



## Committee on Professional Ethics

Opinion 902 (1/13/12)

**Topic:** Payment for marketing services based on contacts developed.

**Digest:** A lawyer may not base compensation to a marketing firm on the number of potential or actual clients the firm introduces to the lawyer.

**Rules:** 7.2

### FACTS

1. The inquirer is a collection attorney who proposes to enter into a contract with a marketing firm. The firm would introduce the attorney to its network of doctors so that the attorney could seek collection work from those doctors. The attorney would prefer not to pay the firm a monthly fee, but rather to base the fee arrangements on “benchmarks and results.”

### QUESTIONS

2. Can the attorney pay the marketing company a fixed fee each time the company makes an introduction and sets up a meeting with a doctor?
3. Can the attorney pay an additional fee to the marketing company if and when the doctor retains the attorney in a certain number of collection cases?

### OPINION

4. Lawyers may engage in marketing activities subject to various restrictions in the Rules of Professional Conduct. A lawyer who contracts with a firm to perform such services may not arrange for it to engage in activities that the lawyer would be ethically prohibited from undertaking directly.<sup>1</sup>

---

<sup>1</sup> See Rule 8.4(a); Rule 7.3(b) (defining solicitation to include certain advertisements initiated by “or on behalf of” a lawyer); Rule 7.2, Cmt [1] (recognizing that a lawyer may compensate vendors engaged to provide marketing services, but citing Rule 5.3 for the duties of lawyers “with respect to the conduct of nonlawyers who prepare marketing materials for them”); N.Y. State 887 (2011); Florida Opinion 89-4.

5. Here, the inquiring attorney would be contracting for advertising services governed by Rule 7.1. Moreover, those services could include forms of advertising targeted at specific recipients so as to constitute solicitation under Rule 7.3(b). In that case the attorney would also need to be mindful of the requirements of Rule 7.3, such as the limitations on solicitations made in person, by telephone, or by interactive computer-accessed communication.

6. Assuming that the services sought by the inquiring attorney would be compliant with the rules on advertising and solicitation, we turn to the questions posed, concerning permissible fee structures.

7. Rule 7.2(a) provides: “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,” except in two situations not relevant to this inquiry. Comment [1] to Rule 7.2 acknowledges that the rule allows a lawyer “to pay for advertising and communications permitted by these Rules,” but states that lawyers “are not permitted to pay others for channeling professional work.”

8. In several of our prior opinions we have applied this rule, or its virtually identical predecessor under the Code of Professional Responsibility, and have disapproved arrangements involving the exchange of money or other value for referrals.<sup>2</sup>

9. The proposed fee arrangements are inconsistent with the text of Rule 7.2(a) and with our prior opinions. Payment of a fee to the marketing firm for an introduction and meeting with a potential doctor client would be a payment to recommend or obtain employment by a prospective client. Paying the firm an additional fee if and when the doctor retains the attorney in a certain number of collection cases would violate the prohibition of rewards for having made a recommendation resulting in employment by a client.

## CONCLUSION

10. A lawyer who contracts with a marketing firm to introduce the lawyer to its network of doctors as prospective clients may not compensate the firm with a fee for each introduction and meeting with one of the doctors, nor with a fee if and when a doctor retains the attorney in a certain number of collection cases.

(44-11)

---

<sup>2</sup> See N.Y. State 887 (2011) (employee marketer may not be paid bonus based on referrals of particular matters or based on profitability of firm if such profits are substantially related to employee’s marketing efforts); N.Y. State 791 (2006) (lawyer may not participate in business networking organization that requires mutual referrals or charges dues and requires nonlawyer members to refer potential clients to lawyer members); N.Y. State 779 (2004) (improper for attorney to pay marketing organization for bundles of “leads” to potential clients); N.Y. State 565 (1984) (“any compensation in the form of a commission or percentage based upon the volume of business developed would be clearly improper[,] ... would tend to give the marketing firm a pecuniary interest in the success of the solicitation, and may lead to the use of hard-sell tactics or other improprieties”).