

COMMITTEE ON ATTORNEY ADVERTISING

Appointed by the Supreme Court of New Jersey

OPINION 43

Committee on Attorney Advertising

**Internet Advertising, Misleading Content,
and Impermissible Referral Services**

The Committee on Attorney Advertising received a grievance regarding an Internet attorney-client matching company (“Internet company”) with which fifteen (15) New Jersey attorneys were participating. The attorney respondents and the Internet company submitted a response to the allegations set forth in the grievance. Recognizing that the rules in New Jersey on Internet advertising may not be clear, the Committee hereby addresses the grievance by issuing an advisory opinion. The Committee finds that the Internet website is not an impermissible attorney referral service but it is misleading, in violation of *Rule of Professional Conduct 7.1(a)*. New Jersey attorneys may not participate in advertising that is misleading.

The Internet company offers a group of websites concerning bankruptcy. The websites include general information about what debts may be discharged and the difference between a chapter 7 and chapter 13 bankruptcy, and offers to connect visitors to the website (“Users”) with a bankruptcy attorney. Respondents stated that the company takes actions to ensure that its websites have a high ranking on various Internet search engines (“search engine optimization”).

The Committee focused on one specific website with which the New Jersey attorneys were participating. Attorneys who participate in this website pay for the exclusive rights to a geographical area, by zip code. When a User seeking an attorney provides his or her zip code and contact information, the website will identify the sole participating attorney for the pertinent geographical area.

The website does not inform the User that the search for a bankruptcy attorney is completed the moment he or she inputs a zip code. Rather, the website home page invites the User to “get a free evaluation from a local bankruptcy attorney” by filling out a form. The website states that “step 1 of 5” for the free evaluation is to provide the User’s zip code and select a reason for considering bankruptcy. The website explains that the User must provide the zip code because “the law varies from state to state.”

The User enters the zip code and the next screen – step 2 of the “free evaluation” – appears, seeking information about bills and monthly expenses. Step 3 of this “free evaluation” asks about what assets the User owns, step 4 asks about income, and step 5 requests the User’s contact information. While only the zip code box in step 1 and parts of the contact information in step 5 have a little red asterisk indicating “required information,” the sequential steps seeking what any consumer would feel is pertinent information for the promised “evaluation” appear to be necessary.

The website contains a lengthy, 16-sentence disclaimer at the bottom of the home page that the site is a lawyer advertisement, not a referral service, and the company is not making an attorney recommendation. The 5th sentence of this 16-sentence disclaimer states that “[t]he sole basis for the inclusion of the participating lawyers or law firms is the payment of a fee for exclusive geographical advertising rights.” This convoluted “legalese” means, in plain English,

that only one participating attorney is offered per geographical area, though the translation from “legalese” to plain English is unlikely to be grasped by most consumers. At the bottom of the page there also is a link to “terms and conditions,” a many-page document with other disclaimers. The website does not make representations about the quality or suitability of participating attorneys. It merely offers Users the opportunity to “connect with a local bankruptcy attorney for a free case evaluation.”

A list with the names of all New Jersey attorneys participating in the website is not easy to find. The link for “find office locations of bankruptcy attorneys” and “New Jersey attorneys” did not reveal a list of participating attorneys in New Jersey. The only information under “New Jersey attorneys” in April, 2011, when the Committee sought to find a list of names, was “Passaic Bankruptcy Attorney,” “Newark Bankruptcy Attorney,” or “New Jersey Bankruptcy Attorney.” When those links are clicked, the respective website page states that a “Passaic bankruptcy attorney,” “Newark bankruptcy attorney,” or “New Jersey bankruptcy attorney” is ready to discuss the case and directs the User to enter the zip code to begin the “free evaluation.”

The list of New Jersey participating attorneys can be accessed only by focusing on these two sentences in the 16-sentence disclaimer at the bottom of the home page: “An attorney responsible for the content of this Site is [out-of-state attorney name], licensed in Illinois with offices at [street address], Chicago, Illinois 60602. To see the attorney in your area who is responsible for this advertisement, please [click here](#).” When the User clicks on the “click here” link, a list of over 400 names and addresses of nationwide participating attorneys pops up, sorted by state. Hence, the list of New Jersey participating attorneys is accessed solely by clicking to find out “the attorney in your area who is responsible for this advertisement” then scrolling down the list for New Jersey attorneys. It is not accessed by clicking on more prominent links, such as

the link for “Bankruptcy Lawyers,” “Find a Bankruptcy Lawyer,” “Bankruptcy Lawyers by State,” “New Jersey,” or any link under the heading “Filing Bankruptcy in New Jersey.”

