

BOARD OF PROFESSIONAL RESPONSIBILITY
OF THE
SUPREME COURT OF TENNESSEE

FORMAL ETHICS OPINION 2018-F-165

The Board of Professional Responsibility has been requested to issue a Formal Ethics Opinion regarding the ethical implications of a website owned and operated by a company on which businesses and individuals may post a description of legal services for which they are seeking representation and lawyers/law firms may subsequently submit quotes for the cost of the legal services.

OPINION

The proposed legal marketplace website, owned and operated by a company on which businesses and individuals may post a description of legal services for which they are seeking representation and lawyers/law firms may subsequently submit quotes for the cost of the legal services, appears to comply with the Tennessee Rules of Professional Conduct if it is operated in accordance with the conditions and guidelines set forth in this opinion.

INTRODUCTION

The inquiring company owns and operates a website that will allow a potential client to post a general description of the legal services it is seeking so that a lawyer/firm may respond with a quoted fee for such services. The potential client will entertain various quotes while also considering the marketing materials that the lawyer/firm makes available to the potential client through the website. The potential client is free to select a lawyer/firm of its choice and the Company will not be involved in any way with the selection process aside from providing the client and lawyer the means from which to post, quote, and, to a certain extent, communicate.

Additionally, the Company will not make any recommendations nor endorse or vouch for a lawyer's credentials, abilities, competence, character, or other professional qualities and will not otherwise screen or filter the quoting process. The Company's website will make clear to the public that the website is not providing a recommendation or referral by the Company.

Both the potential clients and the lawyers/firms will be required to pay the Company a fixed annual membership to participate on the website. The lawyers/firms will also be required to purchase "bids" or "quotes" for a fixed fee in order to participate on the website. Similarly, the potential clients will be required to pay for a set/ fee to post legal projects to the website to elicit quotes from lawyers/firms.

For example: To participate on the Company's website, a lawyer pays the Company an annual membership fee of \$1,000. The lawyer also pays \$3,000 for 20 "quotes" that the lawyer can use at his/her discretion on the website. The potential client also pays an annual membership fee of \$1,000 for the ability to post twelve projects. Or the potential client may purchase a membership with unlimited projects for one year.

Pricing for lawyers and potential clients will vary depending on the type of legal matters and/or clients seeking representation. For example, there may be two different pricing schemes; one for businesses seeking representation in mostly corporate matters and one for individuals seeking representation in mostly consumer and/or personal matters. The Company, however, will not receive any portion of any fees paid by clients or lawyers/firms or in any way direct, filter or point to any particular lawyer or law firm. It is up to the lawyer/law firm to submit their quote for the project.

ISSUES

- I. Is the proposed website an Intermediary Organization?
- II. Does the proposed legal marketplace website comply with the Tennessee Rules of Professional Conduct with regard to advertising?

DISCUSSION

I.

Is the proposed website an Intermediary Organization?

Rule 7.6 of the Tennessee Rules of Professional Conduct defines an intermediary organization as "a lawyer advertising cooperative, lawyer referral service, prepaid legal insurance provider, or a similar organization the business or activities of which include the performance of fee-generating legal services or the payment for or provision of legal services to the organizations customers, members, or beneficiaries in matters for which the organization does not bear ultimate responsibility.

The inquiring company makes no referrals, explicit or implicit on the website. Once a project is submitted, the site has no control or influence as to which attorneys or firms view the project or quote the project. There is no filtering, sorting, directing or in any way are attorneys delivered or directed to the end user. No attorney or firm names appear on the site until they submit a quote to the end user, and that information only goes to that particular end user. Based upon the foregoing, the operation of the proposed website does not fall within the parameters of an Intermediary Organization as defined by the Tennessee Rules of Professional Conduct.

II.

Does the proposed legal marketplace website comply with the Tennessee Rules of Professional Conduct with regard to advertising?

