

## **I. ISSUE(S) PRESENTED**

What legal ethics regulations and standards must a California lawyer consider when deciding whether to participate in a marketing program where consumers obtain an immediate, brief, limited-scope telephonic consultation with a lawyer selected by the program? If that program charges potential clients a flat fee for a limited scope of legal services that includes both the fee for legal services and the program's marketing fee, will the lawyer's participation run afoul of ethics rules and regulations?

## **II. DIGEST**

Rules 5.4 and 7.2 preclude a lawyer from paying for cases, whether by a division of fees or as separate payment for a case. Likewise, Business and Professions Code section 6152 precludes the use of runners or cappers in the solicitation or procurement of business for an attorney. Certified legal referral services are designed to facilitate the process of lawyer selection by identifying lawyers who meet minimum criteria. A lawyer's payment of a fee to a lawyer referral services that does not qualify under the State Bar Rules is a violation of Rule 5.4(a)(4), which prohibits a lawyer from paying a nonlawyer for recommending the lawyer's services.

A lawyer-client relationship initiated via a third-party introduction does not relieve the lawyer of the responsibility of performing a conflict check pursuant to Rule 1.7. Where payments are made to a lawyer by a third party, the lawyer must obtain the client's informed written consent pursuant to Rule 1.8.6(c). Failing to obtain informed consent for third-party payments and commingling fees for legal services with "marketing fees" or other property is a violation of California's legal ethics regulations.

Rule 5.4 prohibits a lawyer or law firm from sharing fees directly or indirectly with an organization that is not authorized to practice law. Unethical fee-sharing results where a consumer pays legal fees directly to a third party, which holds and controls the fees until services have been completed, and which then splits the fee with a lawyer.

## **III. PRIMARY AUTHORITIES ADDRESSED**

California Business & Professions Code sections 6151, 6152, 6155, and 6157;  
California Rule of Professional Conduct Rule 5.4 (effective November 1, 2018);  
California Rule of Professional Conduct Rule 7.2 (effective November 1, 2018);  
California Rule of Professional Conduct Rule 7.3 (effective November 1, 2018);  
State Bar of California Rule 3.820.

## **IV. BACKGROUND FACTS**

Attorney is considering signing up with Company, an Internet-based marketing company ("Company"). Company is a for-profit business and is not an approved lawyer referral service pursuant to the California Rules of Professional Conduct or the Rules of the State Bar of California.

Company's business originally offered an online legal directory of lawyers that allowed clients, peers, and others to write reviews on listed lawyers that Company also numerically rated on a scale of one (worst) to ten (best) based on publicly-available information, reviews, and information provided by the individual lawyers.

Company offers a service that matches potential clients who need discrete and defined legal services with attorneys participating in Company's program. If Attorney signs up with Company, she may offer only the services Company lists, although she may choose which of those listed services to offer.

Company offers two different methods of matching lawyer and client.

***“Instant Connection” Mode***

In “instant connection” mode, consumers select an option on the Company website that connects them with the next available participating lawyer, who contacts the consumer within a few minutes for a 15-minute telephone conversation at a fixed cost. In “instant connection” mode, the participating lawyer is not identified by name, his or her Company profile is not available to the consumer, and the lawyer is selected for the consumer through the Company website based on the speed of the participating lawyer's response. Before the telephone call occurs, the consumer may provide information to the lawyer, including by uploading documents for the lawyer's review, but the lawyer selected by Company has no opportunity to conduct a conflict check before receiving such information.

***“Consumer Chooses” Mode***

In the “consumer chooses” mode, consumers can read Company profiles of lawyers, review the practice areas that the lawyers specify, and select a specific lawyer from the lawyers listed on the Company website. As with the “instant connection mode,” the consumer can provide information to the lawyer and upload documents for the lawyer's review. In this mode, the lawyer who the consumer selects must contact the consumer within one business day.

***Company's Compensation Business Model***

In either mode, the lawyers provide the services, including the 15-minute telephone call, for a fixed fee that Company determines. To initiate a call by a Company lawyer, the client remits the entire amount of the fixed fee to Company. When services are completed, Company deducts and retains a so-called “marketing fee” and pays the fixed fee to the lawyer. The marketing fee varies, depending on the nature of the service, but generally ranges between 20 and 30 percent of the fixed fee that the lawyers have agreed to.

