

New York State Bar Association

COMMITTEE ON PROFESSIONAL ETHICS

Opinion 799 – 9/29/06
Explains: N.Y. State 779 (2004)

Topic: Advertising and solicitation; internet website directory

Digest: Lawyer may not participate in website that charges lawyer a fee to provide information about potential clients whom lawyer will then contact, where the website purports to analyze the prospective client's problem and selects which of its subscribing lawyers should respond, nor may the lawyer contact the prospective client by telephone unless the prospective client has expressly requested a telephone contact.

Code: DR 1-102(A), DR 2-101(A),(K), DR 2-103(A), (B), (D), DR 3-101 (A)

QUESTION

1. May a lawyer use the services of a website that forwards inquiries from potential clients to subscribing lawyers, where the subscribing lawyers pay a fee to participate in the service and the service purports to analyze the prospective client's problem and select an appropriate lawyer for the matter?

OPINION

2. An increasing number of websites and internet services offer to put lawyers in touch with persons seeking representation. In this opinion, we address some of the ways in which the New York Code of Professional Responsibility (the "Code") applies to the use of such services.

3. The websites typically ask potential clients to identify themselves and state the nature of their legal problem. Using such information, the website contacts those lawyers who have subscribed to their service and indicated an interest in undertaking matters of the kind described by the prospect. One or more of the lawyers notified by

the website may then contact the prospective client directly by return e-mail and/or by telephone, to ask whether the prospective client wants to retain that lawyer.

4. The extent to which the websites review and evaluate the potential client's statement of the legal problem varies. Some of the websites represent that a staff attorney will screen the requests submitted by the prospective client and screen the prospective attorneys. Others represent that they are not a referral service and do not review the prospective client's submission. Rather they forward the submission automatically to the law firms selected by the client. These sites may provide prospective clients with various tools to limit the attorneys listed, including filters for geographical area or practice area of the subscribing lawyers.

5. The services generally charge the lawyer a fee that is either refunded or discounted if the service does not provide an economic benefit to the subscribing lawyer. The websites the Committee has reviewed are run from locations outside New York.

6. Because of the wide variation in the structure and function of the many web-based services operating in this area, this opinion does not attempt to address every factual permutation. It is only a general guide to the ethical obligations of New York lawyers who make use of web-based matching services.

7. We discuss first two questions raised by the operation of these websites: (a) whether a lawyer who participates in the service is paying for a recommendation in violation of DR 2-103(B); and (b) whether a lawyer who contacts a client referred by the website is soliciting employment from a prospective client in violation of DR 2-103(A). We also provide guidelines regarding such services that arise out of other provisions of the Code.

Paying for a recommendation in violation of DR 2-103(B)

8. DR 2-103(B) provides, with exceptions not applicable here, "A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client...." The question is whether the services "recommend or obtain employment."

9. We begin with the observation that a traditional advertising directory in paper form, such as the "yellow pages," is not recommending or obtaining employment within the meaning of DR 2-103(B). The question is at what point an online "directory" website becomes a referral service for purposes of DR 2-103(B). For example, an online yellow pages that provides tools by which a potential client can filter a list of attorneys by geography and/or practice area (e.g., to create a list of attorneys in "Albany" who do "personal injury" work) does not violate the rule.

10. We find that the line is crossed, however, when a website purports to recommend a particular lawyer or lawyers for the prospective client's problem, *based on an analysis of that problem*. For example, if a potential client describes a slip-and-fall incident on an intake form and the website determines that the problem calls for a personal injury lawyer and then recommends one or more attorneys in that area, the website is "recommending" those lawyers.¹ This conclusion applies whether the website's selection of counsel is the result of human intelligence or a computer program designed to respond to certain key words (e.g., if the potential client uses the words "injury", "doctor" or "fell" on an intake form, the program would characterize the problem as one of "personal injury" in order to recommend lawyers). Such activity is prohibited by other than a qualified lawyer referral service. DR 2-103(D).²

Improper solicitation in violation of DR 2-103(A)

¹ We express no opinion as to whether the website may be operating in violation of Section 495(1)(d) of the Judiciary Law ("No corporation . . . shall . . . furnish attorneys or counsel"). If the website were to be operating in violation of the Judiciary Law or found to be otherwise engaged in the unauthorized practice of law, it would be unethical for a lawyer to participate in its operations. DR 3-101(A).

² In N.Y. State 779 (2004), we found a violation of DR 2-103(B) where a lawyer pays a marketing organization to furnish the lawyer with "leads" to potential clients. We there explained:

The payment by an attorney ... for a bundle of "leads" to prospective clients would violate DR 2-103(B) because neither of the exceptions in sub-paragraphs (1) or (2) applies. The payments would be compensation paid to Marketer "to recommend or obtain employment by a client," so it would be improper for an attorney to participate in the proposed transaction with Marketer.