The concept of a legal marketplace has been a topic of discussion in other states, prompting some bar associations to render ethics opinions. “Whether a service that links consumers and lawyers is permissible advertising or a type of impermissible referral arrangement that violates the ethics rules depends on the characteristics and operation of the service in question and the particular jurisdiction’s view of what constitutes a lawyer referral service.”¹

In Tennessee, lawyer referral services are considered Intermediary Organizations that must be registered with the Board of Professional Responsibility, unless they are charitable or other non-profit organizations.

Ethics authorities in several jurisdictions have reviewed similar websites to the one proposed to the Board of Professional Responsibility by the inquiring company.² The primary issue in the majority of jurisdictions is whether the website constitutes an impermissible lawyer referral service.

Some ethics opinions have identified factors which weigh in favor of finding that a service is permissible advertising and not an impermissible type of lawyer referral service. Those factors include the following:

1. Lawyer-client relationships are formed without the intervention the company.³
2. Users decide which lawyer to contact.⁴
3. The Service plays no role in the decision-making process of prospective clients.⁵
4. Participating lawyers pay a fixed amount for a fixed period of time.⁶

¹ *ABA/BNA Lawyers. Manual on Professional Conduct, Advertising and Solicitation: Advertising costs and Referrals (last updated 2014) p. 81:701.*

² Utah St. Bar Op. 15-05; Ariz. Eth. Op. 06-06; and D.C. Bar Eth. Op. 302.

³ Nassau County (N.Y.) Ethics Op. 01-4, 17 Laws. Man. Prof. Conduct 123 (2001); 2004 NC Eth. Op 1; R.I. Eth. Op. 2005-1, 21 Laws. Man. Prof. Conduct 152 (2005).

⁴ 2004 NC Eth. Op 1; R. I. Eth. Op. 2005-1, 21 Laws. Man. Prof. Conduct 152 (2005).

⁵ R.I. Eth. Op. 2005-1, 21 Laws. Man. Prof. Conduct 152 (2005); SC Adv. Op. 01-03, 17 Laws. Man. Prof. Conduct 661 (2001).

⁶ Ohio Adv. Op. 2005-001, 21 Laws. Man. Prof. Conduct 152 (2005).

5. The company provides the lawyer's information to a viewer automatically, based on information provided by the viewer and the participating lawyer, without exercising subjective discretion.⁷
6. The company does not recommend or promote the use of any particular lawyer's services and either does not charge lawyers any fee or discloses on its website that it charges a fee.⁸
7. The company does not limit the number of lawyers who may be listed in a particular geographic or practice area so that it would effectively be recommending particular lawyers to potential clients.⁹
8. The company does not recommend or promote the use of any particular lawyer's services and either does not charge lawyers any fee or discloses on its website that it charges a fee.¹⁰
9. The company does not limit the number of lawyers who may be listed in a particular geographic or practice area so that it would effectively be recommending particular lawyers to potential clients.¹¹

The legal marketplace website owned by the inquiring company squarely fits within the factors favoring a finding that the service is permissible advertising.

The Ohio Supreme Court Board of Professional Conduct previously reviewed the propriety of fee based advertising websites and set forth three factors to distinguish a fee-based lawyer advertising website from an impermissible lawyer referral service. An impermissible lawyer referral service website does the following: "1) the website requires the lawyer to pay an amount based on the number of people who contact or hire the lawyer or a percentage of the legal fees obtained; 2) the website provides services beyond the ministerial function of placing lawyer's information into public view; and 3) the website appear to be recommending the lawyer or offering his or her services as part of the website's overall services."¹²

The proposed website is currently operating in the State of Ohio under a letter of guidance issued by the Advisory Opinion Subcommittee of the Supreme Court of Ohio. That letter guidance approved the use of the website under the following general conditions:

1. The proposed Website cannot operate in any manner that requires the lawyer to pay a fee based on the number of people who contact or hire the lawyer;

⁷ Colo. Formal Eth. Op. 122, 26 Laws. Man. Prof. Conduct 722 (2008, amended 2010); Ohio Av. Op. 2001-02, 17 Laws. Man. Prof. Conduct 287 (2001); R.I. Eth. Op.2005-01, 21 Laws. Man. Prof. Conduct 152 (2005); Tex. Eth. Op. 573 (2006).

