

In this hypothetical, an attorney wishes to become a member of a lead-sharing organization, which can be either a for-profit or not-for-profit association, in which members pay a \$500 membership fee, and meet once a week. The membership fee is not distributed, in whole or in part, back to any member, but rather pays administrative costs of the organization and goes towards the profit of the association. Part of the oath associated with membership is that each member will maintain a high degree of professionalism in dealing with their leads, including, inter alia, timeliness and quality of services. Membership is often dependent on the number of leads a member passes. During the meetings, members take turns giving a 30-second promotional, stating any of the following: their name, professional title, industry, place of employment, and who would represent a “good lead” for them. On an alternating basis, one member per meeting gets to present a fifteen minute presentation in which they can discuss any aspect of their industry they deem appropriate. The presentation may be educational, a plea for business, etc. The meeting then involves members passing leads to other members. These leads represent potential clients and may have been actively solicited by the lead-passing member whether they know of a particular professional in the lead-receiving member’s industry. The lead-receiving member has no control over how the lead was generated, but the lead-receiving member retains full control over their representation of the client, and need not disclose any details of that relationship to any other person or entity. At the end of the meeting, the 30-second promotional process is usually repeated.

QUESTIONS PRESENTED:

- 1) Is it ethical for a lawyer to become a member of a lead-sharing organization and use that organization to receive leads for legal services from other members of the organization?
- 2) Can a lawyer have an ownership interest in a lead-sharing organization that is either for-profit or not-for-profit?
- 3) Under the same set of hypothetical facts, can a lawyer be a member of a lead-sharing organization when the lawyer is also a licensed title insurance agent, or any other business professional, that provides services through an ancillary business, and solicits business only with respect to real estate closings and title insurance sales or referrals directed to his non-legal business?
- 4) Assuming that the lawyer may participate in this lead-sharing organization, are there any restrictions on what may be included in their 15-minute presentation?

APPLICABLE RULES & OPINIONS

The rules applicable to these questions are Rule 7.3(d) and 7.2(c), which qualify that a lawyer may not give anything of value to another for securing employment by a client; Rule 5.4(c), regarding the professional independence of the lawyer; Rule 1.7(a), regarding general conflict's analysis; and Rule 1.6(a), that qualifies client confidentiality. Also pertinent to the Committee's analysis is LEO 1348.

ANALYSIS

The Committee believes that the arrangement as described in this hypothetical does not fall within the parameters of a lawyer referral service as described in LEO 1348. Further, the Committee would like to preface its analysis by stating that this opinion is not intended to discourage the development and use of lawyer referral services.¹ Nevertheless, the Committee believes that the arrangement as described in this hypothetical may create undisclosed conflicts of interest, compromise a lawyer's professional independence, and risk violation of the solicitation rules.

The Committee's analysis starts with Rule 7.3(d) and Rule 7.2(c) and the basic prohibition against a lawyer giving anything of value to a person or organization for securing employment by a client or as a reward for having made a recommendation resulting in employment by a client.² This prohibition is designed to prohibit lawyers from compensating another for recommendations or as a reward for influencing a prospective client to employ the lawyer. The Committee considers the "leads" or referrals exchanged among members of this group to be things of value. The Committee finds that this practice of reciprocal referrals amounts to *quid pro quo* payment for services, in violation of Rules 7.3(d) and 7.2(c) and possibly in violation of

¹ Rule 7.3 Direct Contact With Prospective Clients and Recommendations Of Professional Employment
Comment [7] The legal profession has developed lawyer referral systems designed to aid individuals who are able to pay fees but need assistance in locating lawyers competent to handle their particular problems. Use of a lawyer referral system enables a layman to avoid an uninformed selection of a lawyer because such a system makes possible the employment of competent lawyers who have indicated an interest in the subject matter involved. Lawyers should support the principle of lawyer referral systems and should encourage the evolution of other ethical plans which aid in the selection of qualified counsel.

² Rule 7.3 Direct Contact With Prospective Clients and Recommendations Of Professional Employment
(d) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure employment by a client, or as a reward for having made a recommendation resulting in employment by a client, except that the lawyer may pay for public communications permitted by Rule 7.1 and 7.2 and the usual and reasonable fees or dues charged by a lawyer referral service and any qualified legal services plan or contract of legal services insurance as authorized by law, provided that such communications of the service or plan are in accordance with the standards of this Rule or Rule 7.1 and 7.2, as appropriate.

