

KENTUCKY BAR ASSOCIATION

Ethics Opinion KBA E-429

Date: June 17, 2008

Subject: Participation in for-profit group marketing

Question I: May a lawyer participate in a for-profit group marketing arrangement where prospective clients are provided information about lawyers through an 800 number or an internet website?

Answer: Qualified yes, so long as the arrangement complies with the Advertising Rules and does not function as a for-profit lawyer referral service. See discussion below.

Question II: May a lawyer pay reasonable costs to participate in a for-profit group marketing arrangement?

Answer: Qualified yes. See discussion below.

Question III: If a lawyer participates in for-profit group marketing, is the lawyer responsible for assuring that the advertisement complies with the requirements of the Kentucky Rules of Professional Conduct.

Answer: Yes

References: SCR 3.130 - Rule 5.4; 7.01 - 7.06; 7.09-7.50; 8.3; KBA E-427; KBA E-428; NY State Ethics Op. 799 (2006); Va. Ethics Op. A-0117 (2006); WA. Inf. Op. 2106 (2006); S.C. Ethics Adv. Comm. Op. 01-03 (2001).

Introduction

The KBA Ethics Committee has been asked to opine on the ethical propriety of various group marketing arrangements, specifically those that provide prospective clients with information about participating lawyers through the internet or an 800 telephone number. Before beginning a discussion of group marketing, it should be noted that the Attorneys' Advertising Commission (AAC) has jurisdiction over lawyer advertising under SCR 3.130 (7.01-7.06). Rule 7.05 provides that all advertisements must be submitted to the AAC not later than the publication date of the advertisement. The AAC reviews advertisements and may issue advisory opinions to individual lawyers. As in the past, however, when specific advertising arrangements raise ethical questions beyond the

advertising rules, the Ethics Committee will address the ethical implications of those arrangements.¹

It would be virtually impossible to address the specific details of each and every conceivable group marketing model. It is, however, possible to describe some of the more common features of these models and address the most frequent challenges and pitfalls a lawyer may face.

Most of the group marketing models have several common characteristics. They are all sponsored by for-profit entities² and the lawyer pays a fee to participate. In addition, the initial advertisement, whether it is in the newspaper, on television or on the internet, is generic in nature; it usually does not promote an individual lawyer. Only after the prospective client makes an initial contact with the group marketer, either through an 800 number or over the internet, does the prospective client receive more individualized information about one or more specific lawyers. Some group advertisements are targeted at anyone who might need a lawyer, while others target those with specific needs, such as those who have been charged with a crime or have been injured in an accident. As the following discussion indicates, the marketer's level of involvement in analyzing the problem and identifying a specific lawyer may vary substantially. At one end of the spectrum, there are marketing arrangements designed so that the prospective client inputs certain demographic information, such as a zip code or type of practice needed, and a list of participating lawyers is provided. The list may include an internet link to each lawyer's webpage or provide a way to contact the participating lawyers. It is up to the client to evaluate the information about the lawyers and decide which, if any, to contact. At the other end of the spectrum is the arrangement where the prospective client provides considerable detail about his or her needs; the marketing organization then evaluates the client's needs and selects one or more lawyers from its participating members. The organization may represent that it is evaluating the needs of the client and the qualifications of the lawyer, thereby providing the prospective client with the best "match."

Discussion

As this Committee has noted previously,³ the Rules of Professional Conduct were not designed to specifically address many of the issues that arise in an age of advanced technology and sophisticated marketing schemes. Nevertheless, despite the many changes in the profession and the way in which we communicate, the underlying values and principles of the profession remain unchanged – lawyers must protect their clients and the public. These principles are reflected in the Rules of Professional Conduct in various ways, but those most relevant to group marketing are as follows:

¹ For example, KBA E-427 (2007) dealt with the ethical implication of domain names and KBA E-428 (2007) dealt with not-for-profit lawyer referral services.

² Participation in not-for-profit lawyer referral services is specifically authorized by Rule 7.20 and KBA E-428 (2007) addresses compensation arrangements with not-for-profit bar associations.

³ KBA E – 427 (2007).

- A lawyer may not use a third party to do that which the lawyer is prohibited from doing under the Rules of Professional Conduct. Rule 8.3(a).⁴
- Communications regarding the lawyer’s services cannot be false, deceptive or misleading. Rule 7.15.⁵
- A lawyer may not give anything of value to a non-lawyer for recommending the lawyer, except that the lawyer may pay the reasonable cost of advertising. Rule 7.20(2).⁶
- A lawyer may not share a fee with a non-lawyer. Rule 5.4.⁷

It is against the backdrop of these principles that we will evaluate the propriety of group marketing.

