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THE APPLICABILITY OF COLO. RPC 7.2 TO INTERNET-BASED LAWYER MARKETING PROGRAMS

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Introduction and Scope

With the acceleration of technology, Colorado lawyers are exposed to a proliferation of private companies offering internet-based services designed to market legal services. Rule 7.2 of the Colorado Rules of Professional Conduct (Colorado Rules or Colo. RPC) governs lawyer advertising and addresses the propriety and contours of both advertising in internet directories and the use of referral services. This opinion addresses the application of Colo. RPC 7.2 to certain internet-based lawyer marketing programs and attempts to provide guidelines for Colorado attorneys to determine whether a given program is permissible under Colo. RPC 7.2. The potential applicability of other Colorado Rules is also discussed.

Syllabus

Colo. RPC 7.2(a) permits lawyer advertising, stating that “[s]ubject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.” Further, Colo. RPC 7.2(b) states that “[a] lawyer shall not give anything of value to a person for recommending the lawyer’s services.” Colo. RPC 7.2(b) contains two exceptions to this general rule that are pertinent here. First, Colo. RPC 7.2(b)(1) provides that a lawyer does not violate Colo. RPC 7.2(b) by “pay[ing] the reasonable costs of communications permitted by [Rule 7.2].” Comment [5] specifically states that Rule 7.2(b)(1) includes “on-line directory listings.” Second, Colo. RPC 7.2(b)(2) provides that a lawyer may “pay the usual charges of a not-for-profit lawyer referral service or legal service organization.” By definition, Colo. RPC 7.2(b)(1) thus makes for-profit referral services impermissible.

The pivotal point is the distinction between “on-line directory listings” and a for-profit “referral service.” The lawyer must evaluate the program under consideration to ascertain that it is in the nature of a listing-type directory rather than a for-profit program that provides referrals to specific lawyers, regardless of the purported criteria for such referrals.

Analysis

A lawyer in Colorado is generally permitted to advertise as long as the lawyer complies with the Colorado Rules. Colo. RPC 7.2(a). A lawyer in Colorado is generally not permitted to pay another person (or entity) in exchange for a recommendation of that lawyer’s services. Colo. RPC 7.2(b).¹ Two exceptions to Colo. RPC 7.2(b) are pertinent here: (1) under Colo. RPC 7.2(b)(1), a lawyer may pay the reasonable costs of communications permitted by Colo. RPC 7.2; and (2) under Colo. RPC 7.2(b)(2), a lawyer may pay the usual charges of a not-for-profit lawyer referral service or a qualified lawyer referral service.

Comment [5] elaborates on the exception contained in Colo. RPC 7.2(b)(1) by clarifying that the exception includes “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.” Comment [5] goes on to state that “[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.”

With respect to a referral service, Comment [6] states:

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.

Comment [6] also cites the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act (ABA Model Lawyer Referral Rules) as guidance with regard to the definition of a referral service. The ABA Model Lawyer Referral Rules do not specifically define a referral service, but instead articulate the functions of such services. On this point, the ABA Model Lawyer Referral Rules provide the following guidance:

- Lawyer referral services have been in operation in this country for more than 50 years, and were first established in response to requests by middle-income people for assistance in obtaining appropriate legal counsel.
- Lawyer referral and information services are designed to assist persons who are able to pay normal attorney fees but whose ability to locate appropriate legal representation is frustrated by a lack of experience with the legal system, a lack of information about the type of service needed, or a fear of the potential costs of seeing a lawyer.
- Lawyer referral programs offer two important services to the public. First, they help the client determine if the problem is truly of a legal nature by screening inquiries and referring the client to other service agencies when appropriate. The second, and perhaps more important function of a lawyer referral service is to provide the client with an unbiased referral to an attorney who has experience in the area of law appropriate to the client's needs.
- The public has come to equate the function of lawyer referral programs with consumer-oriented assistance, and expects that the loyalty of the program will lie with the consumer, and only secondarily with the participating attorney. Thus, the analysis of whether an online marketing program is permissible under Colo. RPC 7.2 seems to be based on the dichotomy between, on one hand, permissible legal service plans or not-for-profit or qualified lawyer referral services, and, on the other hand, a for-profit referral service that is not an approved lawyer referral service. *See* Colo. RPC 7.2, cmt. [6]. Aside from the language set out above, the Colorado Rules and the materials cited in them do not appear to provide additional guidance.