Rule 7.2 Advertising
(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may:

- (1) pay the reasonable costs of advertisements or communications permitted by this Rule;
- (2) pay the usual charges of a not-for-profit lawyer referral service or legal services organization; and
- (3) pay for a lawyer practice in accordance with Rule 1.17.

Virginia's statutory prohibition on "running and capping."³ The lawyer, in this hypothetical, would be giving something of value to another organizational member in the form of return referrals as a term of membership. When membership in a lead-sharing organization is dependent on the number of leads a member passes, the Committee finds that this type of membership requires the lawyer to exchange something of value for referrals.

The rationale against permitting a lawyer to make such exclusive or *quid pro quo* referrals is that this activity may compromise the professional judgment of the lawyer. Rule 5.4 precludes the lawyer from allowing another person who recommends the lawyer from directing or regulating the lawyer's judgment.⁴ A lawyer who is beholden to an organization may feel obligated to accept a case he is not competent to handle, or conversely, a lawyer may be obligated to refer a client to a particular member specialist when a non-member specialist may be better suited to meet the client's needs. Either of these situations may put the client's interests at risk.

The prior analysis deals with a lawyer's acceptance of leads, however, there are additional concerns raised by a lawyer's passing leads. The passing of leads creates potential conflicts of interest for the lawyer pursuant to Rule 1.7(a)(2).⁵ This rule specifically cautions the lawyer regarding potential conflicts stemming from the lawyer's personal interests. Participation in a lead-sharing organization potentially creates such a conflict when the lawyer's membership is dependent on the number of leads the member lawyer passes, thereby impacting the lawyer's freedom to choose the most appropriate specialty provider for a client.

Other issues triggered by your hypothetical are the confidentiality provisions that protect the client, even to the level of client identity in some representations. A lawyer may not participate in a plan that requires the lawyer to disclose information relating to the representation of a client except in compliance with Rule 1.6.⁶ The mere disclosure of a client's name and specific need in certain circumstances may be enough to violate the Rule without consent of the client.

³ See Letter from Att'y Gen. of Virginia Kenneth T. Cuccinelli, II to Karen A. Gould, Executive Director, Virginia State Bar (December 7, 2010) (on file with the Virginia State Bar), which cites to §54.1-3939 and §54.1-3941.

⁴ Rule 5.4 Professional Independence Of A Lawyer
(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

⁵ Rule 1.7 Conflict of Interest: General Rule
(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

⁶ Rule 1.6 Confidentiality of Information
(a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the

CONCLUSION:

In conclusion, the answers to your specific questions are as follows:

- 1) This Committee finds that it is unethical for a lawyer to participate in a lead-sharing organization such as the one described in this hypothetical, for all the afore-mentioned reasons.
- 2) This Committee finds that there would be nothing unethical in a lawyer owning an interest in a company that is a lead-sharing organization as long as the lawyer is not a member.
- 3) This Committee finds there to be no ethical violation when a lawyer participates in a lead-sharing organization as a title insurance agent or in some other professional capacity, operating through an ancillary business as long as the lawyer does not violate any of the Rules of Professional Conduct.
- 4) Since the Committee has found the lawyer's participation in this lead-sharing organization to be unethical, this question is rendered moot.

These same questions have been addressed by the states of Maryland, Massachusetts, Arizona, New Hampshire, Oregon, New York, and Montana, all of which have come to the same conclusion that membership in such an organization compromises the lawyer's independence, potentially creates undisclosed conflicts of interest, and violates solicitation rules.⁷

This opinion is not intended to diminish the importance of the ethical practice of lawyer to lawyer referrals in the professional world and the benefits of *bona fide* lawyer referral programs. Referring clients to other lawyers with expertise in certain areas, or receiving such referrals, goes a long way toward sustaining the legal profession and the provision of legal services in many communities. The prohibitions and cautions of this opinion are predicated and indeed limited to a hypothetical organization which bases membership on a commitment to provide referrals. Nothing in this opinion is intended to preclude a lawyer's involvement or membership in organizations that promote the interplay of lawyers and other professionals for education, community action, or social goals, out of which networking and referrals may develop.

This opinion is advisory only based upon the facts as presented, and not binding on any court or tribunal.

disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

⁷ See, Maryland State Bar Association Committee on Ethics Docket 2007-16 and 2005-11; Massachusetts Bar Association Ethics Opinion 08-01; New Hampshire Bar Association Ethics Committee Opinion #2005-06/6; Oregon State Bar Legal Ethics Committee Formal Opinion No. 2005-175; New York State Bar Association Committee on Professional Ethics Opinion 791-2/1/06; and State Bar of Montana Ethics Committee Opinion 960227.