



PENNSYLVANIA BAR ASSOCIATION
LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY COMMITTEE
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FORMAL OPINION 2016-200

Ethical Considerations Relating to Participation in Fixed Fee Limited Scope Legal Services Referral Programs

I. SUMMARY

The Pennsylvania Bar Association Legal Ethics and Professional Responsibility Committee (the “Committee”) has reviewed the potential ethics issues arising from lawyers participating in legal services referral programs meeting the following description:

A for-profit business (the “Business”), which is not a law firm or lawyer-owned, assists in pairing up potential clients seeking certain so-called “limited scope” or “unbundled” legal services with lawyers who are willing to provide such services for a flat fee, with the amount of the fee established by the Business. The client remits the full fee, in advance, to the Business. The Business then forwards the fee to the lawyer after confirming, according to its own procedures and standards, that the requested services were performed. The lawyer then separately pays the Business what is described as a “marketing fee” for each assignment completed. The so-called “marketing fee” charged regarding one type of service may represent a different percentage of the legal fee than the marketing fee charged for another type of service; but, in any event, the amount of the “marketing fee” varies directly with the amount of the flat fee for the legal services. In other words, the greater the amount of the flat fee, the greater the amount of the marketing fee, with the marketing fee typically ranging between 20% to 30% of the legal fee.

Based on this description, the Committee concludes that a Pennsylvania lawyer’s participation in such a program (which, for brevity, will be referred to in this Opinion as a “Flat

Fee Limited Scope” or “FFLS” program) would violate the following provisions of the Pennsylvania Rules of Professional Conduct (“RPCs”):

1. RPC 5.4(a), which generally prohibits sharing legal fees with non-lawyers; and
2. RPC 1.15(i), which requires legal fees paid in advance to be deposited in the lawyer’s Trust Account.

Participation in such a program also poses a substantial risk that the lawyer could violate the following RPCs:

1. RPC 2.1, which requires a lawyer to exercise independent professional judgment;
2. RPC 5.4(c), which, in pertinent part, prohibits a lawyer from allowing a person who recommends a lawyer to direct or regulate the lawyer’s professional judgment;
3. RPC 5.3(c)(1), which holds a lawyer responsible for conduct of a non-lawyer that would violate the RPCs if engaged in by the lawyer, if the lawyer has ordered or ratified such conduct;
4. RPC 8.4(a), which prohibits a lawyer from violating the RPCs through the acts of another;
5. RPC 1.16(d), which, in pertinent part, requires a lawyer to refund to a client any advance payment of fees that has not been earned upon termination of the representation;
6. RPC 1.2(c), which permits a lawyer to limit the scope of a representation, but only if the limitation is reasonable under the circumstances and the client has given informed consent;
7. RPC 1.6(a), which generally prohibits a lawyer from revealing information relating to the representation of a client; and
8. RPC 7.7(a), which, in pertinent part, prohibits a lawyer from accepting referrals from a lawyer referral service if the service engaged in communications with the public in a manner that would violate the RPCs if the communication were made by the lawyer.

Participation in such a program could also raise potential concerns regarding assisting in the unauthorized practice of law, in violation of RPC 5.5(a).

II. ETHICAL CONSIDERATIONS RELATING TO FEE SHARING WITH NON-LAWYERS AND PAYING FOR RECOMMENDING A LAWYER’S SERVICES

An obvious concern presented by the FFLS programs described above is whether they involve the sharing of legal fees with non-lawyers, which is prohibited under RPC 5.4(a). The Businesses which operate such programs, presumably in recognition of this concern, typically

structure payment in such a way that the actual payment of funds by the client is not directly “shared” between the lawyer and the non-lawyer Business. Instead, as described previously, the client pays a flat fee to the Business and, upon the Business supposedly verifying that the lawyer has earned the fee, the Business remits the full amount of the flat fee to the lawyer, typically by electronic bank transfer to the lawyer’s operating account. Then, in an ostensibly separate transaction, the Business collects its marketing fee related to the completed assignment from the lawyer, typically through a pre-authorized, monthly direct debit from the same operating account into which the fees are deposited.

The manner in which the payments are structured is not dispositive of whether the lawyer’s payment to the Business constitutes fee sharing.¹ Rather, the manner in which the amount of the “marketing fee” is established, taken in conjunction with what the lawyer is supposedly paying for, leads to the conclusion that the lawyer’s payment of such “marketing fees” constitutes impermissible fee sharing with a non-lawyer.