I. Types of Programs

The Committee has observed that many of the existing on-line marketing programs being offered to Colorado lawyers fall on a spectrum between a clearly permissible directory and a clearly impermissible for-profit referral service. This opinion examines two hypothetical programs, one from each of these modes.

A. Online Lawyer Directories

FictitiousLegalDirectory.com (a fictional name) re-creates traditional forms of advertising, such as telephone directories and printed lawyer directories, but is adjusted for use on websites. In general, this service provides a directory listing much like that of the Colorado Bar Association's Find-A-Lawyer online directory. The information is free to the user and the user contacts the lawyer directly. The engagement occurs between the user and the lawyer. A lawyer participating in FictitiousLegalDirectory.com must pay for the advertising, typically a monthly fee.

FictitiousLegalDirectory.com groups lawyers, and is searchable, on the bases of practice area and geographical area. This program also provides an opportunity for lawyers to increase their visibility in the directory by paying a larger fee for a more prominent listing. The program prominently explains that it is an advertisement and that it is not recommending a specific lawyer to a client.

B. Online Legal Referral Services

A prospective client submits a description of his or her legal problem to FictitiousLegalReferral.com. Any member lawyer in the client's geographic area who is interested in working with that client sub-

mits a return message through FictitiousLegalReferral.com that is then forwarded to the client. The lawyer pays a fee for each client contact.

In addition to a per contact fee, to participate in FictitiousLegalReferral.com, an attorney must pay a fee based on the size of the geographic area in which the attorney's listing will appear. A lawyer may pay an additional fee to be the "recommended" lawyer in a limited geographic area. The "recommended" lawyer in a geographic area is listed first in the list given to a prospective client. The site refers to the "recommended" lawyers as being of the "highest quality." However, the site bases its recommendation solely on the payment of an additional fee and does not screen or investigate the qualifications of lawyers designated as "recommended." The site does not disclose that "recommended" status is based solely on the payment of a fee.

FictitiousLegalReferral.com nonetheless describes the "pairing" process as one that will pair the prospective client with the "right" lawyer, one who is "specifically qualified" to handle the client's case and is located in the desired geographic area. FictitiousLegalReferral.com also makes representations about the quality of the lawyers with whom prospective clients will be paired, claiming that they are "knowledgeable," and "competent."

FictitiousLegalReferral.com requires only that the attorney be licensed and in good standing in the jurisdictions in which he or she practices. FictitiousLegalReferral.com limits membership in each geographic and practice area. FictitiousLegalReferral.com guarantees members that it will limit participation by geographic area and practice area such that members will recoup at least the amount of their membership fee via clients obtained through the site.

FictitiousLegalReferral.com is a for-profit entity. It has not been approved by any regulatory authority in Colorado.²

II. Directory vs. For-Profit Referral Service

FictitiousLegalDirectory.com fits within the delineation of permissible advertising set out in Comment [5] to Colo. RPC 7.2 in that it clearly identifies itself as an advertisement. Further, fees charged to participating lawyers are fixed rather than based on "leads" generated. Finally, FictitiousLegalDirectory.com provides information about lawyers only in a ministerial fashion based on non-substantive criteria such as geographic location and practice area.

By contrast, FictitiousLegalReferral.com does not comply with the standards established by Colo. RPC 7.2. First, it charges lawyers based on the actual number of people who hire the lawyer. Further, and crucially, FictitiousLegalReferral.com purports to recommend a lawyer who will meet the inquiring client's needs. It does this without making clear to the client that (a) the recommended lawyer's information is being provided because the lawyer advertised on FictitiousLegalReferral.com and paid a fee for "recommended" status, and (b) FictitiousLegalReferral.com is not substantively recommending the services of that lawyer.³

FictitiousLegalDirectory.com and FictitiousLegalReferral.com represent extreme examples of permissible and impermissible services. In light of the variety of internet advertising programs, the Committee has determined that it is appropriate to identify criteria for evaluating whether a program is an advertising service or a referral service under Colo. RPC 7.2.

