

**Nebraska Ethics Advisory Opinion for Lawyers
No. 07-05**

A NEBRASKA LAWYER MAY ADVERTISE IN AN INTERNET-BASED LAWYER DIRECTORY AS LONG AS: (1) THE DIRECTORY DOES NOTHING MORE THAN LIST LAWYERS AND APPROPRIATE INFORMATION FOR THE BENEFIT OF THOSE WHO ACCESS THE DIRECTORY; (2) NO RECOMMENDATION IS MADE AS TO A PARTICULAR LAWYER; (3) ANY FEE PAID BY THE LAWYER FOR PARTICIPATION IN THE DIRECTORY IS REASONABLE AND IS FIXED FOR A CERTAIN PERIOD OF TIME; (4) THE DIRECTORY CONTAINS A DISCLAIMER THAT IT IS A DIRECTORY OF LAWYERS, NOT A LAWYER REFERRAL SERVICE OR PREPAID LEGAL PLAN; AND (5) NO OTHER RULES CONCERNING LAWYER ADVERTISING IN GENERAL ARE VIOLATED.

QUESTION PRESENTED

May a Nebraska lawyer advertise in an internet-based lawyer directory such as the AARP Legal Services Network by GE Benefit Solutions (the "Directory")?

FACTS

In order to become listed in the Directory, a lawyer must go through an application process which includes payment of a fee. Once the application and fee are received, a determination is made by the operator of the Directory (the "Directory Company") as to whether the lawyer meets the criteria established by the Company. Once accepted, an annual fixed fee is charged to participating lawyers which appears to be a reasonable charge for the advertising. However, no legal fees are shared with the Company nor is a "per-referral" fee paid. In addition, participating lawyers are free to participate in other directories or forms of advertising.

The Directory includes only the lawyer's name, address, contact information, the languages the lawyer speaks fluently, and area(s) of practice (with appropriate disclaimers, as necessary). Lawyers are not able to identify themselves as a specialist in any particular area of practice. The Directory's website does not permit users to submit any information to the website about their legal issues. A user can only search for lawyers by zip code, city or state and/or practice area. A search results in the generation of a list of lawyers in random order. No other information is needed to search the Directory and the search is free. The Directory also contains a disclaimer that it is a directory of lawyers, not a lawyer referral service or prepaid legal plan and no endorsement or evaluation of a lawyer is given.

Users may also access the Directory by calling a call center. The staff is instructed to ask for the user's zip code, city, state, and/or practice area of user's choosing. The staff member then performs the search using the online Directory and reads the results to the caller. The staff member will not answer any questions or about legal issues or about the lawyers listed in the Directory. In addition, resolution of complaints by these staff members is limited to technical issues. If they receive a complaint about a lawyer, the caller is advised to contact their local bar association or other relevant authority or to consider consulting another lawyer. The Company will, however, document and record complaints and such complaints may lead to the removal of a lawyer from the Directory.

The Directory requires certain minimum criteria to be met by a participating lawyer such as a stated minimum number of years of experience, admission to the Bar in the state where they are practicing, malpractice insurance. A participating lawyer must provide each client who identifies the lawyer through use of the Directory with a written fee agreement before beginning any legal work for the client and agree to not charge more for legal services provided to clients who are users of the Directory than would be charged to other clients who are not users of the Directory. A lawyer must also identify only those locations from which the lawyer is willing to perform work.

The Company recommends, and in some cases requires, that all participating lawyers provide certain listed services to members of not-for-profit organizations that provide the Directory for a free or reduced charge as a benefit to their members (such as AARP). These services include: 30 minute free consultation in person or by telephone; simple will for a single person at a cost of \$75; simple wills for a married couple at a cost of \$100; financial power of attorney at a cost of \$35; healthcare power of attorney and living will at a cost of \$35; and a 20% discount off the lawyer's usual and customary hourly rate.

APPLICABLE RULES OF PROFESSIONAL CONDUCT

RULE 1.5 FEES

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

- (1) an agreement by a lawyer with the lawyer's firm, partner or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
 - (2) a lawyer who purchases the practice of a deceased, disabled or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;
 - (3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and
 - (4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.
- (c) A lawyer shall not permit 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.

RULE 7.1 COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

RULE 7.2 ADVERTISING

- (a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.
- (b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may
 - (1) pay the reasonable costs of advertisements or communications permitted by this Rule;
 - (2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;

- (3) pay for a law practice in accordance with Rule 1.17; and
- (4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if

- (i) the reciprocal referral agreement is not exclusive, and
- (ii) the client is informed of the existence and nature of the agreement.