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## V. DISCUSSION

California Rules of Professional Conduct 5.4(a) and (b)<sup>1</sup>, with some exceptions not applicable here, prohibit a California lawyer or law firm from “directly or indirectly” sharing legal fees with non-lawyers or an organization that is not authorized to practice law. This prohibition is broadly interpreted to apply to transactions between a lawyer and a non-lawyer and prohibits lawyers from paying for cases, whether that payment is a division of fees or a separate payment for a case. *Ibid*; see also *Cal. Bus & Prof. Code* § 6152 (the use of runners or cappers for any attorneys constitutes unlawful solicitation). This could include, without limitation, flat referral fees, a percentage of the amount earned, or some other form.

### A. Company’s Business Model Involves Unethical Compensation For Securing Lawyer’s Services

Rule 7.2(b) provides that “A lawyer shall not compensate, give, or promise anything of value to a person for the purpose of recommending or securing the services of the lawyer or the lawyer’s law firm . . .” Rule 5.4 stands for the proposition that attorneys may not split attorney fees with non-lawyers. When Rule 7.2(b) and 5.4 are read together, the scope of the prohibition is clearly much broader: an attorney may not pay for cases, whether that payment takes the form of a division of fees or a separate payment for a case. This ethical principle is also expressed in Business and Professions Code section 6152, which makes acting as a runner or capper a crime. Section 1651 defines a “runner” or a “capper” as “any person, firm, association or corporation acting for consideration in any manner or in any capacity as an agent for an attorney at law or law firm . . . in the solicitation or procurement of business for the attorney at law or law firm as provided in this article.”

Rule 7.2(b)(1), and Business and Professions Code section 6157, subdivision (d), acknowledge that lawyers may pay for advertising. But that advertising may not be to a specific person; it must be directed to the general public. Here, potential clients pay Company a “marketing fee” that is withheld from the amount paid to the lawyers. Although this is not expressly calculated as a percentage of the flat fee, it is proportional and generally equals 20 to 30 percent of the fixed fee the lawyer receives. The fee paid in either the “instant connection” mode or the “consumer chooses” mode is to deliver a specific client to the lawyer for a specific engagement. Because of the specific nature of the payment, this fee to Company does not fall within the exceptions set forth in Rule 7.2(b)(1) or Business and Professions Code section 6157(c) for fees or costs paid for advertisements.

New York State Bar Association Ethics Opinion 1132 analyzed a referral service with a business model similar to Company’s.<sup>2</sup> (See also New York State Bar Association Ethics

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<sup>1</sup> References to Rule mean the California Rules of Professional Conduct approved by the Supreme Court of California, effective November 1, 2018.

<sup>2</sup> Other jurisdictions have reached similar conclusions. (See, e.g., Supreme Ct. of Ohio Board of Prof. Conduct Opn. 2016-3; Penn. Bar Assn. Formal Opn. 2016-200; South Carolina Bar Ethics Advisory Opn. 16-06; New Jersey Supreme Court Advisory Committee On Professional Ethics opinion 732, Committee On Attorney Advertising 44, Committee On The Unauthorized Practice

Opinion 1131 [specifying the transparent and mechanical methods by which a lead can be generated, including that a service may not explicitly or implicitly recommend any lawyer].) The Opinion discussed that ratings given lawyers in that business model and the “satisfaction” guaranteed to users of the service meant that lawyers were paying for a recommendation from the service.

California legal ethics rules may not lead to the same conclusion as that contained in New York State Bar Association Ethics Opinion 1132 with respect to any guarantee of satisfaction that may be offered by Company. However, the New York Opinion is well-reasoned and sound, and California lawyers should be vigilant to ensure ratings and endorsements do not contain guarantees, warranties, or predictions regarding the result of representation in violation of Rule 7.1, including Comment [4] and Business and Professions Code section 6157.2(a).

Notwithstanding these concerns, Company’s business model is nonetheless problematic as an improper fee-splitting agreement. Attorney is paying Company for the cases Company refers. As such, the arrangement between Company and Attorney involves fee-sharing in contravention of Rules 7.2 and 5.4, as set out above.

#### **B. Company’s “Instant Connection Mode” is an Unauthorized Legal Referral Service**

The opening proviso of the Certified Lawyer Referral Services under State Bar of California Rules 3.800 through 3.829 states “An individual or organization that refers prospective clients to attorneys must comply with minimum standards and be certified by the State Bar of California as a lawyer referral service unless exempt by law.” Among other requirements, pursuant to State Bar of California Rule 3.801, a lawyer referral service must submit an Application for Certification as a Lawyer Referral Service that includes panel membership criteria. A certified lawyer referral service must meet minimum standards, as set forth in State Bar of California Rule 3.820 *et seq.*, which include having a governing committee, one or more panels of attorneys to provide legal services, and a staff to evaluate and process requests for legal assistance. Certified lawyer referral services must, *inter alia*, also serve its community and improve the quality and affordability of legal services, charge no fees that increase a client’s cost or that decrease the quantity or quality of services otherwise available to the client, tell each client how to submit a complaint about the service or one of its panel members, and fully cooperate with any State Bar audit. *See* State Bar of California Rules 3.820 (A)-(I).