III. Criteria for Evaluating Internet Marketing Programs

It is likely that the proliferation of online attorney marketing programs will continue and that new programs will arise with various permutations of the characteristics identified in this opinion. For future guidance to Colorado lawyers, the Committee sets out the following characteristics that must be present in such a program for it to be an advertising program in which a lawyer is permitted to participate:

A. The selection of lawyers for a potential client identified in response to the potential client's information is a non-subjective process performed by a software program or, in any event, performed without exercise of any discretion, based on the information provided by the potential client and the information provided by participating lawyers.⁴

B. The program takes sufficient steps to ensure that a reasonable potential client understands that (1) only lawyers who have paid a fee to be included in the service will be given the opportunity to respond to the potential client and (2) the service makes no assertion about the quality of the lawyers included in the service without an objective basis for such assertion. The service must not state that it is making referrals of lawyers and must not describe itself in a way that would cause a reasonable potential client to believe the program is selecting, referring, and recommending the participating lawyers. The service should disclose whether the program is open to all licensed lawyers or, if there are limits on the number or qualifications of lawyers who may participate in the program, it should disclose the nature of those limits.

C. The fee charged by the program is a reasonable fee for the advertising and public relations services provided.

D. The program does not limit or restrict, whether directly or by means of a high fee structure, finely drawn geographic and legal practice areas, or otherwise, the number of lawyers it allows to participate for a given geographic area or legal practice area to such an extent that the program in effect recommends particular types of potential clients to a particular lawyer.

E. Every initial communication sent by the lawyer to a potential client that is identified through the program complies with Colo. RPC 7.3(d).

Conclusion

The existing lawyer marketing programs in Colorado vary widely with respect to the characteristics that bear on the distinction between “online directory listings” and a for-profit “referral service.” The lawyer must evaluate the program under consideration to ascertain that it is in the nature of a listing-type directory rather than a program that purports to provide unbiased referrals to specific lawyers based on criteria such as expertise and experience.

NOTES

1. Colo. RPC 1.5(e) prohibits referral fees.

2. Despite the reference to approval of for-profit entities in Colo. RPC 7.2, the Colorado Supreme Court has not designated a regulatory authority to approve for-profit services. The Committee is not aware of any process for obtaining designation as an “approved for-profit entity” in Colorado.

3. Ethics opinions from other states have reached conflicting conclusions on whether certain services constitute permissible advertising or improper recommendations. Arizona and Washington opinions concluded that referral services that were similar to FictitiousLegalReferral.com violated the Arizona version of Colo. RPC 7.2. State Bar of Ariz. Ethics Op. 06-06 (2006); Wash. State Bar Ass’n Informal Op. 2106 (2006). Conversely, ethics opinions from South Carolina, North Carolina, Maine, and Rhode Island approved somewhat similar programs under the versions of Colo. RPC 7.2 adopted in those states. S.C. Bar Ethics Advisory Comm. Advisory Op. 01-03 (2003); N.C. State Bar 2004 Formal Ethics Op. 1 (2004); Maine Bd. of Bar Overseers Op. 174 (2000); Op. 2005-1, R.I. Supreme Ct. Ethics Advisory Panel Request No. 885 (2004). A for-profit referral program was rejected in Texas in 2005. Tex. Ctr. for Legal Ethics Op. 561 (2005). In 2006, the Texas Center for Legal Ethics considered a second for-profit referral program and, instead of approving or rejecting the program, promulgated criteria for determining whether a program is a permissible advertising service or a prohibited for-profit referral service. Tex. Ctr. for Legal Ethics Op. 573 (2006). The Ohio Supreme Court’s disciplinary advisory committee also declined to approve or reject a for-profit program with certain features of FictitiousLegalReferral.com and, instead, issued an opinion that provided guidance for distinguishing between permissible advertising and impermissible paid referrals. Bd. of Comm’rs on Grievances and Discipline of the Supreme Ct. of Ohio Advisory Op. 2001-2 (2001). The Utah State Bar adopted a for-profit referral program as its approved referral service. Utah’s Rule 7.2(b)(2) specifically authorizes payment of the usual charges of a legal service plan or a lawyer referral service.

4. Permissible factors include information about the practice areas, the jurisdictions and courts where the attorney is admitted or regularly practices, years of experience, and hourly rates. Impermissible factors include payment of a fee for preference in referrals or payment of a fee for all referrals in a geographic area.