

STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
OPINION NO. 06-01

March 22, 2006

The Committee has received, by letter dated January 5, 2006, a request to determine whether the North Dakota Rules of Professional Conduct permit participation in a lawyer referral service in which participating lawyers receive referrals from a nonprofit corporation on the condition that the lawyers list themselves in a third-party directory and pay fees to a third party for each referral that results in an attorney-client engagement.

FACTS

The Requesting Attorney practices law in North Dakota in the area of bankruptcy. A California-based lawyer referral service (“service”) plans to operate a nationwide internet-based referral service focusing on linking consumers seeking bankruptcy counsel with bankruptcy counsel looking to represent consumers. The lawyer referral service is a California nonprofit corporation that has applied for designation as a § 501(c)(3) corporation under the Internal Revenue Code. It plans to provide other services to assist consumer bankruptcy lawyers, such as credit counseling. The service will also provide referrals for consumers seeking general litigation attorneys, and in the future, it may provide referrals in additional disciplines.

The lawyer referral service will be governed by an agreement between lawyers (“participating lawyers”) and the service. In addition, the service will maintain rules and procedures for its operation that include oversight of its members and complaint processing.

In order to participate in the lawyer referral service, a lawyer must be a member of the State Bar of North Dakota in good standing and not under investigation. In the case of bankruptcy, the lawyer must be admitted and in good standing to practice before the United

States Bankruptcy Court in North Dakota. The lawyer referral service requires each participating lawyer to be “qualified” in one of four ways:

- a. Specialization certification by a State Bar;
- b. Certification from an independent organization of lawyers in a field of specialization where designation is not obtained solely by payment of a fee;
- c. Execution of a statement signed under penalty of perjury that the lawyer has been engaged in the area for at least five years and represents himself or herself to be competent in that field; or
- d. In the case of bankruptcy, execution of a statement signed under penalty of perjury that the lawyer has been engaged in bankruptcy for at least three years, filed at least 100 petitions and represents himself or herself to be competent in bankruptcy.

In addition to the above requirements, the participating lawyer must carry at least the minimum statutory amount of malpractice and errors and omissions insurance, or other such minimum amount established by the lawyer referral service or the North Dakota Bar.

Participating lawyers must also be listed in the Directory of Lawyers (“Directory”) specified by the lawyer referral service.

The Directory of Lawyers is open to all attorneys and law firms in North Dakota, subject to an annual fee up to \$1,000. Currently the Directory does not charge a fee to attorneys listed in the Directory. The listing in the Directory of Lawyers must comply with all advertising rules for attorneys in North Dakota, and the listing must contain, at a minimum, the name of the law firm or lawyer; street and mailing address; telephone number; email address; qualifications to handle specific types of legal work; and language capabilities. Lawyers listed in the Directory are solely

responsible for the content of the listing. The lawyer referral service will not be a party to the contract for listing in the Directory.

The lawyer referral service anticipates that the largest source of its referrals will come from debt negotiation and settlement companies, while some of its referrals may come from consumers who contact the web site directly. The service will not make any referral unless the consumer specifically requests one. The referral itself will take place by email over the internet, but the lawyer referral service maintains a toll-free nationwide telephone number

Each consumer who requests a referral will receive listing information of up to three lawyers from the Directory of Lawyers, and the lawyers will each receive information about the consumer that the consumer consented to disclose to the lawyers. Referrals will be provided to lawyers on a rotating basis.

Participating lawyers must pay a \$100.00 fee to a third party in order to receive referrals. Should a participating lawyer fail to convert a referral into an attorney-client engagement, the \$100.00 is waived. The third party payee could be the same party responsible for the Directory of Lawyers but not necessarily. A participating lawyer must notify the service within two days of accepting a referral as a client, and failure to do so is grounds for terminating the lawyer's participating in the service.

Participating attorneys must agree that fees for clients it obtains through the lawyer referral service will not be any higher than the fees charged to its other clients and that any transactional costs associated with the service may not be passed on to the consumer.

DISCUSSION

The Committee's opinion is that the proposed arrangement, as described above, involves a lawyer giving value to a person for recommending the lawyer's services. N.D.R. Prof.