(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

COMMENT

[5] Lawyers are not permitted to pay others for channeling professional work. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. See Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers who prepare marketing materials for them.

RULE 7.4 COMMUNICATION OF FIELDS OF PRACTICE

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

(c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.

(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

- (1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and
- (2) the name of the certifying organization is clearly identified in the communication.

DISCUSSION

Rule 7.2(b) of the current Nebraska Rules of Professional Conduct (the "Rules") provides that a lawyer shall not give anything of value to a person for recommending the lawyer's services. A lawyer can, however, pay the reasonable costs of advertisements or communications permitted by Rule 7.2. Comment [5] to Rule 7.2 provides that a lawyer may "pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings," The issue then is whether the Directory is advertising permissible under Rule 7.2(b)(1).

One concern that is frequently raised with respect to on-line legal directories is whether they are, in fact, lawyer referral services. In Formal Opinion 07-01, this Committee determined that an online marketing services agreement which provides for an up front fee for exclusive referrals and an additional fee based on the net recovery of each case was a "for-profit" lawyer referral service in violation of Rule 7.2. The *ABA/BNA Lawyers' Manual on Professional Conduct* addresses the issue as to whether an Internet service that links consumers and lawyers amounts to a referral service. The answer depends on the characteristics and operation of the service in question and the particular jurisdiction's view of what constitutes a lawyer referral service. At page 81:555, the manual provides:

"Some ethics committees have identified factors weighing against a finding that an Internet service is a lawyer referral service:

- § Lawyer-client relationships are formed without the intervention of the company. Nassau County (N.Y.) Ethics Op. 01-4; North Carolina Ethics Op. 2004-1.
- § Users decide which lawyer to contact. North Carolina Ethics Op. 2004-1.
- § The service plays no role in the decision-making process of prospective clients. South Carolina Ethics Op. 01-03.
- § Participating lawyers pay a fixed amount for a fixed period of time. Ohio Supreme Court Ethics Op. 2001-2.
- § The business makes clear to the public that it is viewing an advertisement and not receiving a recommendation or referral. Nassau County (N.Y.) Ethics Op. 01-4; Ohio Supreme Court Ethics Op. 2001-2.

§ The company does not charge lawyers any fee and does not recommend or promote the use of any particular lawyer's services. Nassau County (N.Y.) Ethics Op. 01-4.

On the other side of the equation, ethics committees have cited these factors as weighing in favor of a finding that an Internet service functions as a lawyer referral service:

§ The company receives requests for lawyer services and allocates them to a particular lawyer or law firm. Arizona Ethics Op. 05-08.

§ The business holds itself out to the public as a lawyer referral service. Arizona Ethics Op. 05-08.

§ The company requires lawyers to pay an amount based on the actual number of people who contact or hire the lawyer or a percentage of the fee obtained for rendering legal services. Ohio Supreme Court Ethics Op. 2001-2.

§ The company makes it seem as if it is recommending the attorney or as if the attorney is part of the company's services to its customers. Ohio Supreme Court Ethics Op. 2001-2."

Considering these factors, the Directory does not function as a lawyer referral service because: (1) the Directory lists participating lawyers in a random order and it is up to the users to decide which lawyer to contact; (2) the participating lawyers pay a fixed fee to participate in the Directory for a fixed period of time; (3) the Company services the website and provides telephone access to the Directory but does nothing more than list lawyers and their information for the benefit of those who want to access the Directory; (4) the Directory contains a disclaimer that it is a directory of lawyers, not a lawyer referral service or prepaid legal plan; and (5) the Company makes no recommendation nor does it promote the use of any particular lawyer's services.

As long as the Directory is in compliance with Rule 7.2, and in particular the fee charged is reasonable considering the type of advertising being provided for, a lawyer's participation in the Directory would not violate the Rules. However, a participating lawyer must keep in mind that the lawyer is responsible for the advertisement's content, and given the reach of the Internet, make sure that the lawyer only does work in jurisdictions for which the lawyer is licensed to practice.

CONCLUSION

A Nebraska lawyer may advertise in an internet-based lawyer directory as long as: (1) the Directory does nothing more than list lawyers and appropriate information for the benefit of those who access the Directory; (2) no recommendation is made as to a particular lawyer; (3) any fee paid by the Lawyer for participation in the Directory is reasonable and is fixed for a certain period of time; (4) the Directory contains a disclaimer that it is a directory of

lawyers, not a lawyer referral service or prepaid legal plan; and (5) no other Rules concerning lawyer advertising in general are violated.