Outright payment of referral fees to a non-lawyer² would violate RPC 7.2(c), which prohibits a lawyer from giving “anything of value for recommending the lawyer’s services.” Comment [6] to RPC 7.2 explains that a “communication contains a recommendation if it endorses or vouches for a lawyer’s credentials, abilities, competence, character, or other professional qualities.” One FFLS program website lauds all participating lawyers with such terms and descriptions as “highly rated,” “top reviewed,” “qualified,” “experienced,” and “licensed to practice anywhere in your state.” The individual lawyer profiles prominently feature “star” ratings, on a scale of one to five stars, based on client reviews, as well as the lawyer’s score under the program operator’s proprietary, “1 to 10” numerical rating system. The profiles also include excerpts from client reviews. Such communications fit the definition of “recommendations” in the Comment to RPC 7.2.

RPC 7.2(c)(1) and (2) provide two potentially applicable exceptions to RPC 7.2(c)’s general prohibition against giving “anything of value to a person for recommending the lawyer’s services.” Those exceptions permit payment for the following:

1. the reasonable cost of advertisements or written communications permitted by this Rule; or
2. the usual charges of a lawyer referral service or other legal service organization.

Information published by at least one major operator of a FFLS program asserts that it is not a “lawyer referral service,” presumably because the American Bar Association Model Rules of Professional Conduct (“Model Rules”), and many other states’ RPCs, limit authorized “lawyer referral services” to not-for-profit organizations or services that are approved by specified regulatory authorities (*See* Model Rule 7.2(b)(2)). The FFLS program operator claims that it is

¹ *See* Sup. Ct. of Ohio Bd. of Professional Conduct Op., 2016-3 (“Ohio Opinion 2016-3”), (separating payment to lawyer of legal fees from lawyer’s payment of “marketing fee” does not rule out impermissible fee splitting); South Carolina Ethics Advisory Opinion 16-06 (“S.C. Opinion 16-06”), p.2 (“Allowing the service to indirectly take a portion of the attorney’s fee by disguising it in two separate transactions does not negate the fact that the service is claiming a certain portion of the fee earned by the lawyer as its ‘per service marketing fee’”).

² Payment of referral fees to other lawyers is effectively authorized under, and subject to the provisions of, RPC 1.5(e).

not a lawyer referral service because it does not select particular lawyers to work for particular clients. Rather, the client typically chooses the lawyer from among those participating in an online listing (or “marketplace”) of basically self-qualified lawyers in a particular field. Alternatively, a client can elect to work with the first lawyer who responds to the client’s request for assistance.

As discussed below, whether or not a FFLS program constitutes a “lawyer referral services” is not dispositive of whether the lawyer’s payment of “marketing fees” to the operators of the program as described above constitutes impermissible fee sharing. In any event, the Pennsylvania RPCs differ from the Model Rules in that Pennsylvania does not restrict lawyer referral services to “approved” or not-for-profit organizations. Further, the FFLS programs described above fit within the following, broad definition of “lawyer referral service” set forth in RPC 7.7(b):

A “lawyer referral service” is any person, group of persons, association, organization or entity that receives a fee or charge for referring or causing the direct or indirect referral of a potential client to a lawyer drawn from a specific group or panel of lawyers.

Therefore, even if a Business operating a FFLS program chooses not to describe itself as a “lawyer referral service,” if it meets Pennsylvania’s definition of a lawyer referral service, then a lawyer’s payment of fees to such an organization could potentially be authorized under RPC 7.2(c)(2) as “the usual charge of a lawyer referral service.”³ However, the comment to RPC 7.7 confirms that payments to a lawyer referral service remain subject to RPC 5.4(a)’s prohibition against sharing fees with non-lawyers.⁴ Ethics opinions that have considered similar compensation arrangements have concluded that marketing, advertising, or referral fees paid to for-profit enterprises that are based upon whether a lawyer received any matters, or how many matters were received, or how much revenue was generated by the matters, constitute impermissible fee sharing under RPC 5.4(a). For example, Ohio Opinion 2016-3, which addresses the same types of FFLS programs discussed in this Opinion, states that “a fee-splitting arrangement that is dependent upon the number of clients obtained or the legal fee earned does not comport with the Rules of Professional Conduct.” S.C. Opinion 16-06, which also addressed a FFLS program, reached the same conclusion. Other ethics opinions which have, in various contexts, concluded that advertising, marketing, or referral fees calculated on the basis of matters received or legal fees generated violate Rule 5.4(a) include: Arizona Opinion 10-01; Alabama State Bar Ethics Opinion RO 2012-01 (“Alabama Opinion 2012-01”); Indiana State Bar Association Legal Ethics Committee Opinion 1 of 2012 (“Indiana Opinion 1 of 2012”); Kentucky Bar Association Ethics Opinion E-429 and South Carolina Ethics Advisory Opinion 93-09.