Less sophisticated consumers of legal services may face daunting challenges in lawyer selection. Certified legal referral services are designed to facilitate that process by identifying lawyers who meet minimum criteria (see State Bar of California Rules 3.800-3.829). For this reason, paying registration, referral, or participation fees to a certified lawyer referral service does not violate the prohibition on splitting fees with non-attorneys as set out in Rule 5.4. (See

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Of Law 54 (Joint Opinion) [each concluding that fee structure similar to Company’s is improper fee-sharing with non-lawyers]; cf. Texas State Bar Opn. 573 [permissible to have legal matching services that follow criteria and do not carry out activities that constitute a prohibited solicitation or referral].)

also *Emmons, Williams, Mires & Leech v. State Bar* (1970) 6 Cal.App.3d 565, 569-570; San Diego Bar Ass'n Form. Opn. 1973-12). In contrast, a lawyer's payment of a fee to a lawyer referral service that does *not* qualify under the Rules of the State Bar of California is a violation of Rule 5.4(a)(4), which prohibits a lawyer from paying a nonlawyer for recommending the lawyer's services.

Business and Professions Code section 6155 governs the operations of a lawyer referral service. Subdivision (a) defines a referral service in expansive terms: "An individual, partnership, corporation, association, or any other entity shall not operate for the direct or indirect purpose, in whole or in part, of referring potential clients to attorneys . . ." Subdivision (c) enumerates arrangements that do not constitute a lawyer referral service:

(1) A plan of legal insurance as defined in Section 119.6 of the Insurance Code.

(2) A group or prepaid legal plan, whether operated by a union, trust, mutual benefit or aid association, public or private corporation, or other entity or person, which meets both of the following conditions:

(A) It recommends, furnishes, or pays for legal services to its members or beneficiaries.

(B) It provides telephone advice or personal consultation.

(3) A program having as its purpose the referral of clients to attorneys for representation on a pro bono basis.

Company's business model does not fall into any of the exceptions enumerated under section 6155, subdivision (c).<sup>3</sup> Consumers are not required to join to pay a membership fee to utilize the service, as in a legal insurance, group or prepaid legal plan, nor is its purpose the referral of clients to attorneys for representation on a pro bono basis.

Traditional legal directories and websites that list individual lawyers, law firms, and relevant, truthful information such as the lawyers' contact information are permissible communications concerning an attorney's availability for professional employment under Rule 7.2. They are not solicitations under Rule 7.3 and, moreover, empower consumers to make their own choices in selecting an attorney.

In contrast, Company's "instant connection" mode takes away the consumer's power of choice. Instead, that power is substituted by factors that Company determines to use, including, for example, the fortuitous speed of a lawyer's response to a call. So, Company is acting as a referral service and is subject to the requirements for such services.

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<sup>3</sup> Joint lawyer advertising is also separately discussed in section 6155, subdivision (h). However, that is not pertinent to these facts since Company is not a lawyer.

State Bar of California Rule 3.820 provides the minimum standards for lawyer referral services and promotes consumer choice as the key to defining the difference between permissible joint advertising and referral service activity. Although the facts do not address whether Company meets the requirements set out in State Bar of California Rules 3.800 through 3.829, it is possible that Company could satisfy these minimum standards. Regardless, because Company has failed to register as a referral service, lawyers may not directly or indirectly share fees with Company.

### **C. Company's Business Model Inhibits a Lawyer's Duty to Check for Conflicts**

A potential client's ability to transmit documents before a lawyer has been assigned means that the lawyer will see a potential client's documents even before performing a conflict check. A lawyer-client relationship initiated via a third-party introduction does not relieve the lawyer of the responsibility for complying with all of the lawyer's duties to existing clients, including checking for conflicts of interest with prospective clients to avoid a violation of Rule 1.7. Performing a conflict check as soon as possible is important so that lawyers do not place themselves in a position to be disqualified, and their clients in a position of needing to find replacement counsel.

