

**Nebraska Ethics Advisory Opinion for Lawyers
No. 07-01**

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 IS A "FOR-PROFIT" LAWYER REFERRAL SERVICE IN VIOLATION OF RULE 7.2.

QUESTION PRESENTED

May a Nebraska lawyer enter into an Online Marketing Services Agreement which provides for: (1) an up front fee in exchange for exclusive referrals in Nebraska, website placement, access to case management software, and pay per click management, and (2) compensation for each case based on a percentage of the net recovery.

FACTS

A Nebraska attorney is interested in entering into an Online Marketing Services Agreement (the "Marketing Agreement") with a marketing company (the "Company"). Although not clearly presented, it appears that the members of the Marketing Company are California attorneys. The Company claims to have assembled a comprehensive nationwide internet marketing campaign which targets injured individuals who are seeking legal counsel to handle their cases. The Marketing Agreement requires the local lawyer to purchase a six-month sponsorship of the Marketing Company's network of websites. The sponsorship entitles the local lawyer to (1) exclusive placement in all websites and referrals related to vehicle accidents in Nebraska, (2) access to the Marketing Company's case management software, and (3) management of the local lawyer's paid listing campaigns relating to vehicle listings in Nebraska. All contact information by a potential client is directed to the Company by e-mail or phone. The Company claims to have the matter evaluated by lawyers as to viability. The matter is then referred to the local lawyer who then meets with the potential client and decides whether to accept the case.

Upon acceptance of the case by the local lawyer, a retainer agreement is entered into between the client, the local attorney and a California law firm (which presumably is affiliated with the Marketing Company). The Marketing Company monitors the case progression through its case management system. The California law firm remains available for consultation and decision-making, but the local lawyer is responsible for handling the case. Upon resolution of the case, the California law firm receives 20% of the net recovery.

APPLICABLE RULES OF PROFESSIONAL CONDUCT

RULE 1.5 FEES

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and

(3) the total fee is reasonable.

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.

DISCUSSION

We have assumed that the owners of the Marketing Company are licensed attorneys. If not, then the proposed arrangement is subject to the prohibition on fee sharing with non-lawyers as covered in Formal Opinion 06-10 which dealt with packaged estate plans commercially marketed by non-lawyers.

This Committee has addressed "for-profit" lawyer referral programs under the former Nebraska Code of Professional Responsibility. Formal Opinions 87-2 and 89-3 authorized participation in a "for-profit" legal referral program as long as the lawyer did not give anything of value to the program for recommending the lawyer's services. Thus, it was not unethical to offer reduced fees or a free consultation to those clients that have been referred under the legal referral program as long as the program complied with the applicable provisions of the Code of Professional Responsibility.

Formal Opinion 89-3 also addressed a referral program's requirement that the lawyer pay the pro rata share of the total advertising and promotional expenses incurred by the referral program, plus a reasonable fee for the administration of the company's advertising program: That opinion stated that "paying a second party for the second party's advertising and promotional expenses, plus an administration fee, falls squarely within the prohibition against giving 'anything of value to a person for recommending the lawyer's services' and does not fall within the exception for advertising services."

Formal Opinion 95-3 addressed a situation where a flat fee was paid by participating lawyers in exchange for a guaranteed number of referrals. Although a portion of the fee could be traced to television advertising, participation in the plan was determined to be unethical because the plan violated the secondary advertising prohibition provided for in Formal Opinion 89-3 and resulted in payment of value to a person for recommending the lawyer's services.

Rule 7.2(b) of the current Nebraska Rules of Professional Conduct continues the general rule of the former Nebraska Code of Professional Responsibility that a lawyer shall not give anything of value to a person for recommending the lawyer's services. As stated in comment [5] to Rule 7.2, "Lawyers are not permitted to pay others for channeling professional work." There are a few exceptions to that Rule which include (1) payment for advertising and communications permitted by Rule 7.2, (2) payment to a lawyer referral service if the service is not-for-profit or is qualified (approved by an appropriate regulatory authority), (3) . . . (not applicable to the facts in this opinion), and (4) reciprocal referral agreements which are nonexclusive and where the client is informed of the existence and nature of the agreement.