Conduct 7.2(d). However, the proposed arrangement does not violate the proscription in Rule 7.2(d) of the North Dakota Rules of Professional Conduct, provided that the lawyer referral service is not-for-profit. The Committee does not interpret provisions of the North Dakota Century Code or the United States Bankruptcy Code.

North Dakota Rules of Professional Conduct bar attorneys from giving anything of value to a person for recommending the attorney's services, with certain exceptions. Rule 7.2 states:

- (a) Subject to the requirements of Rule 7.1 and 7.3, a lawyer may market and advertise legal services through media, including published and on-line directories; newspapers, newsletters and other periodicals; outdoor advertising; electronic advertising, including radio, television, video and the Internet; and through text-based communications including written correspondence and email.
- (b) A copy or recording of an advertisement or communication must be kept for two years after its last dissemination along with a record of when and where it was used. For written correspondence and e-mail, a lawyer shall retain for two years from the date of sending a list of addresses. When a lawyer uses recorded voice communications and transmits a communication by telephone call, the lawyer shall retain for two years from the date of the call a record of any telephone number called.
- (c) Any communication made pursuant to this Rule must include the name and office address of at least one lawyer or law firm responsible for its contents.
- (d) 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 not-for-profit lawyer referral service or legal service organization; and
 - (3) pay for a law practice in accordance with Rule 1.17.

The lawyer referral service described to the Committee involves multiple entities. For example, a lawyer may only participate in the service if that lawyer enlists in the Directory of Lawyers chosen by the service. Potentially, a third entity would collect the fees charged for

receiving referrals. The facts and circumstances of the arrangement may bring these associated entities within the scope of the Rules.

The proposed lawyer referral service has the trappings of both an advertisement and a referral service. The service indicates that any lawyer referred to consumers will be listed in a Directory of Lawyers, which the Committee assumes will be accessible to consumers. The Directory of Lawyers may charge lawyers a fee for being listed, and, consequently, any lawyer participating in the lawyer referral service incurs a fee for being listed in the Directory. Under these facts, a participating lawyer gives value in order to receive referrals. In the same vein, a participating lawyer must pay a third party a “transmission” fee for referrals that result in an attorney-client engagement. Payment of fees to a third party in order to receive referrals falls squarely within the prohibition of Rule 7.2(d).

Because the Committee concludes that the proposed lawyer referral service arrangement involves lawyers providing value to persons for recommending the lawyer’s services under Rule 7.2(d), the arrangement is only permissible if it falls under one of the exceptions to Rule 7.2(d).

Reasonable costs of advertisements or communications permitted by Rule 7.2

In the Committee’s opinion, the lawyer referral service does not involve payment of reasonable costs of advertisements or communications as contemplated by Rule 7.2(d)(1). Nebraska Ethics Advisory Opinion No. 89-3 (a lawyer may not pay another to advertise and then refer clients to the lawyer). [Cf, Alabama State Bar Ass’n v. R.W. Lynch Co., 655 So.2d 982 (Ala. 1995) (finding a group advertising arrangement was not a referral service where, among other things, calls were not screened, no representation was made in regard to attorney experience or skill, and callers were forwarded to an attorney based on geographic location only).] Although advertisements and communications may comprise some of the arrangement,

the value to the participating lawyer is the referral of consumers seeking representation, as opposed to the value of purely advertising in the Directory of Lawyers. See N.D.R. Prof. Conduct 7.2, Comment (“A lawyer is allowed to pay for advertising permitted by this Rule . . . , but otherwise is not permitted to pay another person for channeling professional work.”). See also New Jersey Advisory Committee on Professional Ethics Opinion 13, 132 N.J.L.J. 267 (October 5, 1992) (explaining that programs may contain significant aspects of advertising while constituting referral services). Significantly, the service directs consumers to specific lawyers, and it identifies specific consumers.

In turn, the fees charged, or potentially charged, to the participating lawyer are directly attributable to participation in the referral service and for receiving referrals. For example, a participating attorney only pays a \$100.00 fee upon converting a referral into an engagement. [Cf. R.W. Lynch Co., 655 So.2d at 984 (participating attorneys pay a flat rate fee for advertising, as opposed paying a fee for each referral).]

