New York State Bar Association
Committee on Professional Ethics

Opinion 1213 (01/11/2021)

Topic: Lawyer paying for recommendation.

Digest: A lawyer may not participate in an internet lawyer-client matching service that vouches for the lawyer's credentials, competence and effectiveness, and recommends the lawyer as the "best lawyer" for the needs of the potential client.

Rules: 5.4(a), 7.1(a), 7.2(a)

FACTS

1.   The inquirer is a lawyer who wishes to participate in an online service that connects potential clients facing traffic violations with attorneys willing to represent them to fight the violations.

2.   The lawyer matching service has created a platform that requires the client to upload the ticket and provide additional information. According to the inquirer, a proprietary algorithm then matches the client with "the best local traffic lawyer for their case," and quotes a legal fee that was determined by the lawyer selected by the algorithm. Once the fee is paid, the client is paired with the lawyer, who must accept the case within one day or forego the representation opportunity. The legal fee, net of a service charge to the matching service, is then transferred by the service to the lawyer.

3.   The inquirer states that the algorithm is driven by a variety of factors, including lawyer location, fee schedules, success rates, local competition, and customer service.   The online lawyer matching service collects customer feedback and, in its sole discretion, may offer a full or partial refund in the event of an unfavorable outcome.

4.   The service represents that it is not a law firm, does not offer legal advice, and all the attorneys it connects with clients are neither its employees nor its agents. The online service is not owned by New York-admitted lawyers.

QUESTION

5.   Does the portion of the legal fee paid by the client but retained by the online lawyer matching service constitute an impermissible referral fee?

OPINION

6.   With exceptions not here relevant, Rule 7.2 (a) of the New York Rules of Professional Conduct (the "Rules") 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 ….

7.   Comment [1] to Rule 7.2 states that paragraph (a) "does not prohibit a lawyer from paying for advertising and communications permitted by these Rules" and, insofar as is relevant, that a lawyer "may pay others for generating client leads such as Internet-based client leads, as long as . . . the lead generator does not recommend the lawyers." Comment [1] to Rule 7.2 elaborates on the prohibition on recommendations by providing that to comply with Rule 7.1 (which prohibits false, deceptive, or misleading lawyer advertising), "a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, ... or has analyzed a person's legal problems when determining which lawyer should receive the referral."

8.   Here, the matching service is a "lead generator," and participating lawyers pay the service a fee for generating leads. As such, the principal issue the committee must determine is whether the service "recommends" lawyers.

9.   This committee has observed that the Rules "generally do not allow lawyers to pay for referrals of clients," but the prohibition is not meant to keep "a lawyer from paying for advertising and communications permitted by the Rules…" N.Y. State 979 ¶ 4 (2013). The same opinion concluded that a group of lawyer mediators would be paying for joint advertising, rather than paying for prohibited referrals, where a website included a detailed biography of each member of the group, because that format was "reasonably designed to encourage the consumer to select the member with the expertise appropriate to the consumer's needs, rather than to trigger a consumer to call for a referral." N.Y. State 979 ¶12.

10.   In 2017, this Committee issued two additional opinions which, through juxtaposition, illustrate the line between a lawyer ethically participating in internet marketing services, on the

one hand, and a lawyer unethically paying for a referral, on the other hand. See N.Y. State 1131 (2017) and N.Y. State 1132 (2017).

11.   The for-profit service at issue in N.Y. State 1131 charged participating lawyers a fixed monthly fee, and those lawyers submitted their names, contact information, geographic locale and practice areas to the service to include in its database. Potential clients wishing to be contacted by a lawyer sent the service their names and contact information, their geographic locale, and the practice area in which they sought legal advice. The service then searched its database of participating lawyers to identify all lawyers who stated that they engaged in the requested practice area in the requested geographic locale, and selected a lawyer meeting those criteria in the order in which the lawyers had registered with the service – meaning "the first lawyer to register gets the first lead; second lawyer gets the second lead, etc." N.Y. State 1131 ¶ 1.