This language is susceptible to an interpretation that any payment made to a third party for information which enables a lawyer to "obtain" a client is prohibited by DR 2-103(B) unless the circumstances of the payment fall within one of the stated exceptions to the rule. Such an interpretation, which might be deemed to bar participation even in an "electronic yellow pages" service, overstates our conclusion in N.Y. State 779. That opinion should be understood to apply only to those situations in which the organization is effectively making referrals or where it may be deemed to have actively solicited and obtained potential clients for its participating lawyers. In N.Y. State 779, the marketing organization caused its customers to sign a power of attorney form, as well as a retainer agreement, and actually collected a fee for the lawyer to whom the matter would eventually be forwarded. The prospective client was thus effectively committed before the lawyer had agreed to undertake the representation. In every meaningful sense, like the classic "runner," the marketing organization had "obtained" a client and, for a fee, had agreed to forward the client to the lawyer. To the same effect is a recent opinion of the Committee on Professional Ethics of the State Bar of Texas, wherein that body prohibited lawyers from participating in an internet matching service on the grounds that the service was effectively "soliciting or referring prospective clients." Texas Op. 561 (2005). Texas Op. 573 (2006) clarified that Texas Op. 561 was not prohibiting *all* internet matching services, but rather only those services that exercise "discretion" in selecting lawyers.

11. We turn next to whether a lawyer using a website under the circumstances described above is engaged in improper solicitation if the lawyer contacts the prospective client by telephone. DR 2-103(A) provides:

A lawyer shall not solicit professional employment from a prospective client:

1. By in-person or telephone contact, except that a lawyer may solicit professional employment from a close friend, relative, former client or current client.

12. While the Code clearly prohibits solicitation of clients by telephone contact, the question here is whether a lawyer responding to a prospective client's posting inviting such contact is engaged in "solicitation." We agree with the New York City Bar³ that in such situations the client has invited the contact, and that an invited contact is not a "solicitation" within the meaning of the Code (the term is not currently defined). In view of the Code's express prohibition on telephone solicitation, however, we believe that follow-up contacts by phone must be preceded by a clear and unambiguous request from the potential client for telephone contact. For example, it generally would *not* be sufficient that the website contains a statement that by using the website the prospective client thereby consents to having one or more lawyers telephone the client. It generally *would* be sufficient if the potential client is specifically asked to check a box in order to authorize telephone contact.

Guidelines for permissible website matching services

13. In addition to the prohibitions contained in DR 2-103, the Code contains other relevant restrictions and rules, which we do not attempt to completely address here. A lawyer's public communications -- including directory listings -- may not be "false, deceptive or misleading," for example, and must include the name, office address and telephone number of the attorney or law firm whose services are being offered. DR 2-101(A); DR 2-101(K); N.Y. State 756 (2002) ("we believe the use of a web site or e-mail address as the sole identifier of a firm's office address does not satisfy the requirement of DR 2-101[K]").

³ In N.Y. City 2000-1, the Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York considered whether a lawyer's response to a website posting by a person seeking legal counsel should be deemed solicitation. The City Bar committee concluded that a lawyer's response did not constitute "advertising" or "solicitation" as those terms are used in the Code. Rather, the City Bar committee reasoned that it was the prospective clients who "in effect, have 'solicited' [the responding] attorneys." Because the method of communication there employed was electronic posting, however, the City Bar did not have to address the issue of whether a participating lawyer could contact the prospect by telephone.

14. Based on these rules and the foregoing discussion of DR 2-103, we suggest the following guidelines with respect to a website service in which a New York lawyer may pay to participate:

refrains from recommending its subscribing lawyers or otherwise making claims about the competence or character of its subscribing lawyers;

refrains from claims that it will analyze the prospect's legal problem in order to find a suitable lawyer;

explains that its subscribing lawyers have paid to be listed with the service;

states the office address and telephone number of each lawyer participating in the service;

specifies the means of communication that its subscribing lawyers may employ when responding to the prospective client's posting and provides for telephone contact only if the prospective client clearly and unambiguously authorizes the service to forward the request and telephone number to the selected attorneys; and

advises users that the services of the website do not constitute legal representation or the practice of law.

15. In addition, lawyers using such a website should take reasonable measures to prevent the inadvertent disclosure by the prospective client of privileged information.⁴ Depending on circumstances, such measures may include some or all of the following:

the website service should afford the prospective client an opportunity to screen the list of lawyers who will be shown the prospective client's posting and remove lawyers from the list;

the service should only reveal the prospective client's identity to those subscribing lawyers that the prospect requested;

the service and the lawyer should minimize the communication of confidential information between the subscribing lawyer and the

⁴ EC 4-1 ("Both the fiduciary relationship existing between lawyer and client and the proper function of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ the lawyer.").

prospective client until the lawyer has been retained and has completed an appropriate conflicts check;

the service should caution the prospective client that the information provided to the service may not be protected by the attorney-client privilege, where that statement is applicable.

16. As in any other contact with a current or potential client, when following up the prospective client's posting, the subscribing lawyer should avoid any statements that are "false, deceptive or misleading" under DR 2-101(A); should not engage in any form of "coercion, duress or harassment" under DR 2-103(A)(2)(c); and should otherwise treat the prospective client with the courtesy and integrity expected of all lawyers. See DR 1-102(A)(7). Generally, where the prospect indicates an unwillingness to engage the lawyer, the lawyer should refrain from further retention discussions with such party. Cf. N.Y. State 481 (1978) (if client indicates hesitancy about designating the client's lawyer as executor, lawyer should "immediately desist and expressly withdraw his suggestion.").

CONCLUSION

17. For the reasons stated, the question posed is answered in the negative. While websites may be used for advertising purposes, they can not, in exchange for a fee, carry out activities that in a non-web setting would constitute prohibited solicitation or referral.

(22-05)