³ See Ohio Opinion 2016-3 (if a FFLS program fits the definition of a lawyer referral service under the applicable Rule, it should be analyzed as such even if the program operator does not refer to itself as a lawyer referral service).

⁴ See also State Bar of Ariz. Ethics Op. 10-01, (“Arizona Opinion 10-01”), (Payment to lawyer referral service of percentage of legal fees earned on referral matter is prohibited fee sharing under Rule 5.4(a). Specific prohibition against fee sharing in RPC 5.4(a) trumps general rule allowing payment of the “usual charges” of a lawyer referral service in Arizona’s counterpart to RPC 7.2(c)(2)).

Several of the opinions discussed above involve “group coupon” or “deal of the day” promotions, in which a merchant offers coupons for discounted goods or services through an online promoter, and shares the proceeds from the sale of the coupon with the promoter. In PBA Inquiry No. 2011-027, a member of this Committee concluded, without discussion, that a lawyer’s participation in such a promotion would violate RPC 5.4(a)’s prohibition against fee sharing with non-lawyers. On the other hand, the author of PBA Inquiry No. 2014-027 stated that fees paid to an online “pay-per-lead” service were permissible either as “the reasonable cost of advertising” or as “the usual charge of a lawyer referral service,” noting that “the fee charged to the lawyer is not tied to any fee that is earned in the case.” *Accord* PBA Inquiry No. 2010-007 (participation in online “legal matching service” which charges no “finder’s fee” or other “premium for success” and does not involve solicitation would not violate the RPCs).

PBA Inquiry No. 93-162 concluded that a lawyer could properly pay a percentage-based referral fee to a lawyer referral service sponsored by a county bar association, under the then-current version of RPC 7.2(c), which authorized payment of “the usual charges of a *not-for-profit* Lawyer Referral Service or other legal services organization.” (emphasis added). The author of Inquiry 93-162 reasoned that the then-current version of RPC 7.2(c) only authorized payment of such fees to *not-for-profit* services, which use the funds exclusively either to cover operating expenses or otherwise “*for the public benefit.*” This opinion is consistent with two ABA ethics opinions that have approved payments to bar association sponsored lawyer referral services that charge percentage fees. *See* ABA Comm. on Professional Ethics and Grievances, Formal Op. 291 (1956) (concluding that a percentage fee did not violate the public policy underlying the prohibitions against fee-splitting and was therefore, enforceable); ABA Comm. on Professional Ethics, Informal Op. 1076 (1968) (concluding that a flat fee or a sliding scale charge based on the fees derived by the panel members from the cases referred to them is ethically permissible if such an arrangement is under the control of the bar association setting it up). *See also* Emmons v. State Bar of California, 6 Cal. App. 3d. 565 (1970) (noting “[a] bar association [operating a referral service] seeks not individual profit but the fulfillment of public and professional objectives. It has legitimate, nonprofit interest in making legal services more readily available to the public”). *See also* Richards v. SSM Health Care, Inc., 724 N.E.2d 975 (Ill. App., First District 2000) (concluding that payment of a percentage fee to a local county bar association is enforceable as the bar association uses the money to finance the service and for pro bono activities). This rationale does not apply to for-profit Businesses operating the FFLS programs described in this Opinion.

In the alternative, if the FFLS program operators’ contention that such programs are not “lawyer referral services” were correct, RPC 7.2(c)(1), which relates to “the reasonable cost of advertisements” would be the sole remaining potential justification for the marketing fees. However, the ethics opinions cited above recognize that marketing fees calculated upon the basis of the number of matters obtained, or on the amount of legal fees generated by a matter, cannot be justified as the “cost” of advertising. The cost of advertising does not vary depending upon whether the advertising succeeded in bringing in business, or on the amount of revenue generated by a matter. One FFLS program charges participating lawyers “marketing fees” ranging from \$10 for a \$39 “Advice Session” to \$400 for a “Green Card Application,” which generates \$2,995 in legal fees. Clearly, there cannot be a 4000% variance in the operator’s advertising and administrative costs for these two services, particularly since the operator does not, and cannot, have any role in the actual delivery of legal services. The variation in the

amount of the marketing fees based upon the amount of the fees earned by the lawyer establishes that the non-lawyer business is participating directly in, and sharing in, the fee income derived by the lawyer. This is impermissible fee sharing under RPC 5.4(a).

