

## **NEBRASKA ETHICS ADVISORY OPINION FOR LAWYERS**

NO. 14-01

### **MAY AN ATTORNEY PARTICIPATE IN A NOT-FOR-PROFIT “LAWYER REFERRAL PROGRAM” IN WHICH THE ATTORNEY PAYS A DESIGNATED FEE TO PARTICIPATE?**

#### **STATEMENT OF FACTS**

The Nebraska State Bar Association (“NSBA”) is contemplating the formation of a “lawyer referral program” whereby the NSBA would receive legal inquiries from potential clients among the general public and then refer the potential clients to participant attorneys in the “lawyer referral program” with appropriate expertise in the subject matter. According to the materials provided to the committee, the referrals would be conducted in an unbiased manner through the use of an industry-recognized software program equipped with a built-in rotation system designed to distribute referrals in an equitable manner while also taking into account geographical considerations. The referral program would also purportedly provide various consumer protections by implementing a designated procedure to address consumer complaints and limiting access to the program only to those attorneys with adequate malpractice insurance.

According to the materials provided to the committee, participating attorneys will pay an initial fee to participate in the program. Thereafter, if a referral results in a fee-generating case, the lawyer will pay a percentage of the fee earned back to the lawyer referral program in order to fund the reasonable operating expenses of the program. The specific amount of the initial participation fee, and the specific percentage to be paid to the lawyer referral program in fee-generating cases, have yet to be determined by the NSBA.

The NSBA itself is a 501(c)(6) not-for-profit entity. Further, the NSBA indicates that it will ask its House of Delegates to adopt a formal policy establishing that any fees paid into the referral program beyond those necessary to cover the program's reasonable operating costs will either be reinvested into the program or used to support public services activities of the NSBA rather than funding the NSBA itself. The question presented to the committee is whether a lawyer's participation in the proposed referral program would violate any rules of professional conduct and, in particular, the general prohibition against payment in exchange for the referral of a lawyer's services found in §3-507.2.

### **APPLICABLE RULES OF PROFESSIONAL CONDUCT**

The following rules of professional conduct are instructive with respect to the question presented:

#### **§3-507.2**

(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

### **Comment**

[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists prospective clients to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by laypersons to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for prospective clients. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act (requiring that organizations that are identified as lawyer referral services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable objective

eligibility requirements as may be established by the referral service for the protection of prospective clients; (ii) require each participating lawyer to carry reasonably adequate malpractice insurance; (iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not refer prospective clients to lawyers who own, operate or are employed by the referral service.)

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with prospective clients, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

## **DISCUSSION**

The crux of the issue presented to the Committee is whether a lawyer's participation in the NSBA's proposed "lawyer referral service" would violate any rule of professional conduct given that participating lawyers would have to pay a fee in order to participate in the program. As a preliminary matter, it is important to emphasize that the referral program at issue is in the planning and development stages and, thus, no formal rules and regulations have been adopted and subject to consideration by the Committee. The NSBA, however, has provided a general framework regarding the program and this

opinion is based on the program as its proposed operation has been explained to the Committee by the NSBA.

The NSBA is itself a not-for-profit 501(c)(6) entity. Moreover, the tentative plan for the referral program is for all proceeds obtained from the program to either be reinvested back into the program or used to fund various NSBA public service interests. Under these parameters, we find that the program does not violate any rule(s) of professional conduct and, in particular, an attorney's participation would not violate the general prohibition of payment in exchange for client referrals. Specifically, Neb. R. Prof. C. §3-507.2 generally prohibits a lawyer from giving anything of value to a person for the purpose of recommending the lawyer's services. However, §3-507.2(b)(1-4) provides a list of exceptions to the general rule under which a lawyer may permissibly pay for the referral of clients. With respect to the matter at hand, §3-507.2(b)(2) explicitly states that a lawyer may pay for the "usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service." (Emphasis added). Because the lawyer referral service to be implemented by the NSBA will purportedly re-invest all proceeds received back into the program itself, or donate any surplus to public service activities, the program is clearly a "not-for-profit" referral service for the purposes of §3-507.2. Accordingly, a lawyer's participation in the plan would be authorized under §3-507.2(b)(2) and would not be subject to the general prohibition under §3-507.2.