The Internet company charges participating attorneys a monthly fee that is adjusted upward or downward based on how many Users enter information and are put in contact with participating attorneys. As a result, attorneys pay a certain dollar amount per contact.

Rule of Professional Conduct 7.2(c) provides in relevant part:

A lawyer shall not give anything of value to a person for recommending the lawyer’s services, except that: (1) a lawyer may pay the reasonable cost of advertising or written communication permitted by this Rule; . . . and (3) a lawyer may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.

A “not-for-profit lawyer referral service” is defined as a “lawyer referral service operated, sponsored, or approved by a bar association.” *RPC 7.3(d)*. The Internet company is not operated, sponsored, or approved by a bar association. A “legal service organization” is defined as a legal aid office or public defender office; a military legal assistance office; a lawyer referral service operated by a bar association; or a bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries that has registered as such with the New Jersey Supreme Court. *RPC 7.3(e)*. The Internet company does not meet any of these definitions.

Rule of Professional Conduct 7.3(d) provides:

A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure the lawyer’s employment by a client, or as a reward for having made a recommendation resulting in the lawyer’s employment by the client except that the lawyer may pay for public communications permitted by *RPC 7.1* and the usual and reasonable fees or dues charged by a lawyer referral service operated, sponsored, or approved by a bar association.

Accordingly, the *Rules* prohibit an attorney from giving anything of value to a person for recommending the lawyer's services, or compensating or giving anything of value to a person or organization to secure the lawyer's employment by a client or as a reward for having made a recommendation resulting in the lawyer's employment by a client. *RPC 7.2(c); RPC 7.3(d)*. Both of these *Rules* provide that attorneys may, however, pay the reasonable cost of advertising or public communication. The question, then, is whether the payments made by participating attorneys to the Internet company are for the reasonable cost of advertising. If the website is considered an impermissible attorney referral service and not mere advertising, New Jersey attorneys may not participate.

The Committee first considered whether a legal marketing scheme is an impermissible attorney referral service in CAA Joint Opinion 6 / ACPE Opinion 645, 126 *N.J.L.J.* 894 (October 4, 1990). A private company devised a marketing scheme inviting prospective clients with specific types of legal issues to telephone a toll-free number and receive a referral to an attorney. The advertisement stated that calls would be screened by a "trained paralegal" and forwarded to "experienced" attorneys. The Committees found that the marketing scheme was an impermissible referral service and New Jersey attorneys may not participate.

The Committee returned to the issue two years later, in CAA Opinion 13, 132 *N.J.L.J.* 267 (October 5, 1992), 1 *N.J.L.* 1588 (October 12, 1992). The Committee considered three marketing schemes, one involving a company offering a "talking yellow pages" funneling consumers to a toll-free telephone number, the second involving a company running a television advertisement and toll-free telephone number, and the third involving a cooperative advertising plan where attorneys advertise "under a common banner." The Committee found that the first

two schemes were impermissible referral services but the third scheme may be permissible because it merely presented information about participating attorneys. The Committee added that the cooperative advertising plan must include a disclaimer that it is paid advertising and not a referral service.

Opinion 13 set forth three factors for distinguishing between impermissible referral services and advertising. The first factor is whether the marketer limits access to information or whether, like a “Yellow Pages” directory, the entire list of participating attorneys is available to the consumer. The Committee noted that even when the entire list of participating attorneys is scrolled on a television advertisement, if it is scrolled at rapid speed, retention of the information is unlikely and access to the information is considered limited. The second factor is whether the marketer, explicitly or implicitly, guides consumers to a specific attorney. In contrast to directories such as “Yellow Pages,” a referral service “is a directing intermediary, not just an encounter between the consumer and the passive information made available by the attorney.” The Committee noted that such directive conduct “tends to invite from the consumer a sense of reliance.” The third factor is whether the marketer serves a public purpose (providing information about attorneys or putting people in touch with attorneys) or primarily a commercial purpose.

The following year, the Committee supplemented Opinion 13, 133 *N.J.L.J.* 652 (March 1, 1993), 2 *N.J.L.* 353 (March 8, 1993), again in the context of a television advertisement with a toll-free telephone number. The advertisement displayed the names and addresses of participating attorneys in a way that could be retained; the names were not scrolled and they appeared on screen for an adequate period of time. While the callers to the toll-free number were “guided” to a specific participating attorney by geographical area, the advertisement informed

the callers that they would be sent to the attorney who paid to participate in that area. The Committee found that the advertisement clearly disclosed that calls were directed to the participating attorney – “not necessarily the ‘right’ attorney.”