At least one FFLS program operator has claimed that its “marketing fees” are analogous to the percentage based fees that credit card companies charge merchants, including lawyers, for customer transactions. However, unlike the FFLS program operators, which receive the prospective clients’ payment up front, the credit card companies’ risk of non-payment varies directly with the dollar amount of the transactions it processes on the merchant’s behalf.⁵

The proponents of FFLS programs have also claimed that the lawyer’s payment of marketing fees which vary based upon (1) the number of matters received, and (2) on the amount of legal fees generated by those matters, is not impermissible fee sharing, because such payments supposedly do not interfere with the lawyer’s professional independence. Even if this were accurate, it would not be dispositive of the issue. Moreover, while the premise that the primary policy underlying RPC 5.4(a) is the preservation of the lawyer’s professional independence is valid, the assumption that the lawyer’s payment to a non-lawyer of marketing fees amounting to 20% to 30% of legal fees earned does not interfere with the lawyer’s professional independence is, at a minimum, of questionable validity. As discussed elsewhere in this Opinion, there are a number of aspects of the FFLS programs that pose a substantial risk of interfering with a lawyer’s professional independence.

The operators of FFLS programs have also suggested that any regulatory restriction on such programs should be subject to the same constitutional scrutiny as advertising regulations. However, the prohibition against fee sharing with non-lawyers is not part of the rules relating to advertising regulation. The modern regulation of lawyer advertising focuses primarily on insuring that prospective clients are not deceived, but provisions of the RPCs address many other important concerns, as well. The “marketing fees” collected by operators of FFLS programs do not correspond to any traditional model of compensation for advertising. Advertising and marketing fees are typically based upon a before-the-fact assessment of the likely value and effectiveness of such services and not on an after-the-fact calculation of the revenue the advertiser actually derived from such services. In the digital age, internet advertising services are able to refine the valuation of such services by calculating the number of “clicks” the advertising receives, a more sophisticated approach to the long-standing practice of estimating the number of “eyeballs” likely to see a print or television advertisement or billboard, which is a logical indication of the value of such services. *See* State Bar of Arizona Ethics Op. 11-02, pp. 7-8 (differentiating “pay-per-click” pricing for advertising from payment based on percentage of legal fees earned). To base advertising fees directly on the revenue derived from such services, to the extent that this can be established, would effectively make the provider of advertising services a joint venturer with its customer.⁶ Such a joint venture arrangement may be acceptable

⁵ The FFLS program operators presumably incur merchant’s fees for processing clients’ credit card transactions which vary relative to the amount of the transaction. However, this cost represents only a small proportion of the 20 to 30 percent marketing fees the operators are charging lawyers.

⁶ Indiana Opinion 1 of 2012 concluded that a “group coupon” promoter’s retention of up to 50 percent of the proceeds of coupon sales could not be considered the “reasonable costs of advertisements” under Indiana’s Rule 7.2(b)(1), in part because such costs are “fixed.” *See also* ABA Standing Comm. on Ethics and Professional Responsibility, Formal Op. 465 (2013), at 3 (evaluation of reasonableness of advertising fees under Model Rule

for advertisers in other businesses or professions, but for Pennsylvania lawyers, is prohibited under RPC 5.4(a).

III. ETHICAL CONSIDERATIONS RELATING TO HANDLING OF CLIENT FUNDS

As discussed above, the non-lawyer Business collects the client's advance fee payment prior to commencement of the lawyer-client relationship and then retains the advance fee until the Business concludes, to its satisfaction, that the fees have been earned by, and should be remitted to, the lawyer. This poses several ethical issues. Such an arrangement effectively, and exclusively, delegates to a non-lawyer several critical decisions and functions that fall within the exclusive domain of the practice of law. This includes, for example, the decision whether the professional services the client requested of the lawyer have been satisfactorily completed, such that the advance fee has been earned by and is payable to the lawyer. Such delegation violates RPC 2.1, which requires a lawyer to exercise independent professional judgment, and RPC 5.4(c), which 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.

