

PROPOSED

R-25

Month __, 2018

SYLLABUS

Participation in a for-profit online matching service which for a fee matches prospective clients with lawyers constitutes an impermissible sharing of fees with a nonlawyer if the attorney's fee is paid to and controlled by the nonlawyer and the cost for the matching service is based on a percentage of the attorney's fee paid for the legal services provided by the lawyer. Therefore, a Michigan lawyer participating in this business model:

- 1. Violates MRPC 6.3(b), which prohibits a lawyer from participating in for-profit lawyer referral services.**
- 2. Violates MRPC 5.4, which prohibits a lawyer from sharing fees with a nonlawyer.**
- 3. Violates MRPC 7.2(c), which prohibits a lawyer from giving anything of value to recommend a lawyer's services unless it is a reasonable payment for advertising the lawyer's services, the usual charges for a not-for-profit lawyer referral service or payment for the sale of a law practice.**
- 4. Subverts compliance with MRPC 1.15, which requires a lawyer to safeguard legal fees and expenses paid in advance by depositing them into a client trust account until the fee is earned and the expense is incurred.**
- 5. Impedes compliance with MRPC 1.16(d) and its requirement that any unearned prepaid fees and unexpended advances on costs must be refunded.**
- 6. Assists in the unauthorized practice of law in violation of MRPC 5.5(a) to the extent the online service holds itself out as a provider of legal services and guarantees satisfaction.**
- 7. Violates MRPC 5.3 to the extent that the conduct of the matching service when performing administrative "back office" services traditionally done through the law firm does not comport with the professional obligations of the lawyer.**

References: MRPC 1.15(b)-(d), (g); 1.16(a), (d); 5.3; 5.4; 5.5(a); 6.3(b); 7.2(c); R-021; RI-366

TEXT

The Committee has been asked to consider whether Michigan lawyers may ethically participate in online services that match prospective clients with lawyers. The assessment requires a careful review of the business model to determine whether it constitutes a for-profit lawyer referral service and if compliance with the terms for participation requires a Michigan lawyer to violate the Michigan Rules of Professional Conduct (MRPC).

Legal matching services are not new, but innovation in technology has spearheaded private entrepreneurial online matching services beyond the usual bar association non-profit lawyer referral services. To evaluate this issue, this Opinion reviews two online lawyer matching services to consider whether Michigan lawyers can remain ethically compliant if becoming a participating lawyer.

Model 1. One such business model has a national website that includes in its business name “legal services” to market its online matching services to consumers needing legal services. All participating lawyers are branded with the business name to associate them with the non-law firm entity in advertisements to drive prospective clients to the website to purchase legal services at fixed prices.

Many legal services are offered on the website for a fixed fee. For example, a consumer selects the desired legal services, pays a set price for a 15 minute consultation, pays another set price for review of a business document with a 30 minute consultation, or pays a set price for “start-to-finish” work. After paying the fixed fee, the consumer reviews profiles of participating lawyers and selects a lawyer to provide the legal services. Another legal service offered on the website is a 15 or 30 minute consultation with a participating lawyer for a fixed fee provided by the next available participating lawyer who calls the consumer within 15 minutes of the consumer’s purchase of the consultation. Many legal services are offered for this fee arrangement from consultation after a document review to full service “start-to-finish” work regarding a particular matter.

Both offerings require the consumer to make payment for the legal services through the website’s payment portal for deposit into the matching service’s account before any contact by the consumer with a participating lawyer. The website advertises that all legal services are backed by a “satisfaction guarantee,” which may include switching lawyers, substituting the services, or a refund.

The website markets to lawyers that it can match them with clients who have already paid for limited-scope legal services and that it takes care of all administrative matters, including collecting the fee, holding the fee until the legal services are provided, distributing the prepaid fee to the lawyer, and automatically deducting a percentage of the legal fee as a “marketing fee” from the lawyer’s operating account.

