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State Bar of Arizona Ethics Opinions

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11-02: Internet; Advertising; Referral Service; Fee Sharing 10/2011

A lawyer may ethically participate in an Internet-based group advertising program that limits participation to a single lawyer for each ZIP code from which prospective clients may come, provided that the service fully and accurately discloses its advertising nature and, specifically, that each lawyer has paid to be the sole lawyer listed in a particular ZIP code. To remain a permissible group advertising program, such a service may do nothing more to match clients with lawyers than to provide inquiring clients with the name and contact information of participating lawyers, without communicating any substantive endorsement. The service will lose the protection afforded by the required disclosures and cross the line that distinguishes permissible advertising from an impermissible for-profit referral service if the required disclosures are difficult to find, read, or understand; are contradicted by other messages on the website; or are made so late in the process that the consumer of legal services is unlikely to read them before contacting participating lawyers.

A lawyer also may ethically participate in Internet advertising on a pay-per-click basis in which the advertising charge is based on the number of consumers who request information or otherwise respond to the lawyer's advertisement, provided that the advertising charge is not based on the amount of fees ultimately paid by any clients who actually engage the lawyer.

This opinion is based on certain assumed facts with respect to a hypothetical group advertising website, as set forth in the body of this opinion, which the Committee is informed is an emerging type of advertising arrangement that may take different forms. This opinion is intended to provide general parameters to guide lawyers who desire to participate in this type of advertising arrangement. Because the facts are hypothetical, however, the Committee has not examined any particular website's disclosures for their content, prominence, timing, and understandability. Any lawyer considering participating in such a service should make a thorough evaluation of the adequacy of the particular service's disclosures, consistent with the guidance set

forth in this opinion, before participating.

FACTS

A for-profit business (“the Service”) maintains a website that provides information on legal subjects and advertises the services of lawyers who practice in a particular area of law (such as bankruptcy). Consumers are offered the opportunity to connect with lawyers practicing in that area by calling a toll-free phone number or submitting an online form. The information provided by the interested consumer is then provided to the lawyer who has paid to be listed with the Service as the lawyer in that subject matter for the ZIP code in which the consumer is located.

All of the participating lawyers, regardless of assigned ZIP code, are listed on the website with their contact information; consumers may therefore choose to contact the listed lawyers directly rather than using the website’s toll-free number or online form. The listing does not specify which lawyer is assigned to which consumer ZIP code; it is therefore possible that a consumer may locate, contact, and engage a lawyer through the website who is not the lawyer assigned by the Service to that consumer’s ZIP code.

The website contains a disclaimer stating that the website is a group advertisement, not a lawyer referral service or a law firm, and specifying that the only basis for listing any of the lawyers whose names appear on the website is those lawyers’ payment of a fee. The website also discloses the geographical matching aspect of the website; specifically, consumers are told that if they use the toll-free number or contact form to reach a lawyer, their information will be provided to the one lawyer who has purchased exclusive rights to that ZIP code. The website does not facilitate the transfer of any information other than contact information for consumer or lawyer; any substantive communication about a potential legal matter is handled between the prospective client and the lawyer.

Participating lawyers pay to participate based on the number of individuals whose information is provided to them through the website (on a “pay-per-click” basis).

QUESTION PRESENTED

May a lawyer ethically participate in a group advertising service where (1) only one lawyer is permitted to advertise in each ZIP code from which possible clients could come and (2) the fee paid by the lawyer is calculated based on the number of prospective clients who attempt to contact the lawyer through the service?

APPLICABLE ARIZONA RULES OF PROFESSIONAL CONDUCT (“ER __”)

ER 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 ER 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.

...

ER 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.

ER 7.2 Advertising

(a) Subject to the requirements of ERs 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.

...

Comments to ER 7.2

. . .

[5] Lawyers are not permitted to pay others for channeling professional work. Giving or receiving a de minimis gift that is not a quid pro quo for referring a particular client is permissible. 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. . . .

[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified 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. Published and electronic group advertising and directories are not lawyer referral services, but participation in such listings is governed by ERs 7.1 and 7.4. A lawyer referral service, on the other hand, is 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. 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, such as the State Bar of Arizona, as affording adequate protections for prospective clients.