In at least some circumstances, the Business may consider the completion of a telephone call between the lawyer and the client on the Business's phone system (which apparently does not monitor content) as alone sufficient to establish that the advance fee has been "earned" and can be remitted to the lawyer's operating account. Clearly, a lawyer would not be permitted to make this determination in such a mechanistic fashion. Under RPC 5.3(c)(1), a lawyer cannot knowingly allow a non-lawyer to take action on the lawyer's behalf that is prohibited by the RPCs. Under RPC 8.4(a), a lawyer is prohibited from violating the RPCs through the acts of another.

Such delegation of responsibility also interferes with the lawyer's independence in carrying out relevant obligations under RPC 1.16(d), which, in pertinent part, provides that:

Upon termination of representation, the lawyer shall ... [refund] any advance payment of fee or expense that has not been earned or incurred.

As noted above, once a lawyer-client relationship has been established, it is solely the lawyer's obligation to see to it that, when the representation has been terminated, for whatever reason, any unearned advance fee is returned to the client. Because, under the procedures described above for the FFLS program, the lawyer never possesses or controls the advance fee, the lawyer is unable to ensure that those obligations are fulfilled. *See e.g.* State Bar of Arizona Ethics Op. 13-01 ("Arizona Opinion 13-01"), p. 11 (stating, in the context of discussion of "deal

7.2(b)(1) is based upon comparison to "alternate types of advertising"); Nebraska Ethics Advisory Opinion 12-03, at 2868 (to the extent that promoter's percentage share of "group coupon" sales arguably exceed "the true cost of advertising, then the lawyer risks violating Rule 5.4(a)"). The 2015 PwC Law Firm Statistical Survey, available at <http://www.pwc.com/us/en/law-firms/surveys/assets/2015-lfss-brochure.pdf> indicates that median in-house and outside advertising and marketing expenses total slightly over 2 percent of median lawyer revenue. This compares to the marketing fees ranging from 20 to 30 percent of revenue charged by FFLS program operators.

of the day” promotions, that “the lawyer cannot delegate the obligation to refund legal fees to a third party”); *accord*, Alabama Opinion 2012-01).

These problems highlight a broader issue with the FFLS programs: The delegation of the possession and distribution of advance fee payments to a non-lawyer violates RPC 1.15(i), which provides:

A lawyer shall deposit into a Trust Account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred, unless the client gives informed consent, confirmed in writing, to the handling of fees and expenses in a different manner.

The only way to rectify the issues discussed above would be for the Business to immediately remit advance fee payments to the lawyer, for deposit in the lawyer’s Trust Account, as defined in RPC 1.15(a)(11), as soon as a lawyer-client relationship is established. *Accord*, Arizona Opinion 13-01; Indiana Opinion 1 of 2012. This would not only comply with RPC 1.15(i), but would also allow the lawyer to independently fulfill his or her non-delegable obligations with respect to the disposition of the funds, as required under RPCs 2.1, 5.4(c), and 1.16(d). However, as presently constituted, the FFLS programs do not accommodate this requirement.

IV. ETHICAL CONSIDERATIONS RELATING TO “LIMITED SCOPE” REPRESENTATION⁷

“Limited scope” representation is authorized under RPC 1.2(c), which provides:

A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

The two operative requirements for limited scope representation are that (1) the limitation be “reasonable,” and (2) “the client gives informed consent.” When a prospective client contacts a Business operating a FFLS program seeking legal assistance, the Business, as a non-lawyer, cannot properly assess whether the limited scope legal services the prospective client seeks are appropriate for the client, or that the limitations on the scope of the representation offered through the FFLS program would be “reasonable” within the meaning of RPC 1.2(c), given the prospective client’s particular circumstances. The Business cannot secure the prospective client’s informed consent to the limitations to the representation, because this is also a non-delegable responsibility of the lawyer who ultimately undertakes the representation.

⁷ Joint Formal Opinion 2011-100 (“FO 2011-100”), issued by this Committee and the Philadelphia Bar Association Professional Guidance Committee, addresses the ethical issues generally associated with “limited scope” representation under RPC 1.2(c). The Committee recommends that lawyers considering undertaking such a representation, whether through an FFLS program or otherwise, consult FO 2011-100 for guidance. To avoid duplication, this Opinion will focus on the issues uniquely associated with undertaking limited scope representation through an FFLS program.

