

The Supreme Court of Ohio

BOARD OF PROFESSIONAL CONDUCT

65 SOUTH FRONT STREET, 5TH FLOOR, COLUMBUS, OH 43215-3431

Telephone: 614.387.9370 Fax: 614.387.9379

www.supremecourt.ohio.gov

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D. ALLAN ASBURY

SENIOR COUNSEL

HEIDI WAGNER DORN

COUNSEL

OPINION 2016-3

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Lawyer Participation in Referral Services

SYLLABUS: A lawyer should carefully evaluate a lawyer referral service, or similar online model, to ensure that it complies with the Rules of Professional Conduct and the ethical requirements of the lawyer. Where the service meets all of the elements of a lawyer referral service, a participating lawyer must ensure that the service complies with Gov.Bar R. XVI, in order for the lawyer to comply with the Rules of Professional Conduct. A lawyer's participation in an online, nonlawyer-owned legal referral service, where the lawyer is required to pay a "marketing fee" to a nonlawyer for each service completed for a client, is unethical. A lawyer must ensure that the lawyer referral service does not interfere with the lawyer's independent professional judgment under Prof.Cond.R. 5.4. A lawyer is responsible for the conduct of the nonlawyers of the service (Prof.Cond.R. 5.3), as well as the advertising and marketing provided by the service on the lawyer's behalf. Prof.Cond.R. 7.1, 7.2, 7.3. Additionally, a fee structure that is tied specifically to individual client representations that a lawyer completes or to the percentage of a fee is not permissible, unless the lawyer referral service is registered with the Supreme Court of Ohio. Prof.Cond.R. 1.5, Gov.Bar R. XVI.

QUESTION: A lawyer seeks guidance regarding whether a particular business model involving online lawyer referrals is permissible under the Rules of Professional Conduct and the Rules for the Government of the Bar of Ohio. The proposed business model is an online referral service that matches a prospective client with a lawyer for a particular legal service. Although the client chooses the lawyer, the company defines the types of legal services offered, the scope of the representation, the fees charged, and other

parameters of the legal representation. Additionally, the model requires a lawyer to pay a “marketing fee,” for each completed client matter. The “marketing fee” is based on the fee generated from the completed individual legal matter. The requesting lawyer asks whether this model constitutes impermissible fee splitting with a nonlawyer under Prof.Cond.R. 1.5, or if the lawyer’s conduct would otherwise violate the Rules of Professional Conduct. This is a hypothetical business model; however, the Board acknowledges that similar business models currently exist in the marketplace. The conclusions set forth in this opinion apply equally to the proposed business model and aspects of existing business models.

APPLICABLE RULES: Prof.Cond.R. 1.1, 1.6, 1.18, 5.3, 5.4, 5.5, 7.2, 7.3, 7.4; Gov.Bar R. XVI

OPINION: This business model presents multiple, potential ethical issues for lawyers. These include fee-splitting with nonlawyers, advertising and marketing, a lawyer’s responsibility for the actions of nonlawyer assistants, interference with the lawyer’s professional judgment, and facilitating the unauthorized practice of law. As similar online services that match lawyers and clients exist, the Board will evaluate this type of referral service generally to determine if a lawyer’s participation would comply with the Rules of Professional Conduct.

ANALYSIS: The two most evident issues involving the Rules of Professional Conduct are that this business model would 1) operate as lawyer referral service not registered with the Supreme Court of Ohio, and 2) interfere with or limit the lawyer’s professional independence from the lawyer-client relationship. There also are several other considerations under the Rules of Professional Conduct.

Lawyer Referral Service

This business model may not refer to itself as a lawyer referral service in Ohio, yet it proposes to function in a manner similar to a lawyer referral service. A lawyer referral service operates to refer prospective clients to lawyers, based on a number of factors, including area of practice, experience, and geographic location. Gov.Bar R. XVI, Section 1(A)(1), (7). A lawyer may participate in a lawyer referral service only if it meets the requirements of the Rules of Professional Conduct, and it is registered with Supreme Court of Ohio. Prof.Cond.R. 7.2(b)(2),(3), Cmt. [6]; Gov.Bar R. XVI, Section 1(A)(2), (B).

In Ohio, a lawyer referral service must meet certain requirements in order for a lawyer to participate ethically. First, the lawyer referral service must be open to any lawyer licensed to practice in Ohio who maintains professional liability insurance with a

minimum amount of \$100,000 per occurrence and \$300,000 in the aggregate. Gov.Bar R. XVI, Section 1(A)(3), Section 2(A)(1). Second, a lawyer participating in a lawyer referral service is required to disclose disciplinary complaints. Gov.Bar R. XVI Sec. 2(A)(2), (4). Additionally, a lawyer referral service may require a participating lawyer to pay a fee, calculated as a percentage of the legal fee earned on the referred matter. Gov.Bar R. XVI, Section 2(C)(1). If a business operates as a lawyer referral service, even though it is called something else, it still must be registered with the Supreme Court of Ohio in order for a lawyer to ethically participate in it.

