

STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE

OPINION NO 08-06

I. Introduction

The Committee has received a request from a Law Firm (“the Firm”) to determine whether the North Dakota Rules of Professional Conduct permit participation in a “‘lawyer referral service’”¹ whereby the Firm would pay an annual fee in exchange for the “ ‘lawyer referral service’” performing advertising and marketing services to employees of a medical entity. The Committee concludes that the proposed arrangement would violate Rule 7.2(d), North Dakota R. Prof. Conduct.

II. Facts

The Firm inquires whether it would be permissible under the North Dakota Rules of Professional Conduct to pay a contractual fee to participate in a “‘lawyer referral service’” to advertise and market its services in wills and estate planning to employees of a for-profit medical entity. An outside for-profit “advertising/marketing agency” proposes to “administer” the advertising and marketing to the employees through the use of the medical entity’s internal advertising sources (internal online employee bulletin boards and the like). The advertisements would only be available to the employees. The advertisements would specifically market the Firm’s services in wills and estate planning and would advertise those services at a “specified

¹ The Firm’s letter requesting this opinion refers to both a “lawyer referral service” and to an “advertising/marketing agency” administering a advertising and marketing program to certain individuals as described herein.

‘reduced’ rate.” The Committee assumes that the Firm is the only participating firm, *see* n.3, *infra*.

III. Discussion

In Opinion 06-01 the Committee considered a similar issue. In that Opinion, the question was whether Rule 7.2 of the North Dakota Rules of Professional Conduct prohibited a lawyer from participating in a lawyer referral service that was operated by a non-profit corporation when the lawyer fulfilled certain conditions imposed by the referral service.

Rule 7.2, N.D. Prof. Conduct provides in relevant part:

(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 e-mail.

* * *

(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 Committee concluded in Opinion 06-01 that participation was permissible under Rule 7.2(d) so long as all the entities constituting the lawyer referral service operated as not-for-profit and the referral service complied with all other applicable rules of professional conduct. However, the Committee also noted that lawyers are prohibited from paying a for-profit lawyer referral service. *Id.* at p. 6 (citing State Bar of Arizona Ethics Opinion 05-08).

Here, the Firm notes in its letter requesting this Opinion that it questions the propriety of participating in a “lawyer referral service” operated by a for-profit “advertising/marketing agency” that was retained by medical entity (also for-profit). This analysis turns on whether the “advertising/marketing agency” is a for-profit “lawyer referral service” under Rule 7.2(d)(2) or is merely providing advertising services in exchange for the annual fee.

The Comment to Rule 7.2, N.D.R. Prof. Conduct states that while a lawyer is permitted to pay for advertising permitted under the rules of professional conduct, a lawyer is “not permitted to pay another person for channeling professional work.” See e.g., *Disciplinary Bd. v. McCray*, 2008 ND 162, ¶ 51 (Crothers, J. concurring in part and dissenting in part) (finding potential violations of Rule 7.2(d) for giving value to a person to recommend lawyer’s services). This is the essence of a referral service - a third party is paid for channeling prospective clients to a lawyer. As recognized by the State Bar of Arizona, a referral service is any organization that holds itself out to the public as a lawyer referral service. State Bar of Arizona Ethics Opinion 06-06 (citing to analogue of N.D.R. Prof. Conduct 7.2).

The comment to the ABA Model Rule 7.2 adds that “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. . . .” In Arizona’s Ethics Opinion 06-06, the bar recognized that “[i]t is the act of providing the name of an attorney who the provider claims would meet the client’s needs that constitutes a referral.”

In Opinion 06-01 the Committee noted that even where lawyers pay a fee to be listed in a “directory of lawyers”² where the “directory” was tied to a lawyer referral service would involve

² The “directory of lawyers” was open to all attorneys and law firms in North Dakota, subject to an annual fee of not more than \$1000.

giving value in order to receive referrals, which is clearly prohibited under N.D.R. Prof. Conduct 7.2(d). *Id.* at p. 5.

Here, the proposed arrangement would involve giving value (1,200 dollar annual fee) in exchange for the specific targeting of a specified group of individuals for “advertising” and “marketing.” Moreover, the targeted group of individuals would be offered a specified “reduced” rate for legal services and presumably will be advised of the Firm’s expertise in the area of wills and estate planning.³ The act of providing the name of the Firm along with the claim that the Firm’s attorneys will be able to meet an employee’s will and estate planning needs in exchange for a fee constitutes a referral. State Bar of Arizona Opinion 06-06. Accordingly, since the “lawyer referral service” is for-profit and the arrangement involves giving value for the referral, the proposed arrangement is prohibited under Rule 7.2(d)(2), N.D.R. Prof. Conduct.

Nor does the Committee believe that the proposed arrangement would merely be advertising. Here, the Firm’s wills and estate planning services would not be marketed or recommended to the public at large. Instead, the Firm presumably was chosen by the “lawyer referral service” as an appropriate firm to recommend exclusively to the medical entity’s employees. *See* Texas Ethics Opinion 573 (2006)(a referral service is one that selects or recommends lawyers). As the Committee implicitly recognized in Opinion 06-01, specifically identified consumers who are directed to specific lawyers has the trappings of a referral service and not an advertising service. *Id.* at p. 6.

Moreover, a lawyer may not pay another to advertise and then refer clients to the lawyer. *Id.* (citing Nebraska Ethics Advisory Opinion No. 89-3)(stating that a lawyer may pay for self-advertising costs, a lawyer may not pay another to advertise and then refer clients to him/her.) It

³ The Committee also assumes that no other law firm will be involved in the arrangement.

is the Committee's opinion that the "lawyer referral service" will be referring clients to the Firm by virtue of its arrangement to market the Firm's wills and estate planning services at a reduced rate not available to the public at large. See Arizona's Ethics Opinion 06-06, (stating "the act of providing the name of an attorney who the provider claims would meet the client's needs" constitutes a referral).

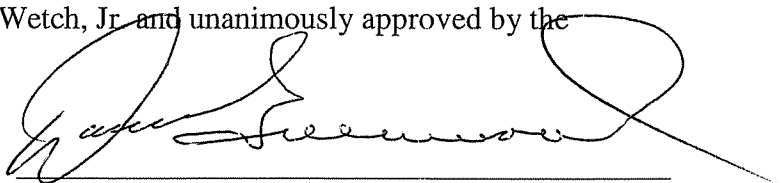
While advertising is permitted under the Rules of Professional Conduct, Rule 7.2(d)(1) only permits a lawyer to pay "the reasonable costs of advertisements" permitted under the rule. The Committee's opinion is that the proposed arrangement does not comprise simply advertising but instead involves giving value for recommending the Firm's services to a select group of individuals.

IV. Conclusion

The Committee concludes that the proposed arrangement would violate Rule 7.2(d)(2), N.D.R. Prof. Conduct.

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

This Opinion was drafted by Joseph A. Wetch, Jr. and unanimously approved by the Committee on November 17, 2008.

A handwritten signature in black ink, appearing to read "Dann Greenwood", written over a horizontal line.

Dann Greenwood, Chair