Therefore, the responsibility to determine whether the prospective limited scope representation is appropriate for the prospective client, and whether the limitations are reasonable under the circumstances, falls solely on the lawyer who proposes to undertake the representation, as does the obligation to secure the prospective client's informed consent to the limitations.⁸ In theory, at least, it would be possible for a lawyer who decides to accept a FFLS program referral to fulfill these obligations. From a practical and economic standpoint, however, given the time and financial constraints imposed by of the FFLS programs, it will be challenging, if not impossible, for a lawyer to make the necessary assessment of the appropriateness and reasonableness of the limited scope assignment, to secure the client's informed consent to such limitations, and to then provide the requested professional services. The challenge of obtaining "informed consent" in the context of a prospective matter received through an FFLS program is highlighted by considering the definition of "informed consent" in RPC 1.0(e), and the Comments (6 and 7) to that definition:

"Informed consent" denotes the consent by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a), 1.7(b), 1.8(a)(3), (b), (f) and (g), 1.9(a) and (b), 1.10(d), 1.11(a)(2) and (d)(2)(i), 1.12(a) and 1.18(d)(1). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation

⁸ The lawyer must also independently assess whether the proposed flat fee would be "clearly excessive" under RPC 1.5(a) although, from a practical standpoint, that seems unlikely to be a concern under the FFLS programs.

provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. . . . The term informed consent in Rule 1.0 and the guidance provided in the Comment should be understood in the context of legal ethics and is not intended to incorporate jurisprudence of medical malpractice law.

The burden on the lawyer to verify the appropriateness of the "limited scope" services to meet the client's needs, as well as the reasonableness of the limitation on the scope of services to be provided, is further heightened by the broad and vague descriptions of limited scope services that are offered on a flat fee basis through a typical FFLS program operator, such as: Document Review; Create a Termination Letter; Create a Business Contract; Create an Operating Agreement; Create a Business Partnership; Create an Asset Purchase Agreement; Create an Estate Plan Bundle; Create a Living Trust Bundle (Couple); Create a Parenting Plan; and Create a Commercial Lease Agreement. Even if the prospective client selects the correct general category of service, the prospective client's perception of what is needed may differ from what is actually required, and the lawyer would have no way of ascertaining the scope and magnitude of the effort required to meet the prospective client's true needs until after speaking with the client, possibly at great length.

This is not to mention that the lawyer must also conduct a proper conflict check which, in most cases, cannot be completed until the lawyer is in direct communication with the prospective client.

An example of one of the most basic and self-explanatory services offered through an FFLS program is a fifteen minute "Advice Session" on one of several topics for a flat fee of \$39. A lawyer who completes an assignment for such a session must remit a \$10 marketing fee back to the Business. In most, if not all cases, it is difficult to imagine how a lawyer could fulfill all of the obligations imposed under RPC 1.2(c), as well as conduct a proper conflicts check, within fifteen minutes. Of course, a lawyer could (and perhaps should) consider the time devoted to fulfilling these obligations as part of the "business intake" process, and therefore reserve to the client the full fifteen minutes allotted for consultation and substantive advice. In such circumstances, the lawyer would need to evaluate the economic feasibility of devoting the time required to fulfill all ethical obligations and then to provide fifteen minutes of legal

representation, in return for \$29 in net revenue. It is conceivable, for example, that the lawyer might perceive the fifteen minute “advice sessions” and the associated time devoted to “intake” procedures as “loss leaders” that could provide opportunities for more extensive and economically remunerative legal representation of the prospective client.

If, on the other hand, a lawyer exercising his or her independent professional and business judgment concludes that it is not feasible to provide the requested professional services and to fulfill the lawyer’s ethical obligations to the client, including the obligations imposed under RPC 1.2(c) and the obligation to perform a proper conflict check, then the lawyer would be required to decline the matter. However, lawyers seeking to expand their practices through FFLS programs may face significant economic pressure to overlook their professional obligations.

V. ETHICAL CONSIDERATIONS RELATING TO PRESET FLAT FEES

As discussed above, the Business operating the FFLS program establishes the schedule of flat fees to be paid for the services offered. At first blush, this may also appear to be an inappropriate interference with the lawyer’s independent professional judgment. However, as discussed in the preceding section, the lawyer has an obligation to independently evaluate the appropriateness and reasonableness of the proposed limited scope representation. The lawyer similarly has the ability, and the obligation, to evaluate the appropriateness of the proposed fee arrangement. The situation is practically indistinguishable from circumstances where a prospective client comes to a lawyer (without the benefit of an intermediary) and demands that the lawyer perform work for an unreasonably low fee, or seeks to impose unreasonable or inappropriate limitations on the scope of the representation. A lawyer always has the ability to decline such matters and may, in many circumstances, have the professional obligation to do so.