Nonlawyer Agents

In the business model, nonlawyers may perform legal or quasi-legal functions on behalf of the lawyer. The lawyer has no implied or apparent control or direction over the work of the nonlawyers at the company to ensure that they act in a manner that complies with the Rules of Professional Conduct.

A lawyer is required to make reasonable efforts to ensure that any “nonlawyer employed by, retained by, or associated with” the lawyer conducts himself or herself in a manner that comports with the professional obligations of the lawyer. Prof.Cond.R. 5.3(a). A lawyer is responsible for the activities of a nonlawyer who engages in conduct on behalf of the lawyer that, if performed by the lawyer, would violate the Rules of Professional Conduct, and if the lawyer “orders or, with the knowledge of the specific conduct, ratifies the conduct.” Prof.Cond.R. 5.3(c).

In order to comply with the Rules of Professional Conduct, a lawyer involved in this type of referral service should verify that the nonlawyers of the company are not engaging in the practice of law, as the lawyer could be responsible for assisting in the unauthorized practice of law. Prof.Cond.R. 5.5(a); Gov.Bar R. VII. “A lawyer must make reasonable efforts to ensure the services are provided in a manner compatible with the lawyer’s professional obligations.” Prof.Cond.R. 5.3, cmt. [3].

Independent Professional Judgment of a Lawyer

Under the proposed business model, the company, not the lawyer, controls nearly every aspect of the attorney-client relationship, from beginning to end. The company, not the lawyer, defines the type of services offered, the scope of the representation, and the fees charged. The model is antithetical to the core components of the client-lawyer relationship because the lawyer’s exercise of independent professional judgment on behalf of the client is eviscerated.

Under the Rules of Professional Conduct, a lawyer is responsible for approving, or tacitly approving, actions that involve the lawyer's practice of law. Prof.Cond.R. 5.4 outlines the professional independence of a lawyer and contains traditional limitations on nonlawyer involvement in the practice of law.

Prof.Cond.R. 5.4(c) prohibits a lawyer from allowing a person who recommends, employs or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services. This rule ensures the lawyer will abide by the client's decisions concerning the objective of the representation and will serve the interests of the client, and not those of a third party. Although an exception exists for a lawyer's participation in attorney referral services registered with the Supreme Court of Ohio, a lawyer may not participate in any lawyer referral service or other type of activity that interferes with the lawyer's exercise of professional judgment in handling a client's case. Prof.Cond.R. 5.4(c), (d)(3).

A lawyer must be cautious when considering a referral service that makes decisions that are clearly within the scope of the lawyer's exercise of professional judgment on behalf of a client. Decisions such as setting limits on the amount of time a lawyer must spend on each client's case, specifying a number of cases that a lawyer must agree to handle, limiting the scope of a lawyer's representation of a client, or generally directing a lawyer's representation of a client are all decisions that a lawyer is duty-bound to make. Moreover, many of these decisions must be made in consultation with the client, and not at the direction or control of a third-party referral service.

Fees and Fee Splitting

The proposed business model contains potential violations of the Rules of Professional Conduct where the client pays the fee in advance to the referral service, but payment is made to the lawyer by the referral service only after the representation is completed. This arrangement appears to make the fee contingent upon the outcome of the matter, which is prohibited in certain instances under Prof.Cond.R. 1.5(c), (d). Such an arrangement implicates prohibitions on fee-splitting with nonlawyers under Prof.Cond.R. 5.4(a). Additionally, a situation where a third-party is receiving and holding client funds may be contrary to a lawyer's duty to hold client funds in trust under Prof.Cond.R. 1.15(a).

The Supreme Court of Ohio has disciplined lawyers for sharing fees with nonlawyers. In *Cincinnati Bar Assn. v. Mullaney*, 2008-Ohio-4541, ¶ 21, three lawyers were disciplined for sharing legal fees with nonlawyers by accepting a portion of the fees paid

to a company that purported to serve homeowners threatened with foreclosure. The company told prospective customers that a lawyer and legal services would be furnished to them as part of the fee. In *Disciplinary Counsel v. Stranke*, 2006-Ohio-4357, a lawyer was suspended for sharing fees with a bankruptcy counseling firm that solicited and referred clients to him. In *Cleveland Bar Assn. v. Nosan*, 2006-Ohio-163, a lawyer was suspended for sharing fees with debt-counseling company that advertised for clients and provided the lawyer with office space and support staff.

Even where a business model states that it does not engage in impermissible fee splitting because the fees are separated into two different transactions or are called a “marketing fee” or similar term, fee splitting with a nonlawyer likely occurs. Such fees are not traditional advertising fees, as outlined in Adv.Op. 2001-2. Unlike advertising fees that are fixed amounts and paid for a fixed period of time, these “marketing fees” are a percentage of the fee generated on each legal service completed by the lawyer. Therefore, a fee-splitting arrangement that is dependent on the number of clients obtained or the legal fee earned does not comport with the Rules of Professional Conduct. Similar fee arrangements should be examined closely by a lawyer before participating in the service.