12.   Based principally on the service's use of "neutral" and "mechanical" factors, we concluded that the lawyer matching service described in N.Y. State 1131 did not violate the prohibition against paying for a recommendation, which is the core tenet of Rule 7.2(a). We reasoned:

> ... [T]o "recommend also includes identifying a particular lawyer or lawyers to a potential client as "a right" or "the right" lawyer for the client situation after an analysis of either the potential client's legal problem or the lawyer's qualifications to address that problem. We believe identifying "a right" or "the right" lawyer implies some qualitative comparative assessment of the lawyers available to perform the services the potential client requires.
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> We believe that the Service would not constitute a "recommendation" as long as the Service's advertising does not state or imply that the Service is making a recommendation and makes clear that (i) being included on its list of participating lawyers requires only a payment and the Service does not vet the qualifications of such lawyers, other than, for example, confirming the lawyer's good standing with the licensing authority, if that is the case, (ii) the Service's selection of a participating lawyer from that list is the result of a neutral process that involves no evaluative judgment, and (iii) when a lawyer is chosen by the Service, it does not mean the selected lawyer is the "best" or "right" lawyer for the client's needs or that the lawyer is otherwise preferred over other lawyers. If these three conditions are met, a layer's payment to the Service to participate in its matching service as a lawyer available to contact potential clients is permissible under Rule 7.2(a).

N.Y State 1131 ¶¶ 20-21.

13. We reached a different conclusion, however, in N.Y. State 1132 (2017), where we concluded that the online lawyer matching service operated by Avvo Legal Services ("Avvo") had crossed the line from a permissible marketing service to an impermissible payment for a recommendation in violation of Rule 7.2(a).

14. We noted in N.Y. State 1132 that Avvo gave each participating lawyer a rating that was advertised as helping a potential client "quickly assess a lawyer's background." The rating was scaled from 1 to 10 and calibrated in one-tenth increments, suggesting to the committee a degree of "mathematical precision." N.Y. State 1132 ¶ 27. Avvo advertisements also stated that the model developed to calculate each lawyer's rating "was developed with input from hundreds of attorneys, thousands of customers and many other legal professionals who deeply understand the work attorneys do" and that the rating "enables a potential client to find 'the right lawyer' . . . for their needs," N.Y. State 1132 ¶ 28.

15. Here, the online service that matches lawyers with potential clients to fight tickets has many characteristics similar to the factors that drove our conclusion in N.Y. State 1132 that Avvo's online lawyer matching service violated Rule 7.2(a). Conversely, the matching service has few of the characteristics that led us to approve the online lawyer matching service at issue in N.Y. State 1131. Specifically, the online service here matches the potential client with an attorney based on factors that include attorney success rate, response rate, and customer service rating. The website states that the potential client is not just matched to any lawyer, but to an "experienced traffic attorney" with a "great track record in the court where the ticket will be contested." The service also states that it has collected data and knows which lawyers are successful and which are not in each court served.

16. The online lawyer matching service here in issue plainly strives to give potential clients the impression that it has selected the "best" or "right" lawyer for the potential client's matter, and that the lawyer selected is preferred over other candidates in the service's database. Based on these express and implied representations, the service appears to vouch for a matched lawyer's credentials, competence and effectiveness, making the communication a prohibited recommendation. Accordingly, under Rule 7.2(a), the inquirer's payment for participation in the online service would constitute a prohibited referral fee, not a permitted marketing fee.

17. Beyond the violation of Rule 7.2(a), two additional ethical concerns arise. First, would the inquirer's participation in the online service result in improper fee sharing with a non-lawyer under

Rule 5.4(a)? Second, would participation in the online service violate the inquirer's duty under Rule 7.1(a) not to participate in the use or dissemination of advertisements containing statements or claims that are false, deceptive or misleading? *See* Rule 7.2, Comment [1] (lead generator's communications must be "consistent with" Rule 7.1). Because we conclude that the inquirer's participation in the online matching service violates Rule 7.2(a), we do not need to address these additional concerns now.

CONCLUSION

18.   A lawyer may not participate in an online lawyer-client matching service that vouches for the lawyer's credentials, competence and effectiveness and recommends the lawyer as the "best lawyer" for the needs of the potential client. Accordingly, a lawyer participating in such a lawyer matching service would violate Rule 7.2(a).

(26-20)