2007-180 (2007) (lawyer may pay nationwide internet referral service for listing if listing is not false or misleading and does not imply that the lawyer can represent clients outside jurisdictions of the lawyer's license, fee is not based on

number of referrals, retained clients or revenue generated by listing and the service does not exercise discretion in matching clients with lawyers); Rhode Island 2005-01 (permitting website that enables lawyers to post information about their services and respond to anonymous requests for legal services in exchange for flat annual membership fee if website exercises no discretion over which requests lawyers may access); South Carolina 01-03 (lawyer may pay internet advertising service fee determined by the number of "hits" that the service produces for the lawyer provided that the service does not steer business to any particular lawyer and the payments are not based on whether user ultimately becomes a client); Texas Op. 573 (2006) (lawyer may participate in for-profit internet service that matches potential clients and lawyers if selection process is fully automated and performed by computers without the exercise of human discretion); Virginia Advertising Op. A-0117 (2006) (lawyer may participate in online lawyer directory in which publisher does not recommend or steer business to particular lawyers).

Solicitation and Permissible Contact

27. Finally, a lawyer who purchases leads must comply with applicable restrictions on the solicitation of potential clients. A solicitation, as defined by Rule 7.3(b), is an advertisement "initiated by or on behalf of a lawyer" that is targeted at a specific recipient or group of recipients and intended to secure the lawyer's retention for pecuniary gain. However, Rule 7.3(b) also contains an exception: a solicitation "does not include a proposal or other writing prepared and delivered in response to a specific request." If the potential client (the "lead") has specifically requested or consented to a phone call, then the lawyer's phone call is not a solicitation because it is not "initiated by or on behalf of" the lawyer. Rather the phone call is initiated in response to a specific "request" by the potential client. Although the exception in Rule 7.3(b) refers to a proposal or other "writing" delivered in response to a client's request, we think a writing is just one example and that the exception also applies to a request by a potential client to be contacted in any specified manner, including by telephone, text, email or otherwise. *See* N.Y. State 1049 (2015) (where a potential client posts a message on a website asking to be contacted by a lawyer about a legal problem, a lawyer may respond in the matter invited by the client); N.Y. State 1014 (2014) (where detainee communicates through another detainee that he desires to be contacted by a particular lawyer, the lawyer's response is not a solicitation, because the communication was initiated by the prospective client).

CONCLUSION

28. A lawyer may pay a for-profit service for leads to potential clients obtained via a website on which potential clients provide contact information and agree to be contacted by a participating lawyer, as long as (i) the lawyer who contacts the potential client has been selected by transparent and mechanical methods that do not purport to be based on an analysis of the potential client's legal problem or the qualifications of the selected lawyer to handle that problem; (ii) the service does not explicitly or implicitly recommend any lawyer, and (iii) the website of the service complies with the requirements of Rule 7.1. A lawyer who purchases such a lead to a potential client may telephone that potential client if the party has invited a telephonic communication by the lawyer selected by the service.

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