Model 2. Another for-profit online matching service specifically targets businesses needing legal services to match with its network of participating lawyers. The website has “legal” in its name to connect it with the provision of legal services. A business owner/contact uses the online platform to submit a completed attorney request form to permit a website project manager to generate a list of participating network attorneys matching the selection criteria. The business owner/contact receives an alert when the attorney matching list is ready for review and must then create an account to view the network-generated list, the attorney profiles, and pricing. The business owner/contact may receive a free half hour consultation with the network lawyers listed. After the consultation, each lawyer sends a pricing proposal using many alternative fee arrangements. After selecting a network attorney, the business client pays the legal services fee through the matching

service's website account. The website provides administrative support through centralized billing and invoices.

The website uses an application and vetting process to establish its network of participating lawyers. Besides meeting minimum requirements (a minimum years of professional experience and a minimum level of malpractice insurance coverage), network lawyers must offer preferred pricing to website business customers reflecting at least a net 17.5% discount off their standard rates inclusive of the matching service fee and alternative fee arrangements, including fixed and capped fees. Lawyers admitted to the network must maintain a 95% approval rating to remain in the network.

The website collects and holds all fees paid in advance by the business client until earned by the selected network attorney. The website gets a percentage (about 7.5%) of each legal fee remitted to the website and touts that the discounted rates offered by the network attorneys are 60-75% less than the traditional law firm solution because the website handles the back-office administrative processes traditionally done by attorneys through their law firm. The website guarantees client satisfaction by promising to credit the business client website account up to \$10,000 to complete any work not done right or inconsistent with the website's standards through another network attorney.

Numerous ethical concerns are presented by both business models. Although these online matching services do not call themselves lawyer referral services, the functional characteristics of a referral service are embedded in both business models. Traditionally, a lawyer referral service operates to refer prospective clients to participating lawyers who have met the qualifications set by the service, including experience in a particular practice area, geographic location, and minimum malpractice insurance coverage. The introductory comments to the ABA Model Supreme Court Rules Governing Lawyer Referrals state that a lawyer referral program "is to provide the client with an unbiased referral to an attorney who has experience in the area of law appropriate to the client's needs." Introduction, ABA Model Supreme Court Rules Governing Lawyer Referral And Information Services. These online matching services promise to match consumers in need of legal services with qualified lawyers. The prospective client's ability to choose a lawyer from the network of participating lawyers rather than the referral service identifying and making the selection does not negate the referral characteristics of the business model. Hence, the Committee concludes that both business models operate as for-profit lawyer referral services. A number of other jurisdictions agree.¹ Some jurisdictions have taken a contrary

¹ See South Carolina Ethics Opinion 17-06 (2017) (A website service that refers clients to a lawyer for a portion of the fee paid to the lawyer for legal services violates the prohibition of Rule 7.2(c) that precludes payments to a for-profit referral service); New Jersey Ethics Opinion 732 (2017) (Lawyers may not participate in the program because the program improperly requires a lawyer to pay an ethically impermissible referral fee.); Ohio Ethics Opinion 2016-3 (2016) (A lawyer's participation in an online for-profit service where the fee structure is tied specifically to individual client representations that a lawyer completes or to a percentage of the attorney's fee is not permissible. A lawyer may participate in a lawyer referral service only if it meets the requirements of Rule 7.2(b) and is registered with the Supreme Court of Ohio); Kentucky Ethics Opinion KBA E-429 (2008) (Some internet for-profit group marketing arrangements go beyond the mere pooling of finances of group advertisers because the participating lawyers pay a fee for a specific referral and thus function as an ethically impermissible for-profit lawyer referral service.); Arizona Ethics Opinion 05-08 (2005) (It is ethically impermissible for a lawyer to participate in a for-profit client/attorney internet matching service that substantially functions as a for-profit lawyer referral service because the

view based on differing ethical standards on what constitutes an ethically permissible lawyer referral service.²

For Michigan lawyers to participate in a lawyer referral service, it must meet the criteria in MRPC 6.3. The referral service must be a not-for-profit referral service, maintain registration with the State Bar, and operate in the public interest under the Rule. Both matching services considered in this Opinion are for-profit services and are not registered with the State Bar. Accordingly, a Michigan lawyer participating in either of these business models violates Rule 6.3(b).