[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 ER 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 program would mislead prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. . . .

RELEVANT ETHICS OPINIONS AND OTHER AUTHORITIES

Ariz. Ethics Ops. [95-13](#), [99-06](#), [05-08](#), [06-06](#), [10-01](#); Arizona Advertising Committee Op. 01-93; Colorado Bar Association Ethics Committee Op. 122 (Oct. 16, 2010); Kentucky Bar Association Ethics Opinion KBA E-429 (2008); Nebraska State Bar Association Advisory

Committee Op. 95-3; New Jersey Committee on Attorney Advertising Opinion 43 (June 28, 2011); South Carolina Ethics Advisory Opinion 01-03; *Zelotes v. Rousseau*, Grievance Complaint No. 04-0912 (Connecticut Grievance Committee, Feb. 8, 2010)

OPINION

Is the Service a permissible group advertising arrangement or an impermissible lawyer referral service?

In Ariz. Ethics Op. 06-06, the Committee considered whether an online service that matched prospective clients with potential lawyers based on geographic and practice areas was an impermissible “lawyer referral service” within the meaning of ER 7.2(b). The service at issue touted that it would match the prospective client with the “right” lawyer who is “specifically qualified” to handle the client’s case. The service also made representations regarding the quality of the lawyers, claiming that they were pre-screened, “knowledgeable,” and “competent.” On these facts, Op. 06-06 concluded that the service at issue was a referral service and that participation was precluded by ER 7.2(b).

Like the service considered in Op. 06-06, resolution of this inquiry depends on whether the Service is a “referral service” within the meaning of ER 7.2(b). Because the Service is a for-profit service and has not sought or received the approval of an appropriate regulatory authority, lawyer participation is permissible only if the Service is a form of advertising rather than a referral service. See ER 7.2(b)(2) (Arizona lawyers may only pay fees to referral services that are non-profit or approved by an appropriate regulatory authority).

According to the comments to ER 7.2, a referral service is “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.” ER 7.2 cmt. 6.

The Service does not hold itself out to the public as a lawyer referral service. Instead, the Service specifically states that it is an advertising venue and is making no recommendation regarding the lawyers who have paid a fee to be listed. In this regard, it is unlike the service considered in Op. 06-06, which represented that it was matching prospective clients who were “specifically qualified to handle their particular legal matter.” Ariz. Ethics Op. 06-06; see *also* Ariz. Ethics Op. 95-13 at 4 (a lawyer referral service is one that “ascertain[s] the caller’s legal needs and then match[es] them to a member having the appropriate ‘area of expertise’”); Ariz. Ethics Op. 99-06 (website was a referral service where it routed customer inquiries based on a “match between the subject matter of the question and the members’ claimed expertise”).

Therefore, the inquiry turns on whether the Service “allocates” requests for lawyer services “to a particular lawyer or lawyers” – the other basis on which the comments to ER 7.2 indicate that an arrangement may constitute a referral service.

Because the Service permits only one lawyer to buy the right to advertise in each ZIP code from which prospective clients might come, the Service does in one sense appear to “allocate” requests to a particular lawyer. Other jurisdictions have suggested, based on this rationale, that a service that limits the number of lawyers who may be listed in a particular geographic area is necessarily a referral service. See South Carolina Ethics Op. 01-03 (“To take an extreme example, payment by a lawyer to a service that only allowed one attorney in each practice area would be improper”); Nebraska State Bar Association Advisory Committee Op. 95-3 (for-profit referral service limiting the number of attorneys listed in a subject matter specialty violated ER 7.2); Colorado Bar Association Ethics Committee Op. 122 at n.4 (Oct. 16, 2010) (stating without explanation that restriction on participating lawyers would be a factor rendering service impermissible).