The issue under Rule 7.2 then is whether the Marketing Agreement is simply advertising or is a "for-profit" referral service. Exception (4) clearly does not apply since

the proposed Marketing Agreement is not reciprocal and provides for exclusivity. Comment [5] to Rule 7.2 confirms that on-line directory listings and sponsorship fees constitute permissible advertising and communications. However, the Marketing Agreement and accompanying cover letter indicate that the program extends beyond advertising on the web. All contact information by a potential client is directed to the California law firm by electronic mail or telephone. The California law firm then evaluates the case as to viability prior to directing the case to the local lawyer.

In Arizona Ethics Opinion 06-06, the Arizona State Bar Commission on the Rules of Professional Conduct determined that Arizona lawyers could not pay to take part in a "for-profit" online service that links prospective clients with potential lawyers based on geographic practice areas. The Arizona Commission relied on Comment [6] to Arizona Rule 7.e, which defined a referral service as "any organization in which a person or entity receives requests for lawyer services, and allocates such requests to a particular lawyer or lawyers or that holds itself out to the public as a lawyer referral service." The Nebraska version of Comment [6] varies from the Arizona version and provides that a lawyer referral service "is any organization that holds itself out to the public as a lawyer referral service". The question then is whether the Company and/or the California law firm hold themselves out to the public as a lawyer referral service.

Although the Company does not call what it offers a referral service, the Marketing Agreement includes a provision entitled "Referral of Cases". This provision specifically provides for referral of cases to the local lawyer by the California law firm. Ohio Supreme Court Ethics Opinion 2001-2 provides that one characteristic of a referral service is if the company provides "services that go beyond the ministerial function of placing the attorney's or law firm's information into the public view." By providing services such as case evaluation and case management, the Marketing Agreement clearly provides for services that go beyond a ministerial function. Add this to the fact that the Marketing Agreement specifically provides for referrals, it is clear that the Marketing Agreement provides for a referral service. Further, it is a "for-profit" referral service which is not permitted by Rule 7.2(b).

Consistent with this analysis is an opinion of the Washington State Bar Association Rules of Professional Conduct Committee. That committee's Informal Opinion 2106 stated that Washington lawyers may not pay to participate in an internet matching service where the service "makes 'subjective judgments' and provides more than 'ministerial services'".

Apparently, more than a few states have modified the ABA's model provisions to allow referral fees by eliminating reference to proportionality or responsibility. These states include California, Connecticut, Kansas, Maine, Massachusetts, Michigan, Oregon,

Pennsylvania and Texas. *ABA Lawyer's Manual on Professional Conduct* at 41:709. However, Nebraska has not so modified the model provisions to allow referral fees.

There is one additional reason why the Marketing Agreement is suspect. It provides for compensation to the California law firm on a "20% referral basis". What is meant by a "20% referral basis" is not provided for in the Marketing Agreement. However, the accompanying materials provide that the California law firm receives 20% of the net recovery. The Marketing Agreement provides that this fee is paid for "compensation for work performed on the cases, including but not limited to: substantial work in constructing and maintaining the web sites, generating the potential cases via online marketing, 24 hour per day case screening, intakes, evaluations, and client interviews, and the on-going legal services performed via the case management software". Rule 1.5 (1) permits division of a fee between lawyers who are not in the same firm only if the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation. Although the related materials anticipate that both the California law firm and the local lawyer sign the retainer agreement with the client, it is clear that the intent of the Marketing Agreement is for the local lawyer to take a significant lead role in the case. Under a typical 1/3 contingency agreement, the only way it would be proper to pay the California law firm 60% of this amount would be if the California law firm provided approximately 60% of the services. The services must also be related specifically to the case. Expenses such as constructing and maintaining web sites and online marketing would not necessarily be related to the specific case.

CONCLUSION

An Online Marketing Services Agreement which provides for an up front fee for exclusive referrals, case evaluation prior to placement, and an additional fee based on the net recovery of each case referred to is a "for-profit" lawyer referral service in violation of Rule 7.2.