Lastly, in 2005, the Committee issued an opinion concerning a website run by a private marketing company on which an attorney’s own webpage would be listed. Opinion 36, 182 *N.J.L.J.* 1206 (December 26, 2005), 15 *N.J.L.* 48 (January 2, 2006). The attorney purchased the rights to receive an exclusive listing for a particular county and a specific practice area. The Committee noted that consumers may be misled into believing the website “was other or more than simply a paid advertisement, and carried greater weight,” and that such a consequence “would appear more likely when only a very limited number of lawyers are listed for a particular geographical, subject matter or other defined area.” The Committee concluded that a prominent disclaimer on the website that all attorney listings are a paid advertisement and not a referral or endorsement would rectify consumer confusion.

The Committee’s prior opinions focused on the accuracy and sufficiency of information provided to consumers. Marketers who claimed to find the “right” attorney for consumers, who asserted that they will provide an attorney suitable for the consumer’s legal needs, or who misled consumers (by commission or omission) as to the basis for the selection of an attorney were considered to be impermissible referral services.

Applying these factors to the Internet company website at issue, the Committee finds that the website limits access to information, both by permitting only one attorney to participate per geographical area and by burying the list of participating attorneys. The website also guides Users to a specific attorney, the attorney who has purchased the exclusive rights based on geographical area. The “5 step free evaluation” language implies that something more than just a

match between zip codes is occurring, inviting reliance by the User on the website. Lastly, while the website provides useful information about general bankruptcy topics, the Committee finds that its primary purpose is commercial, to generate profit from fees paid by participating attorneys.

While the limited access to information and directive conduct support a finding that the website is a referral service rather than advertising, the Committee recognizes that further consideration is required. The website does not vouch for the qualifications of the participating attorneys, does not claim to find the “right” attorney, and does not purport to assess Users’ legal needs. It does, however, imply that the selection of participating attorneys is based at least in part on an evaluation rather than on the User’s zip code. As the Committee found in Opinion 36, if sufficient information is clearly imparted to a consumer, the consumer should be able to differentiate between an attorney referral service and a commercial enterprise designed to publicize attorneys practicing in a certain field. The Committee finds that the Internet company website is not an impermissible referral service provided it supplies additional information regarding the basis for selection of attorneys and addresses the other concerns discussed below.

This decision is generally consistent with other jurisdictions’ review of this type of Internet advertising. Arizona, Washington, Kentucky, and New York have found that websites are referral services when they purport to evaluate the needs of the User to match the User to the attorney, or vouch for the qualifications of the participating attorneys.¹ Texas and Ohio have

¹ Arizona Opinion 06-06 (September 2006) (website that matches Users with attorneys based on geographical areas and practice areas, vouches for the qualifications of participating attorneys, provides a satisfaction guarantee, claims to assist Users find the “right lawyer,” and limits participation by attorneys based on geographical and practice areas is a referral service); Washington State Bar Association Advisory Opinion 2106 (2006) (website that screens Users’ legal issues and forwards the inquiries to “qualified” participating attorneys is a referral service); Kentucky Bar Association Ethics Opinion E-429 (June 17, 2008) (website that requires User to provide extensive information and purports to assess the needs of the client and match the client with a specific lawyer is a referral service; when marketers limit the number of participating attorneys, without an appropriate disclaimer, the arrangement “may

found websites to be advertising rather than referral services when sufficient information is presented to the User and the websites make no assertions about the qualifications of the participating attorneys.² South Carolina takes a different view, finding that any website that restricts attorney participation is an impermissible referral service and not advertising.³

Attorney advertising cannot be misleading or omit operative facts. Misleading communications are prohibited by *Rule of Professional Conduct 7.1(a)*. The Committee finds that the Internet company website does not provide sufficient information to the User and is misleading.

Websites that direct Users to only one attorney based on the purchase of exclusive rights to geographical areas are suspect. To avoid misleading consumers, the methodology for the selection of the attorney's name must be made clear, including the fact that the website limits participation to one (paying) attorney per geographical area. The website must inform the consumer in plain language that the "local bankruptcy attorney" name provided to the User is based solely on the zip code provided and not by any evaluation. This information cannot be countermanded by contrary statements, like the suggestion that the zip code is necessary only

mislead the client into believing that there is an evaluative process being conducted when in fact there is not"); New York State Bar Association Committee on Professional Ethics Opinion 799 (September 29, 2006) (website is referral service if it exercises discretion but it is advertising if it transparently permits the prospective client to operate the various filters and make a choice for him or herself).