However, taken to its logical conclusion, this reasoning would potentially render unethical many longstanding advertising practices. For example, a lawyer could pay to be listed in a directory of lawyers practicing in a particular substantive area, whether through a *Yellow Pages*-type provider or in a more specific publication directed at businesses or other lawyers. To the extent that only those lawyers who have paid to be listed (and not all lawyers admitted in the jurisdiction or practicing in that substantive area) are included in the directory, it could be argued that the directory publishers are guiding prospective clients to only that “particular” group of lawyers who have paid for a listing. This cannot be the meaning of the comments to ER 7.2, or else all pay-for-listing arrangements would become unethical.

If a directory listing is permissible, but the one-lawyer-per-ZIP-code model of the advertising is not, that raises an unanswerable question of how many lawyers would need to be included in a paid directory to render it permissible under ER 7.2. Would two be sufficient? Or would a certain percentage of eligible lawyers need to pay to participate to ensure a sufficient sampling to make the listing a true directory and not a referral service? Would a lawyer in an unusual area of practice, or one whose members generally do not advertise, be precluded from participating in an otherwise permissible arrangement simply because not enough of his or her peers were interested in paying to advertise in that way?

The text of the underlying rule provides important context for resolving this issue. The prohibition of ER 7.2 is on paying for “recommendations” of one’s legal services, not merely referrals. See ER 7.2(b). As the Connecticut Grievance Committee explained in dismissing allegations of wrongdoing against lawyers involved in

similar arrangements, the key question is whether the service's "allocation" or direction of consumers to some particular lawyer or lawyers connotes an endorsement of those lawyers as suitable for the consumer's needs, because a message of endorsement is the fundamental characteristic of a "recommendation." See *Zelotes v. Rousseau*, Grievance Complaint No. 04-0912 (Connecticut Grievance Committee, Feb. 8, 2010); see also New Jersey Committee on Advertising Opinion 43 (June 28, 2011) (finding similar service was not a referral service).

Under the particular facts present here, no such endorsement is implied. While a consumer who submits a request through the toll-free number or the online form receives the name of only one prospective lawyer, the website informs the consumer that the only basis on which that lawyer's name was selected was that lawyer's payment of a fee to be *the* lawyer whose name would be provided to all inquiring consumers in that ZIP code. The website also makes available to consumers a list of all of the participating lawyers, not just the single lawyer who has paid to advertise in the consumer's particular ZIP code, thereby enabling the consumer to choose a different lawyer from that list if he or she wishes to do so. In this regard, the Service is materially different than other services Arizona has found to be impermissible referral services in the past, each of which involved some element of endorsement in matching prospective clients with lawyers. See Ariz. Ethics Op. 06-06 (service touted itself as a method to "find the right lawyer" who was "knowledgeable" and "competent" and designated some lawyers as "verified"); Ariz. Ethics Op. 05-08 (service claimed to match clients with "the right lawyers" and stated that participating lawyers had been "prescreened;" service did not disclose that lawyers paid to participate); Ariz. Ethics Op. 99-06 (service identified lawyers by areas of "expertise" to answer questions from prospective clients in purchased geographic area; fees were paid based on revenue generated by lawyer from referrals); Ariz. Ethics Op. 95-13 (service offered to connect prospective clients to "qualified" members of the bar based on both geography and "area[] of experience"); cf. Arizona Advertising Committee Op. 01-93 (finding televised advertisements for hotline matching prospective clients with lawyers based solely on ZIP code and which disclosed advertising nature was not an impermissible referral service).

Our analysis necessarily depends on the specific facts presented, and even small changes in these facts could result in the conclusion that the arrangement was a referral service, rather than an advertisement, in which case ER 7.2(b)(2) would preclude participation absent approval by an appropriate regulatory authority.

Of particular importance to our conclusion are the following assumed facts:

- The Service does no more than simply provide consumers with a lawyer's name based on the consumer's ZIP code.

- The Service specifically and clearly discloses that it is an advertising service.
- The Service also specifically and clearly discloses that it sells the right to receive names of interested consumers within a ZIP code and that the Service will provide only that one lawyer's name to all inquiring consumers within that ZIP code.
- The Service does not express or imply any endorsement of the quality, skill, suitability, or qualifications of the lawyers whose information it provides.