Under both business models, the matching service participation requirements direct or regulate the client-lawyer relationship from its formation to termination. MRPC 5.4(c) prohibits a lawyer from allowing a third-party to “direct or regulate the lawyer’s professional judgment in rendering legal services.” In both business models, the prospective client must interact with and respond to the matching services requirements before having any access to the participating lawyers. The first business model requires payment in full for the desired legal service through the website payment portal before the client can connect with the lawyer. The other business model requires the prospective client to establish an account with the website before receiving the list of network lawyers meeting the client’s selection criteria. Both business models define the services offered, the fees charged, when and how they are paid, and the refund policy. In the first business model, the scope and length of the lawyer-client relationship is determined by the matching service. It even specifies the time the lawyer will spend on the matter for the predetermined set fee. Such matters should be made by or directed by the lawyer after consultation with the prospective client regarding the client’s specific legal matter. Both business models conflict with a lawyer’s ethical obligation to maintain independent professional judgment in rendering legal services as required by MRPC 5.4(c).³

Also, with both business models, the fee paid to the matching service is based on a percentage of the attorney’s fees generated for the legal services provided by the attorney for each client matter. MRPC 5.4(a) provides that unless an exception applies (none of which is applicable here), a

participating lawyer is paying the service for recommending the lawyer’s services contrary to ER 7.2(b)(2)); and Maryland Ethics Opinion 2001-03 (2001) (An internet service that brings clients and lawyers together and receives a portion of the fee paid for the legal services implicates the prohibition against for-profit referral services.).

2 See e.g., North Carolina Proposed 2017 Formal Ethics Opinion 6 (“Proposed opinion rules that a lawyer may participate in an online platform for finding and employing lawyers subject to certain conditions.” The Committee notes that the North Carolina Ethics Committee proposed amendments to certain rules of professional conduct and comments to enable lawyers to meet the conditions for participation.); and Nassau County Bar Association Ethics Opinion 2001-4 (New York, 2001) (“Subject to the operational structure and advertising content as described, an attorney may affiliate with an on-line legal services-related website.”).

3 See Pennsylvania Formal Ethics Opinion 2016-200 (2016) (Delegation to a nonlawyer of critical decisions and functions, such as whether the legal services have been satisfactorily performed or the advanced fee has been earned violates the lawyer’s ethical duty to exercise independent professional judgment.); and Ohio Ethics Opinion 2016-3 (2016) (“A lawyer must be cautious when considering a referral service that makes decisions that are clearly within the scope of the lawyer’s exercise of professional judgment on behalf of a client. Decisions such as setting limits on the amount of time a lawyer must spend on each client’s case, specifying a number of cases that a lawyer must agree to handle, limiting the scope of a lawyer’s representation of a client, or generally directing a lawyer’s representation of a client are all decisions that a lawyer is duty-bound to make.”).

“lawyer or law firm shall not share legal fees with a nonlawyer.” To avoid the inference of fee-splitting with nonlawyers, the first matching service electronically remits the amount of the advanced fee paid by the client to the lawyer’s designated account after the participating lawyer has provided the legal services and then immediately electronically withdraws from an account pre-designated by the lawyer its percentage of the earned attorney’s fee. Whereas, in the second business model, the matching service’s fee is embedded within the percentage discount network attorneys must offer prospective clients. In Informal Ethics Opinion RI-366 (2014), the Committee considered the method by which the nonlawyer was paid when it opined that “[a] lawyer’s participation in a marketing arrangement in which consumers purchase coupons for legal services from a vendor that retains a portion of the purchase price would entail an impermissible sharing of fees with a nonlawyer and, on that basis, is unethical pursuant to MRPC 5.4.” Similarly, if the matching service fee is a percentage of the fee for legal services for each client matter then this is an ethical impermissible fee splitting arrangement. Therefore, a lawyer participating in either business model is engaged in impermissible fee splitting with a nonlawyer contrary to MRPC 5.4(a). Our reasoning is consistent with other jurisdictions.⁴