In Company's "instant connection" or "consumer chooses" mode, an individual can send confidential documents to an attorney before a conflict check has occurred. This gives rise to the possibility that an actual conflict will arise. Moreover, as set out herein, in "instant connection mode" the telephone call with a prospective client occurs before the attorney has an opportunity to conduct a conflict check.

Failing to conduct a conflict check before reviewing a potential client's documents or speaking with a potential client results in the risk that a lawyer will violate the California Rules of Professional Conduct by accepting representation of a new client in a matter in which the interests of a current or former client potentially conflict.

### **D. Required Disclosures Are Not Contemplated by Company's Compensation Business Model and Clients Do Not Provide Informed Written Consent to Payments by a Third Party**

Rule 1.8.6(c) states that a lawyer shall not accept compensation for representing a client from one other than the client unless the lawyer obtains the client's informed written consent. Company's compensation business model requires a consumer to pay it a flat fee; Company then deposits the money into an account while a lawyer provides legal services and, once the lawyer has done so, Company then deducts its "marketing fee" and provides the lawyer with the fees that are due for those services. As a result, under this payment structure, Company makes a third-party payment to the lawyer for representing the consumer. Lawyer must therefore obtain the consumer's informed written consent before accepting payments from Company on behalf of the consumer. Lawyer must do this for each Company client. Attorney's failure to obtain informed written consent to this arrangement results in non-compliance with Rule 1.8.6(c).

### **E. Company's Compensation Business Model Constitutes Impermissible Fee-Splitting**

The principle that attorneys must not pay non-attorneys for cases is well-established. Bar Association of San Francisco Formal Opinion 1976-2 provides that it is ethically improper for an attorney to pay a referring organization a percentage of attorney's recovery on behalf of a client pursuant to an agreement between a referring organization and clients.

Rule 5.4 prohibits a lawyer or law firm from sharing fees directly or indirectly with a nonlawyer or with an organization that is not authorized to practice law. Rule 5.4 excepts payment of "a prescribed registration, referral, or fee to a lawyer referral service established, sponsored, and operated in accordance with the State Bar of California's Minimum Standards for Lawyer Referral Service."

Rule 5.4 prohibits an attorney from dividing fees with a non-attorney even with the client's consent. (Bar Association of San Francisco Form. Opn. 1981-1.) As a preliminary matter, despite the fact that Company's fees are called "marketing fees," Company does not charge a single, set, agreed-upon marketing fee that Attorney must pay for marketing services irrespective of the number of clients referred by Company. Rather, specific "marketing fees" are assessed for each specific client. These "marketing fees" are a misnomer; Company's agreement with Attorney would require fee-sharing with a non-lawyer because the consumer pays the entire fee directly to Company, which then splits it with Attorney after Company deducts its fee.

Notwithstanding the terminology used by Company, this business model constitutes unethical fee-splitting. All fees are held and controlled by Company until services have been completed. Attorney has no control over the fees until Company splits, distributes, and shares them.<sup>4</sup>

## **VI. CONCLUSION**

California lawyers are cautioned against participating in marketing schemes such as Company's. The sentiment expressed by the Supreme Court of Ohio Board of Professional Conduct is well-taken here: lawyers must carefully evaluate a referral service to ensure it complies with the lawyer's ethical obligations. In California, that means understanding and deferring to the limitations of, among others, Rules 5.4, 7.2, and 7.3 and Business and Professions Code 6155.

California lawyers who participate in a plan like Company's violate Rule 5.4. Company's compensation business model, as set out above, constitutes impermissible sharing of fees with a

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<sup>4</sup> This conclusion is consistent with analyses of similar agreements. (See, e.g., *Cain v. Burns* (1955) Cal.App.2d 439, 441-442 [impermissible fee-sharing where an attorney paid a private investigator a fixed percentage of the attorney fees received as compensation for services]; State Bar of Cal. Form. Opn. 1981-60 [improper fee-splitting where services offered in kind as part of an exchange that required a cash payment of eight percent of the purchase amount]; State Bar of Cal. Form. Opn. 1997-148 [improper fee-splitting where marketer and a lawyer share proceeds]; *In the Matter of Bragg* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 615, 624-625 [lawyers may not split profits with a nonlawyer who manages cases].)

non-lawyer and involves unethical compensation for securing lawyer's services. Furthermore, Company's business model operates as an unauthorized legal referral service.

Furthermore, California attorneys must analyze whether each business practice they employ is proper. Here, even though a particular for-profit online program, website, or advertising schedule indicates that it charges only "marketing fees," it is incumbent upon the attorney to engage in an analysis similar to the one set out here.