Equally essential is the adequacy of the disclosures described above – if the disclosures are difficult to find, read, or understand; are contradicted by other messages on the website; or are made so late in the process that the customer is unlikely to read them before contacting participating lawyers; then the Service will lose the protection afforded by these disclosures and cross the line dividing group advertising from referral services. *Cf.* New Jersey Committee on Advertising Opinion 43 (June 28, 2011) (finding similar service was not a referral service but that lack of clarity in disclaimers made the website impermissibly misleading).

Is the pay-per-click method of calculating the cost of advertising permissible?

Because the Service, as described in the opinion request, is not a lawyer referral service, the question regarding participation fees is whether the fees as calculated constitute “the reasonable costs of advertisements” as permitted by ER 7.2(b)(1), rather than an impermissible fee sharing arrangement with non-lawyers prohibited by ER 5.3.

Essential here is the fact that the fee, while based on the number of prospective clients who receive the lawyer's information from the Service, is *not* based on the amount of fees the lawyer actually receives from a client. Indeed, if hundreds of prospective clients in the lawyer's assigned geographic area submitted a contact request, but not a single client actually engaged the lawyer, the lawyer would pay the same as a similarly situated lawyer who received the same number of contact requests but was hired by every prospective client. The pay-per-click arrangement thus does not carry the risks to clients associated with payments based on the fees collected by the lawyer. *Cf.* Ariz. Ethics Op. 10-01 (finding impermissible a referral service fee based on a percentage of the fees paid by the referred client).

Instead, the pay-per-click method is an effort to determine, with some degree of accuracy, the value that a lawyer will obtain by paying to participate in the Service, by attempting to measure the volume of prospective clients to whom the lawyer will be exposed by participating.[1] Pay-per-click pricing serves a purpose akin to the pricing schemes of newspapers, periodicals, radio or television stations based on the likely size of their audience – the reason that

television advertisements during highly rated programs or special events (such as the Super Bowl) are charged at higher rates than advertisements broadcasted during less popular programs. Pay-per-click pricing (which is common in many forms of Internet advertising, such as banner ads and even some Internet search listing services) is simply the most modern, technologically advanced form of volume-based pricing for advertising. See Kentucky Bar Association Ethics Opinion KBA E-429 (2008) (per-“hit” advertising not based on fees ultimately received was permissible advertising cost); South Carolina Ethics Advisory Opinion 01-03 (analogizing pay-per-click fees to the fees charged by more traditional media based on the anticipated size of the audience for an advertisement). Pay-per-click fees are therefore permissible as a “reasonable cost of advertisements” under ER 7.2(b)(1).


CONCLUSION

A lawyer may ethically participate in a group advertising program that limits participation to a single lawyer for each ZIP code from which prospective clients may come, provided that the service fully and accurately discloses its advertising nature and, specifically, that each lawyer has paid to be the sole lawyer listed in a particular ZIP code. To remain a permissible group advertising program, such a service may do nothing more to match clients with lawyers than provide inquiring clients with the name and contact information of participating lawyers, without communicating (expressly or by implication) any substantive endorsement.

A lawyer may ethically participate in Internet advertising on a pay-per-click basis in which the advertising charge is based on the number of consumers who request information or otherwise respond to the lawyer’s advertisement, provided that the fee is not based on the amount of fees ultimately paid by any clients who actually engage the lawyer.

Formal opinions of the Committee on the Rules of Professional Conduct are advisory in nature only and are not binding in any disciplinary or other legal proceedings. This opinion is based on the Ethical Rules in effect on the date the opinion was published. If the rule changes, a different conclusion may be appropriate. © State Bar of Arizona 2011

[1] Because participating lawyers are also listed on the webpage by state, at least some prospective clients may obtain information about the lawyers without “clicking” and being included in the basis of the fee. Thus, even the pay-per-click method is not an exact count of the number of prospective clients who will become aware of a particular lawyer due to his or her participation.

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State Bar of Arizona

4201 N. 24th Street, Suite 100

Phoenix, AZ 85016-6266

Phone: 602.252.4804

Toll Free: 866.48.AZBAR

Fax: 602.271.4930

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