In the first business model, the fee paid to the matching service is labeled a marketing fee. The second business model affixes no label to its fee. MRPC 7.2(c) prohibits a lawyer from giving anything of value for recommending the lawyer’s services except for the reasonable cost of advertisement, a reasonable non-for-profit lawyer referral service participation fee, or to purchase a law practice. The comments to MRPC 7.2 provide that a lawyer “is not permitted to pay another person for channeling professional work.” The advertisement exception under Rule 7.2(c) is the only possible exception for both business models. However, in both business models, the matching service is marketed to consumers as having an association with lawyers qualified to handle their legal matters. Legal consumers are driven to the matching service website based on the marketing brand of the matching service rather than any individual participating lawyer. A true advertising fee has no connection to the formation of an attorney client relationship or the amount of the attorney’s fee paid for the legal services, but is based on the value of the advertisement. Here, the matching service pricing structure is directly linked to the formation of an attorney client relationship and attorney fees generated. Further, a genuine advertising medium offers no

⁴ See South Carolina Ethics Opinion 17-06 (2017) (“Allowing the service to indirectly take a portion of the attorney’s fee by disguising it in two separate transactions does not negate the fact that the service is claiming a certain portion of the fee earned by the lawyer as its ‘per service marketing fee’” and is prohibited fee splitting); New Jersey Ethics Opinion 732 (2017) (Lawyers may not participate in the program because the program requires the lawyer to share a legal fee with a nonlawyer.); Ohio Ethics Opinion 2016-3 (2016) (An arrangement that makes the fee to the online service contingent upon the fee for legal services implicated the prohibition on fee splitting with a nonlawyer); Pennsylvania Formal Ethics Opinion 2016-200 (2016) (“The manner in which the payments are structured is not dispositive of whether the lawyer’s payment to the Business constitutes fee sharing. Rather, the manner in which the amount of the ‘marketing fee’ is established, taken in conjunction with what the lawyer is supposedly paying for, leads to the conclusion that the lawyer’s payment of such ‘marketing fees’ constitutes impermissible fee sharing with a non-lawyer.”); Indiana Ethics Opinion No 1 (2012) (An online group marketing service that receives a percentage of the fee paid for legal service for channeling clients to a lawyer violates the prohibition against fee splitting with nonlawyers.); Alabama Ethics Opinion RO 2012-01 (2012) (The percentage taken by a site that is not tied to the reasonable cost of an advertisement violates the ethical prohibition of sharing fees with nonlawyers.); Kentucky Ethics Opinion KBA E-429 (2008) (Once the compensation system of an internet group marketing scheme becomes tied to the attorney’s fee earned for the referral it becomes a prohibited fee splitting with a nonlawyer.); and Maryland Ethics Opinion 2001-03 (2001) (The referral fee paid to the internet services constitutes a prohibited fee splitting with a nonlawyer.).

“satisfaction guarantee.” For all these reasons, the fee paid to the matching services is not ethically permissible under MRPC 7.2(c). Our perspective is analogous with many other jurisdictions.⁵

In both business models, the matching service collects and controls the attorney’s fees remitted by the legal consumer before legal services are provided by the participating lawyer. A lawyer must safeguard client funds by depositing them into a client trust account until earned and withdrawing/distributing the funds when earned. MRPC 1.15(b) and (g). In Formal Ethics Opinion R-21, the fiduciary obligations of lawyers was emphasized as follows:

MRPC 1.15(d) requires that “[a]ll client or third person funds” be deposited into an IOLTA or non-IOLTA account. “Client or third person funds” include unearned legal fees and advanced expenses that have been paid in advance, funds in which a third person has an interest, and funds in which two or more persons (one of whom may be the lawyer) claim an undivided interest. When the funds received are unearned fees and advanced costs or expenses, they must be held in trust until earned or expended.