⁸ Colo. Eth Op. 122, 26 Laws. Man. Prof. Conduct 722 (2008, amended 2010); Nassau County (N.Y.) Ethics Op. 01-4, 17 Laws. Man. Prof. Conduct 123 (2001).

⁹ Colo. Eth. Op. 122, 26 Laws. Man. Prof. Conduct 722 (2008, amended 2010).

¹⁰ Colo. Eth. Op. 122, 26 Laws. Man. Prof. Conduct 722 (2008, amended 2010); Nassau County (N.Y.) Ethics Op. 01-4, 17 Laws. Man. Prof. Conduct 123 (2001).

¹¹ Color. Eth. Op. 122, 26 Laws. Man. Prof. Conduct 722 (2008, amended 2010).

¹² Ohio Adv. Op. 2001-02

2. The fee paid by the attorney not be in exchange for the Website recommending, referring or electronically directing potential clients to a specific lawyer in violation of RPC 7.2 (c) (giving anything of value to a person for recommending or publicizing the lawyer's services);
3. The fee paid by the lawyer to the Website can never be based upon the amount of fees generated by the lawyer in violation of RPC 5.4 (sharing fees with nonlawyers);
4. The Website should include a prominent disclaimer that potential clients are viewing an advertisement in the form of the attorney bid or quote and not receiving a recommendation or referral by the Website;
5. The Website cannot provide any services to potential clients beyond the purely ministerial function of enabling the electronic exchange of information between two mutually interested persons;
6. The Website cannot play any role in the potential client's decision-making process to hire the lawyer.

The letter of guidance set forth additional considerations as guidelines based on ethics opinions from jurisdictions that follow the Model Rules of Professional Conduct:

- The proposed Website should indicate to consumers that the member lawyers have paid a fee to participate. See Arizona Op. 2005-08.
- The proposed Website may not indicate it has vetted or approved the participating attorneys, or endorse or vouch for a lawyer's credentials, abilities, competence, character, or other professional qualities. Model Rule 7.2, Comment [5].
- The information about the law firm or lawyer and the lawyer's bid or quote should be marked as advertising material. RPC 7.3 See Ohio Adv. Op. 2001-2.
- The proposed Website cannot hold itself out as providing access to the "right" or most "knowledgeable" lawyers, or designate the lawyers as "specialists", "certified", "verified." RPC 7.4. see Tex. Ethics Op. 573 (July, 2006).
- The Website should not provide a satisfaction guarantee, as it may contravene RPC 1.5 Comment [9] (fee dispute resolution).
- The proposed Website should not limit the lawyers available to clients by practice or geographical area. See Arizona Opinion 2006-06.

CONCLUSION

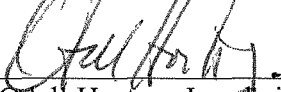
The Tennessee Rules of Professional Conduct permit lawyers to advertise in ways that comply with the rules. “To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services is significant. Nevertheless, advertising by lawyers shall not contain false or misleading communications about the lawyer or the lawyer’s services.”¹³

The use of the internet advertising and the use of websites has become commonplace among lawyers. The proposed legal marketplace website is a way that lawyers and clients can utilize the ever-changing internet to assist in forming their relationships.

The proposed legal marketplace website owned and operated by a company on which businesses and individuals may post a description of legal services for which they are seeking representation and lawyers/law firms may subsequently submit quotes for the cost of the legal services appears to comply with the Tennessee Rules of Professional Conduct if it is operated in accordance with the conditions and guidelines set forth in this opinion.

This 9th day of March, 2018.

ETHICS COMMITTEE:



Odell Horton, Jr., chair



Floyd S. Flippin



Jody S. Pickens

APPROVED AND ADOPTED BY THE BOARD

¹³ Rule 7.2 Tennessee Rules of Professional Conduct, comment [2].