Participation in Group Marketing

It is the view of the Committee that there is nothing inherently unethical about two or more lawyers pooling their financial resources in order to maximize the effectiveness of marketing, as long as those lawyers follow the applicable Rules of Professional Conduct. Each participating lawyer remains responsible for assuring that marketing arrangements comply with the Rules of Professional Conduct, even where the advertisement and the underlying arrangements are controlled by a third party.⁸ Issues of compliance with the Advertising Rules, including those which prohibit communications that are false, deceptive or misleading,⁹ fall within the jurisdiction of the Advertising Commission, but will be mentioned briefly. For example, it would be a violation of the rules for the

⁴ Rule 8.3(a) provides:

It is professional misconduct for a lawyer to:

- (a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

⁵ Rule 7.15 provides:

A lawyer shall not make a false, deceptive or misleading communication about the lawyer or the lawyer’s service. A communication is false, deceptive or misleading if it:

- (a) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading; or
- (b) Is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law; or
- (c) Compares the lawyer’s services with other lawyers’ services, unless the comparison can be factually substantiated.”

⁶ Rule 7.20(2) provides:

A lawyer shall not give anything of value to a non-lawyer for recommending the lawyer’s services, except that a lawyer may pay the reasonable cost of advertising or communication permitted by this Rule.”

⁷ Rule 5.4 provides, in part:

- (a) A lawyer or law firm shall not share legal fees with a nonlawyer....

⁸ See note 4 for text of Rule 8.3, which prohibits a lawyer from circumventing the rules through the acts of another.

⁹ See note 5 for text of Rule 7.15, which prohibits the use of false, deceptive or misleading advertising.

marketing organization to state or imply that it “selects” attorneys based on experience and training, when, in fact, the attorney’s selection is based upon payment of a participation fee. Likewise, ads that promote a participating lawyer as “specialist” in a particular area violate the rules.¹⁰ In addition, all advertisements must contain the name of at least one lawyer or law firm, licensed in Kentucky, responsible for the content.¹¹ As with any communication promoting the lawyer, group advertisements must be submitted to the Attorneys’ Advertising Commission. Any changes must be submitted as well. These purely advertising issues are mentioned here because they often present the biggest challenges to participation in group marketing arrangements. In addition to the advertising issues, there are other ethical challenges to this type of arrangement and the balance of this opinion will focus on the non-advertising issues, specifically whether the arrangement is, in reality, a for-profit referral service rather than advertising and whether the payment arrangement between the lawyer and the service provider is permissible.

Much of the debate over group marketing has focused on whether the marketing arrangement is just another type of advertising or is really a for-profit referral service. Whether a particular arrangement falls in one category or the other will depend upon a careful analysis of the facts. For example, some internet group marketing arrangements are merely directories, similar to the lawyer advertisements in the Yellow Pages, except that the prospective client may be able to narrow the search by locality or area of practice. But even some traditional directories, authorized under the advertising rules, have similar features. Some 800 number ads in newspapers and on television are also similar to the directories described above. The prospective client may provide minimal information about the type of lawyer sought and the locality, and the operator provides the caller with names of participating lawyers. The operator does not analyze the prospective client’s needs or the qualification of the particular lawyers, but merely passes on information about participating lawyers. It is the Committee’s view that a group marketing arrangement that provides directory services, such as those described above, is a type of advertising contemplated by the rules¹² and can be structured in such a way so as to comply with the Rules of Professional Conduct.

Other group marketing arrangements have characteristics of for-profit lawyer referral services. For example, some group marketing arrangements require the prospective client to provide extensive information about the client’s needs. In some cases, third parties purport to analyze the needs of the client and match the client with a specific lawyer. This

¹⁰ Rule 7.40 provides, in part:

A lawyer may communicate the fact that the lawyer does nor does not practice in particular fields of law. ... Any such advertisement or statement shall e strictly factual and shall not contain any form of the words “certified”, “specialist”, “expert”, or “authority.” A lawyer shall not state or imply that the lawyer is a specialist ... (*exceptions omitted*).

¹¹ Rule 7.20 (3) provides:

Any communication made pursuant to these Rules shall include the name of at least one lawyer licensed in Kentucky, or law firm any of whose members are licensed in Kentucky, responsible for its contents.

¹² Rule 7.02 provides the definitions for the Advertising Rules. Rule 7.02(1) provides:

For the purposes of Rule 7, the following definitions shall apply:

(1) “Advertise” or “advertisement” means to furnish any information or communication containing a lawyer’s name or other identifying information... (*exceptions omitted*).

arrangement goes beyond the mere pooling of financial resources of group advertisers. The participating lawyer is paying a fee for a specific referral, something that is prohibited by Rule 7.20(2). Once the advertising organization becomes actively involved in screening cases and matching prospective clients to specific lawyers, the arrangement functions as a lawyer referral service, which the rules prohibit, except when it is a non-profit organization.¹³ The Committee agrees with the substantial number of jurisdictions that have addressed this issue and concluded that such arrangements are unethical. NY State Ethics Op. 799 (2006); Va. Ethics Op. A-0117 (2006); Wa. Inf. Op. 2106 (2006); S.C. Ethics Adv. Comm. Op. 01-03 (2001).