The fiduciary obligations of lawyers under MRPC 1.15 are absolute, and not subject to partialling. Lawyers participating in either business model cannot adhere to the ethical obligations under MRPC 1.15.⁶

A lawyer has precise ethical duties when a dispute arises regarding entitlement of the attorney’s fees. When a dispute arises, MRPC 1.15(c) requires disputed funds be “kept separate by the lawyer until the dispute is resolved.” MRPC 1.15(c) further requires the lawyer to promptly distribute all portions of the property not in dispute. Yet again, since the matching service (not the lawyer) is

5 South Carolina Ethics Opinion 17-06 (2017) (“By basing the advertising charge to the lawyer on the fee collected for the work rather than having a fixed rate per referral or other reasonable cost for the advertisement, a lawyer utilizing this service cannot claim the exception to the prohibition of paying for referrals”); Ohio Ethics Opinion 2016-3 (2016) (The structure of the business model indicates that the fee paid by participating lawyers is not truly advertisement costs. “The Ohio Board previously set forth parameters to distinguish the reasonable amount of advertisement from referral fees as follows: 1) if the lawyer is required to pay an amount of money based on an actual number of people who contact or hire the lawyer, or an amount based on the percentage of the fee obtained from rendering the legal services; 2) if the third party will provide services that go beyond the ministerial function of placing the lawyer’s information into public view; or 3) if the third party will not clarify that the information is an advertisement, but rather, makes the information regarding the lawyer appear as if the third party is referring or recommending the lawyer, or that the lawyer is part of the third party’s services to its users.”); Indiana Ethics Opinion No 1 (2012) (The fee paid to the online service is not a true advertising cost because it is tied to the specific fee paid for legal services rather the reasonable cost of the advertisements.); Alabama Ethics Opinion RO 2012-01 (2012) (The percentage taken by the website is not based on the reasonable cost of advertising, e.g. traffic to the website.); and Kentucky Ethics Opinion KBA E-429 (2008) (When the online service becomes actively involved in matching or referring clients its fee is no longer for advertising and a lawyer is not permitted to give anything of value for the service.).

6 Participating lawyers cannot adhere to their duties to safeguard client funds, assure reasonableness of the fee, and refund an unearned fee when the nonlawyer online service holds and controls the advanced fee based on terms that it sets. See Ohio Ethics Opinion 2016-3 (2016), Indiana Ethics Opinion No 1 (2012), and Alabama Ethics Opinion RO 2012-01 (2012). Pennsylvania concurs except for 1.5(a) concerns as its ethics rules allow lawyers to participate in for-profit matching services. Pennsylvania Formal Ethics Opinion 2016-200 (2016).

paid the unearned attorney's fee, the lawyer may be barred from discharging the lawyer's obligations under Rule 1.15.⁷

The matching service's control of the unearned attorney's fees raises yet another ethical concern. Under MRPC 1.16 (a)(3), clients may discharge a lawyer with or without cause. Similarly, circumstances require the lawyer to decline or withdraw from the representation in the event of, for example, a conflict of interest or a competence issue. In such cases, the lawyer may have to return the entire fee, including the percentage earmarked for the matching service. MRPC 1.16(d) requires the lawyer to refund any "advance payment of fee that has not been earned." When addressing the coupon-related marketing scheme in RI-366, the Committee opined that:

Under circumstances in which a lawyer must decline a prospective representation generated by the proposed marketing arrangement for any reason, including concerns about competence or conflicts, the lawyer has a duty to refund the entire fee, including the Company's share, to the consumer. Regardless of whether the Company is holding the entire advance fee, or the Company has already transmitted fees to the lawyer, less the Company's share, it is unclear how the lawyer could comply with the obligations of MRPC 1.16(d) if the lawyer must decline a potential representation generated by this type of marketing.