VI. ETHICAL CONSIDERATIONS RELATING TO CONFIDENTIALITY

The structure of the FFLS programs exposes the Business to significant information that would ordinarily be considered confidential under RPC 1.6(a). At the outset, the potential client’s description of his or her perceived legal issues and needs is disclosed to the Business before it is disclosed to the lawyer. The Business is, of course, also aware of the fee arrangement between the lawyer and the client. This information, as well as the very existence of the lawyer-client relationship, would typically be considered “information relating to representation of a client” and therefore confidential under RPC 1.6(a).

RPC 1.6(a) prohibits a lawyer from “revealing” confidential information, subject to various exceptions. Under the FFLS program, it is the prospective client who chooses to reveal the information described above to the Business, and that choice is made before the lawyer-client relationship has even been established. Therefore, the client’s disclosure of information to the Business prior to formation of a lawyer-client relationship does not directly implicate the lawyer’s duty of confidentiality under RPC 1.6(a). The program does, however, place information at risk of disclosure in future litigation, since the communications between the client and the Business would not be protected by the lawyer-client privilege.⁹

⁹ Published “Terms of Service” for at least one FFLS Program appropriately disclaim any lawyer-client relationship between the prospective client and the Business. On the other hand, in discussing its “Satisfaction Guarantee,” the

With one exception, the FFLS program does not require, or anticipate, further disclosure of potentially confidential information to the Business once the lawyer-client relationship has been established. The one exception is that the Business must be informed, or at least reach the conclusion, that the assignment has been completed, in order to release the advance fee payment to the lawyer. The completion of the assignment, as well as the nature of the work performed is itself “information relating to representation of the client” subject to RPC 1.6(a). No exception to the prohibition against disclosure applies. Disclosure is not “impliedly authorized in order to carry out the representation.” Rather, disclosure to the Business is merely the Business’s externally-imposed condition to the lawyer’s receipt of the client’s advance fee payment, which has nothing to do with “carrying out the representation.”

The lawyer could request the client’s informed consent to the disclosure. (*See, e.g.* PBA Formal Opinion 2001-200, Section C. (client’s informed consent required before lawyer can turn over billing statements to outside auditor). However, this would require an affirmative discussion with the client during the often brief course of the lawyer-client relationship and, prior to the Business being informed that the matter has been concluded. While this may be possible to accomplish, the structure of the limited scope assignments, particularly the time-limited assignments, does not facilitate the lawyer’s compliance with this obligation.

Of course, if the lawyer completes the requested assignment, the lawyer will remain subject to the confidentiality obligations imposed under RPC 1.6(e) and 1.9(c). Even if the lawyer ultimately declines the assignment, whether due to an identified conflict, or a determination that the requested services are inappropriate or for any other reason, the lawyer, and his or her firm, will be subject to the obligations imposed under 1.18(b).

VII. ETHICAL CONSIDERATIONS RELATING TO COMMUNICATIONS BY LAWYER REFERRAL SERVICES

RPC 7.7(a), in pertinent part, prohibits a lawyer from accepting referrals from a lawyer referral service if the service engages in communications with the public in a manner that would violate the RPCs if the communication were made by the lawyer. This includes communications which, if made by the lawyer, would violate RPC 7.1, which provides:

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.

A lawyer participating in a FFLS program must therefore ensure that the service’s public communications about the lawyer and the lawyer’s services are not false or misleading within the

same FFLS program operator refers to those that purchase legal services through its program as “our clients,” which could heighten concerns regarding potentially assisting in the unauthorized practice of law (*See* Section VIII, below).

meaning of RPC 7.1.¹⁰ For example, if a lawyer recognizes that it is practically or economically infeasible to provide particular FFLS services offered through the program at the rates specified by the program for such services, and still fulfill the lawyer's duty of competence and other ethical obligations described in the preceding Sections of this Opinion, then the lawyer would be obligated, under RPC 7.7(a), to decline to participate in the program, at least with respect to any FFLS services which the lawyer knows cannot feasibly and ethically be provided within the constraints of the program's fee structure.