Usual charges of a not-for-profit lawyer referral service or legal service organization

Rule 7.2(d)(2) permits a lawyer to pay the usual charges of a not-for-profit lawyer referral service, but lawyers are prohibited from paying a for-profit lawyer referral service for referring clients. State Bar of Arizona Ethics Opinion 05-08 (interpreting same language as North Dakota Rule 7.2 as absolute bar to payment to a for-profit referral service).

Whether an organization is not-for-profit depends on the facts and circumstances of each case. The Requesting Attorney described the proposed lawyer referral service as a California nonprofit corporation with a pending application to be recognized as a 501(c)(3) organization for purposes of the Internal Revenue Code. The Committee’s opinion is that a lawyer referral service incorporated as a North Dakota nonprofit corporation under N.D.C.C. Chapter 10-33 or

tax exempt under § 501(c)(3) of the Internal Revenue Code will constitute a not-for-profit lawyer referral service for purposes of Rule 7.2(d)(2). Cf. State Bar of Michigan Ethics Opinion RI-223, January 18, 1995 (opining that neither incorporation under Michigan Nonprofit Corporation Act nor governmental tax qualification provide a not-for-profit safe harbor). While nonprofit organizations established under other jurisdictions might be not-for-profit for purposes of Rule 7.2(d)(2), this Committee declines to make such a determination.

The Committee does not know if the proposed Directory of Lawyers has been incorporated as a nonprofit corporation under North Dakota or whether it is tax exempt under § 501(c)(3). Each entity constituting the lawyer referral service must operate as a not-for-profit in order for the arrangement to be considered a not-for-profit lawyer referral service. N.D.R. Prof. Conduct 7.2(d)(2). [See Nebraska Ethics Advisory Opinion 95-3 (concluding an attorney may not participate in a “for-profit” lawyer referral program); Vermont Bar Association Advisory Ethics Opinion 95-02 (attorneys may participate in a for-profit lawyer referral service if the attorneys do not pay fees to the service). Cf. State Bar of Michigan Ethics Opinion R-G, December 15, 1989 (if a lawyer referral service is for-profit, a lawyer may pay the reasonable costs of advertising, but may not pay other costs of the for-profit); North Carolina State Bar 2004 Formal Ethics Opinion 1 (concluding a lawyer may participate in a for-profit service with aspects of both a lawyer referral service and a legal directory because the potential harm to the consumer of a pure lawyer referral service is avoided).] The not-for-profit requirement of the exception alleviates the tension between maximizing profits and achieving the public purposes behind the lawyer referral service, which include providing consumers with true and accurate information about the largest possible number of attorneys.

The Committee additionally draws attention to Rules 7.1 through 7.5 regarding information about legal services. In particular, communications made on or through the lawyer referral service must not be false or misleading, N.D.R. Prof. Conduct 7.1; communications must contain the name and office address of at least one lawyer or law firm responsible for their content, N.D.R. Prof. Conduct 7.2; and communications must not involve direct contact with potential clients that would violate N.D.R. Prof. Conduct 7.3. Participating lawyers remain ultimately responsible for determining whether the lawyer referral service complies with applicable North Dakota Rules of Professional Conduct.

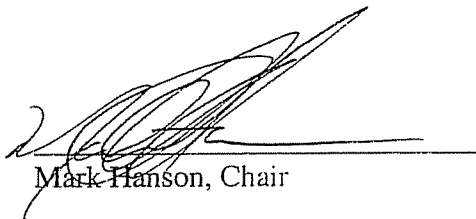
CONCLUSION

The Requesting Attorney may participate in the proposed lawyer referral service without violating Rule 7.2 on the following conditions: (1) that all entities constituting the lawyer referral service operate on a not-for-profit basis under Rule 7.2(d)(2), and (2) the lawyer referral service complies with all other applicable North Dakota Rules of Professional Conduct.

This Opinion is provided pursuant to Rule 1.2(B) of the North Dakota Rules for Lawyer Discipline. This rule provides:

A lawyer who acts with good faith and reasonable reliance on a written opinion or advisory letter of the ethics committee of the association is not subject to sanction for violation of the North Dakota Rules of Professional Conduct as to the conduct that is the subject of the opinion or advisory letter.

This Opinion was drafted by Adele Page and unanimously approved by the Committee on April 12, 2006.



Mark Hanson, Chair