Here, since the matching service (not the lawyer) is paid the unearned attorney's fee, the lawyer may be barred from discharging the lawyer's obligations under Rule 1.16.⁸

Finally, both matching service hold themselves out as legal services organizations based on their naming convention and marketing schemes used to drive legal consumers to their websites. Both matching service provides a "100 percent" personal guarantee about the lawyers' services. MRPC 5.5(a) provides that a lawyer shall not practice law in a jurisdiction in violation of regulating the legal profession in that jurisdiction, or assist another in doing so. This Rule "applies to the unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person." Comment to MRPC 5.5(a). MRPC 5.4 (b)-(d) prohibit a lawyer from practicing law in any form with nonlawyers for a profit. Because the matching services hold themselves out as a legal services organizations, participating lawyers are aiding the unauthorized practice of law in violation of MRPC 5.5(a).⁹

⁷ See the references in note 5.

⁸ See the references in note 5.

⁹ See Ohio Ethics Opinion 2016-3 (2016) ("[A] lawyer involved in this type of referral service should verify that the nonlawyers of the company are not engaging in the practice of law, as the lawyer could be responsible for assisting in the unauthorized practice of law."); Pennsylvania Formal Ethics Opinion 2016-200 (2016) ("Participation in such a program could also raise potential concerns regarding assisting in the unauthorized practice of law, in violation of RPC 5.5(a).").

The Committee notes that MRPC 5.3 may also be implicated due to the matching service performing administrative “back office” services traditionally done through the law firm, such as client billing that includes confidential client information.¹⁰

Conclusion

In summary, Michigan lawyers must carefully review the business model structure of these innovative online matching services to determine whether they constitute a for-profit lawyer referral service under the MRPC despite how the matching service depicts its services. Michigan lawyers must further examine whether compliance with any terms for participation prohibit them from ethically meeting their professional duties.

Based on the two business models considered in this Opinion, a Michigan lawyer’s participation in a for-profit online matching service which for a fee matches prospective clients with lawyers constitutes an impermissible sharing of fees with a nonlawyer if the attorney’s fee is paid to and controlled by the nonlawyer and the cost for the matching service is based on a percentage of the attorney’s fee paid for the legal services provided by the lawyer. Therefore, a Michigan lawyer participating in this business model engages in unethical conduct because the lawyer:

1. Violates MRPC 6.3, which prohibits a lawyer from participating in for-profit lawyer referral services.
2. Violates MRPC 5.4, which prohibits a lawyer from sharing fees with a non-lawyer.
3. Violates MRPC 7.2(c), which prohibits a lawyer from giving anything of value to recommend a lawyer’s services unless it is a reasonable payment for advertising the lawyer’s services, the usual charges for a not-for-profit lawyer referral service or payment for the sale of a law practice.
4. Subverts compliance with MRPC 1.15, which requires a lawyer to safeguard legal fees and expenses paid in advance by depositing them into a client trust account until the fee is earned and the expense is incurred.
5. Impedes compliance with MRPC 1.16(d) and its requirement that any unearned prepaid fees and unexpended advances on costs must be refunded.
6. Assists in the unauthorized practice of law in violation of MRPC 5.5(a) to the extent the online service holds itself out as a provider of legal services and guarantees satisfaction.
7. Violates MRPC 5.3, to the extent the conduct of the matching service when performing administrative “back office” services traditionally done through the law firm does not comport with the professional obligations of the lawyer.

¹⁰ See Ohio Ethics Opinion 2016-3 (2016) and Pennsylvania Formal Ethics Opinion 2016-200 (2016).