VIII. ETHICAL CONSIDERATIONS RELATING TO POTENTIAL ASSISTANCE IN THE UNAUTHORIZED PRACTICE OF LAW

Among other things, RPC 5.5(a) prohibits a Pennsylvania lawyer from assisting another person in the unauthorized practice of law. The Pennsylvania Bar Association has an Unauthorized Practice of Law Committee (the "UPL Committee"), which is charged with the responsibility of investigating whether specific activities constitute the unauthorized practice of law. This Committee defers to the UPL Committee in evaluating whether any specific activity by any specific person or entity constitutes the unauthorized practice of law. Nevertheless, it is important to recognize that, as discussed in the preceding sections of this Opinion, many of the aspects of the FFLS programs described above involve the operators of such programs at least initially making judgments and decisions which are only appropriately made by lawyers. To the extent that such activity might constitute the unauthorized practice of law, a Pennsylvania lawyer participating in an FFLS program who facilitates, cooperates with or otherwise assists in such activities may well be in violation of RPC 5.5(a).

IX. ACCESS TO LEGAL SERVICES

Operators of FFLS programs argue that "unbundling" legal services reduces the cost to clients, thereby making legal services more accessible. Expanding access to legal services is, of course, an important goal that all lawyers, and the organized Bar, should support. However, the manner in which these FFLS programs currently operate raises concerns about whether they advance the goal of expanding access to legal services. Further, compliance with the RPCs should not be considered inconsistent with the goal of facilitating greater access to legal services. Any lawyer can offer "unbundled" or "limited scope" legal services at, or even below, the rates prescribed by an FFLS program, provided the lawyer can do so in a manner that complies with his or her professional and ethical obligations, including the obligation of competence (see RPC 1.1) and full disclosure of and informed consent to any limitations on the scope of the legal services rendered. If a lawyer cannot fulfill those obligations working outside the scope of an FFLS program, he or she almost certainly would not be able to do so working within such a program. If anything, services offered through FFLS programs would be expected to be even more costly than they otherwise would have to be, because of the burden of substantial "marketing fees" that vary in direct relation to the revenue derived from such legal services and that bear no relationship to the actual cost of any marketing services provided.

¹⁰ A lawyer who knowingly allows a lawyer referral service or advertising service to make false or misleading communications on the lawyer's behalf would also violate RPC 8.4(a), which prohibits a lawyer from violating the RPCs through the acts of another.

X. CONCLUSION

A lawyer who participates in a Flat Fee Limited Scope Legal Services referral program such as that described in this Opinion, in which the program operator collects “marketing fees” from that lawyer that vary based upon the legal fees collected by the lawyer, violates RPC 5.4(a)’s prohibition against sharing legal fees with a non-lawyer.

In addition, under the procedures of the FFLS program described in this Opinion, the advance fees paid by the client remain in the possession of the non-lawyer program operator until the operator concludes that the requested legal services have been performed, at which time the operator deposits the funds into the lawyer’s operating account. Consequently, a lawyer who participates in such a program violates RPC 1.15(i), which requires advance fees to be deposited in the lawyer’s Trust Account.

Participation in such a program also poses a substantial risk that the lawyer could violate the following RPCs:

RPC 2.1, which requires a lawyer to exercise independent professional judgment;

RPC 5.4(c), which, in pertinent part, prohibits a lawyer from allowing a person who recommends a lawyer to direct or regulate the lawyer’s professional judgment;

RPC 5.3(c)(1), which holds a lawyer responsible for conduct of a non-lawyer that would violate the RPCs if engaged in by the lawyer, if the lawyer has ordered or ratified such conduct;

RPC 8.4(a), which prohibits a lawyer from violating the RPCs through the acts of another;

RPC 1.16(d), which, in pertinent part, requires a lawyer to refund to a client any advance payment of fees that has not been earned upon termination of the representation;

RPC 1.2(c), which permits a lawyer to limit the scope of a representation, but only if the limitation is reasonable under the circumstances and the client has given informed consent;

RPC 1.6(a), which generally prohibits a lawyer from revealing information relating to the representation of a client; and

RPC 7.7(a), which, in pertinent part, prohibits a lawyer from accepting referrals from a lawyer referral service if the service engaged in communications with the public in a manner that would violate the RPCs if the communication were made by the lawyer.

Participation in such a program could also raise potential concerns regarding assisting in the unauthorized practice of law, in violation of RPC 5.5(a).

CAVEAT: THE FOREGOING OPINION IS ADVISORY ONLY AND IS NOT BINDING ON THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA OR ANY COURT. THIS OPINION CARRIES ONLY SUCH WEIGHT AS AN APPROPRIATE REVIEWING AUTHORITY MAY CHOOSE TO GIVE IT.