Under the Rules of Professional Conduct, a client must be advised in writing that if the lawyer does not complete the representation for any reason, the client may be entitled to a refund of all or part of the fee, as required by Prof.Cond.R. 1.5(d). Where a company, not the lawyer, determines whether a dissatisfied client receives a refund, without mention as to whether the client is advised in writing about a refund, the conduct of the lawyer violates the Rules of Professional Conduct.

Advertising and Marketing

In the proposed business model, the lawyer lacks control over the content of the advertising, to whom it is sent, and how it is disseminated to prospective clients. Moreover, the company does not advertise on behalf of a particular lawyer, but rather advertises the service of the company. A lawyer must ensure that all communications and advertising made on his or her behalf are accurate and do not mislead or create unjustified expectations. Prof.Cond.R. 7.1, 7.2, and 7.3. A lawyer is ethically responsible to ensure that any services provided by a third party comply with the Rules of Professional Conduct, and cannot simply rely on the information provided by the company as insulation against potential ethical violations.

In Ohio, a lawyer is prohibited from giving anything of value to a person for recommending a lawyer's services. Prof.Cond.R. 7.2(c). A lawyer may pay for advertising, but may not pay another person or a for-profit entity to channel professional work for the lawyer. Prof.Cond.R. 7.2(c). A lawyer cannot solicit clients if a significant motive in doing so is pecuniary gain. Prof.Cond.R. 7.3(a).

The Board previously issued an advisory opinion that distinguished advertising fees from referral fees. Adv.Op. 2001-2. The opinion identifies the following factors in determining whether a fee is for advertising services or for providing a referral: 1) if the lawyer is required to pay an amount of money based on an actual number of people who contact or hire the lawyer, or an amount based on the percentage of the fee obtained from rendering the legal services; 2) if the third party will provide services that go beyond the ministerial function of placing the lawyer's information into public view; or 3) if the third party will not clarify that the information is an advertisement, but rather, makes the information regarding the lawyer appear as if the third party is referring or recommending the lawyer, or that the lawyer is part of the third party's services to its users.

When considering participating in a referral service similar to the proposed business model, a lawyer should ensure that it operates in a manner consistent with Adv.Op. 2001-2, as well as the Rules of Professional Conduct governing lawyer advertising and communications with third parties.

Other Rules of Professional Conduct

The proposed business model also implicates several other Rules of Professional Conduct that should be considered when a lawyer is evaluating whether to participate in such a service. At the most fundamental level, a lawyer is required to provide competent representation to a client. Prof.Cond.R. 1.1. A lawyer participating in a lawyer referral service, like the model or similar models, must ensure that he or she is competent to handle referrals in the areas of law listed on the website, is able to reject matters outside of the lawyer's areas of competence, and has the ability to limit the volume of matters to a size that the lawyer can competently handle in compliance with Prof.Cond.R. 1.1.

Prof.Cond.R. 1.6(a) requires a lawyer to maintain confidentiality of information relating to the representation of a client. A lawyer must be aware of confidentiality issues that may arise while participating in a lawyer referral service, and ensure that the client's confidences are preserved in accordance with Prof.Cond.R. 1.6. A lawyer may not

participate in a service that requires disclosure of information relating to the representation except as permitted or required by Prof.Cond.R. 1.6.

A lawyer owes duties to a prospective client “. . . who consults with a lawyer about the possibility of forming a client-lawyer relationship” Prof.Cond.R. 1.18. A lawyer who learns information from a prospective client, even if a lawyer-client relationship never forms, is not permitted to use or reveal the information except as permitted under Prof.Cond.R. 1.9. Prof.Cond.R. 1.18(b). If the referral service requires a lawyer to consult with a client before a client-lawyer relationship is formed, then the lawyer must ensure compliance with his or her duties to that prospective client.

CONCLUSION: A lawyer should carefully evaluate the operation of a lawyer referral service to ensure that the lawyer’s participation in the referral service is consistent with the ethical requirements of the lawyer. Foremost, a lawyer must ensure that his or her participation in the referral service is consistent with the core obligations and duties owed to clients. The lawyer also must ensure that relationships with nonlawyers are conducted in accord with the Rules of Professional Conduct and that the marketing or advertising services provided on the lawyer’s behalf are proper. Additionally, fees tied specifically to the number of individual clients represented or the amount of a legal fee is not permissible, unless the lawyer referral service is registered with the Supreme Court of Ohio.

Advisory Opinions of the Board of Professional Conduct are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Rules of Professional Conduct, the Code of Judicial Conduct, and the Attorney’s Oath of Office.