² Supreme Court of Texas Professional Ethics Committee Opinion 573 (July 2006) (website is advertising if the selection of attorneys is computer-automated with no exercise of discretion, it makes no assertions about the quality of the lawyers included, it informs Users what the limitations on the number or qualifications of participating attorneys are, and it does not unreasonably limit or restrict the number of lawyers that may participate in a given geographical area or legal practice area); Ohio Board of Commissioners on Grievances and Discipline Opinion 2001-2 (April 6, 2001) (website permits participating attorneys to purchase exclusive rights to contacts by Users from selected zip code areas, and if the website "perform[s] only the ministerial function" of placing the attorney's name and related information into view, the website is an advertisement – "unless the context suggests otherwise").

³ South Carolina Ethics Advisory Opinion 01-03 (2001).

because “the law varies from state to state” or the implication that a financial evaluation is required to identify the participating attorney.

The phrase “free evaluation” in the five-step portion of the website that will “connect” the User to a participating attorney connotes a nuanced, fact-specific consideration of the User’s financial condition and is misleading. Inputting the requested information does not result in an evaluation, it results in the User reaching the fifth screen and clicking “submit” with his or her zip code and contact information, thereby triggering the identification of the participating attorney.

Further, all requirements for attorneys to participate in the website must be clearly specified; a full list of participating attorneys must be readily accessible; and the website must inform the User that attorneys have paid a fee to participate. The language “attorney advertisement” or “not an attorney referral service” does not impart sufficient information to the User though this language must still be prominently displayed on the website.

A website may limit attorney participation in various ways, such as by requiring attorneys to have practiced a certain number of years or to maintain a certain level of malpractice insurance. Websites may state that the participating attorneys meet these requirements but must refrain from making statements vouching for the quality of the participating attorneys or comparing participating attorneys to other attorneys.

The question remains whether the payments made by participating attorneys to the Internet company are permissible. The company charges participating attorneys a fee per “contact” or referral of potential clients to the attorney.

Rule of Professional Conduct 7.2(c) permits attorneys to pay the “usual fees” for advertising. In Internet advertising, “pay-per-click,” where the fee is based on the number of clicks or “hits” on the website link, has become a common model for advertising charges. *See* www.en.wikipedia.org, “Pay-per-click.” As one legal commenter states:

[P]ayments computed on the basis of a number of times that the viewer of a Web-based ad “clicks through” to a particular page or site should be permissible, if not linked to the actual establishment of client-lawyer relationships and if the method of computation is analogous to what is done in the marketing of goods and services other than legal services.

[*The Law of Lawyering*, Geoffrey C. Hazard, Jr., W. William Hodes, Peter R. Jarvis (3d ed. 2011), Section 56.5, page 56-09.]

The fee scheme imposed by the Internet company here is “pay-per-lead,” a payment for each contact form the website sends to a participating attorney. The payment is based only on the contact, not on the retention of the attorney by the client or the establishment of an attorney-client relationship.

The Committee hereby decides that attorneys are not flatly prohibited from paying “per-lead” Internet advertising charges provided the marketing scheme is advertising and not an impermissible referral service. Just as “pay-per-click” has become more prevalent in the Internet advertising community, “pay-per-lead” or “pay-per-contact” for Internet advertising is likely to become a more common model due to its inherent reward for effective advertising.

In sum, the content and operation of Internet advertising websites must not be misleading. Internet websites must make the methodology for the selection of the attorney’s name clear, especially if the website limits participation of attorneys by geographical area or

practice area. If participation is limited, all requirements for attorneys to participate in the website must be specified. Websites may state that the participating attorneys meet these requirements but must refrain from making statements vouching for the quality of the participating attorneys or comparing participating attorneys to other attorneys. Internet websites must make a full list of participating attorneys readily accessible. Websites must provide this information to consumers in plain language, not convoluted “legalese.” Such information cannot be countermanded or undermined by contrary statements or suggestions. The language “attorney advertisement” and “not an attorney referral service” must still be prominently displayed on the website.

The Committee finds that the Internet company website is advertising and not an impermissible referral service. The website, however, is misleading, in violation of *Rule of Professional Conduct 7.1(a)*. Attorneys are responsible for the language and methods of websites on which they advertise. A New Jersey attorney who participates in a website that is misleading violates *Rule of Professional Conduct 7.1(a)*.