Finally, the Committee understands that some group marketing arrangements limit the number of lawyers who may participate in a particular field or geographic area so as to assure that the participating lawyers will not be competing with other lawyers for the clients who contact the service. Without an appropriate disclaimer, such an arrangement may mislead the client into believing that there is an evaluative process being conducted when in fact there is not. This would violate the prohibition on false, deceptive or misleading advertisements. Further, it is the Committee's view that, by limiting the number of participants in this way, the service is in effect directing prospective clients to a particular lawyer, thus violating Rule 7.20(2) in the same way that the matching process described above violates the rule.

Payment for Group Marketing

The Rules of Professional Conduct prohibit a lawyer from paying a non-lawyer for recommending his or her services, but the rule authorizes a lawyer to "pay the reasonable costs of advertising or communications permitted by [the] rule." Rule 7.20(2). Most group advertising arrangements require the participating lawyer to pay some kind of enrollment fee, and/or a monthly or yearly fee. The arrangement is not substantially different than the arrangement with the print advertiser who charges a set-up fee of some kind, and then charges another fee for the specific time that the advertisement runs. As long as the advertising costs are reasonable, there is nothing unethical about this type of compensation arrangement.

The compensation issue becomes more complicated if the advertising fee paid by the lawyer is based in whole or in part on the presumed or real economic benefit to the lawyer. For example, some sponsors of internet group advertising charge the lawyer based the number of "hits" to the website or link. Others may charge on the basis of the number of referrals, clients represented or fee generated.

As the Committee understands the system based on "hits," the lawyer is charged each time a potential client accesses a particular website or link. The question is whether such a fee structure is payment for a referral, which is prohibited under Rule 7.20(2), or is the

¹³ According to the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral & Information Service, a referral service is an entity that helps potential clients determine if a problem is truly of a legal nature by screening inquiries and, where appropriate, providing an unbiased referral to an attorney who has experience in the area of law appropriate to the potential client's needs.

payment the reasonable cost of advertising, which is permitted under the same rule. The Committee is of the view that “hits” do not constitute “referrals” within the meaning of the Rules. Calculating the cost of advertising based on the number of viewers of the ad (hits) is no different than basing advertising charges on newspaper circulation or television viewership. Once the prospective client has viewed the information, he or she makes an independent decision whether to contact the lawyer. A “hit” does not necessarily result in employment or even contact with the lawyer. Charging based on “hits” is merely a method of calculating viewership. It is the Committee’s view that payment of reasonable costs for advertising based on the number of hits is consistent with the rules which permit a lawyer to pay the reasonable cost of advertising. This conclusion is consistent with opinions in other jurisdictions, including a recent opinion out of South Carolina. S.C. Ethics Advisory Opinion 01-03 (2001).

While compensation arrangements based “hits” may be permissible, most other arrangements based on presumed or actual economic benefit are highly suspect. For example, if the group advertising organization becomes active in directing potential clients to a specific lawyer and then charges the lawyer a fee for a specific referral, then the arrangement violates Rule 7.20, which prohibits the lawyer from paying for referrals. As the Comments to the Rule observe, “[a] lawyer is allowed to pay for advertising permitted by this Rule, but otherwise is not permitted to pay another person for channeling professional work.” Once the group marketing organization becomes actively involved in matching or referring clients, it ceases to be advertising and a lawyer may not give anything of value for that service. See, New York State Bar Association Committee on Professional Ethics, Opinion Number 799 (2006); South Carolina; SCR 3.130 - Rule 5.4; 7.01 - 7.06; 7.09-7.50; 8.3; KBA E-427; KBA E-428; NY State Ethics Op. 799 (2006); Va. Ethics Op. A-0117 (2006); WA. Inf. Op. 2106 (2006); S.C. Ethics Adv. Comm. Op. 01-03 (2001). Also problematic is the compensation system that is tied to the fee that is earned in a referred case. In addition to the fact that it is payment for the referral, which is prohibited under the Rules, it also is fee splitting with a non-lawyer, which is likewise prohibited under Rule 1.5(e).

Lawyer’s Responsibility for Group Marketing

Rule 8.3 provides that “[i]t is professional misconduct for a lawyer to violate ... the Rules of Professional Conduct ... through the acts of another.” Thus, lawyers who participate in group marketing arrangements are responsible for the content of the advertisements and methods employed in promoting their services. Lawyers who rely on marketing organizations to promote their professional services must thoroughly investigate the practices of the organization to assure that they comply with all of the applicable Rules of Professional Conduct.

Conclusion

Group advertising represents just one of many new marketing arrangements that have been developed in recent year. While such arrangements may be attractive to lawyers in promoting their services, lawyers must be careful to assure that the arrangements comply with all of the Rules of Professional Conduct, including the Advertising Rules. The

lawyer is responsible for the content of all advertisements. He or she may pay the reasonable costs of advertising, but may not pay for client referrals. A lawyer may not participate in arrangements that are for-profit referral services.

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). Note that the Rule provides: “Both informal and formal opinions shall be advisory only; however, no attorney shall be disciplined for any professional act performed by that attorney in compliance with an informal opinion furnished by the Ethics Committee member pursuant to such attorney’s written request, provided that the written request clearly, fairly, accurately and completely states such attorney’s contemplated professional act.”